

May 31, 2018

VIA UPS AND E-MAIL: FOILAppeals@nypd.org

Sergeant Jordan S. Mazur
Records Access Appeals Officer
New York City Police Department
One Police Plaza, Room 1406
New York, NY 10038

FOIL Req. # 2018-PL-3418

Re: Appeal of Denial of FOIL Request

Dear Sergeant Mazur:

We write to appeal the New York City Police Department's ("NYPD") denial of the February 22, 2018 Freedom of Information Law ("FOIL") request ("Request") filed by the NAACP Legal Defense & Educational Fund, Inc. ("LDF") and the Center for Constitutional Rights ("CCR") pursuant to New York Public Officers Law § 89(4)(a).

The Request sought records for six specifically enumerated categories of information: (1) the NYPD's definition of the terms "crew" and "gang;" (2) the process by which the NYPD notifies individuals who have been designated as a gang/crew member, associate, etc. in a gang database; (3) the process by which an individual designated as a gang/crew member, associate, etc. in a gang database can challenge the NYPD's designation; (4) information about individuals' challenges to their designation as gang/crew members, associates, etc.; (5) how the NYPD reviews, audits, and/or modifies its gang database; and (6) a list of companies/agencies with which the NYPD has shared its gang database. Attached please find a copy of the Request and the NYPD's Acknowledgment Letter as Exhibits A and B, respectively.

In a letter dated May 1, 2018, attached as Exhibit C, the NYPD responded to the Request and provided eight NYPD Patrol Guide Procedures and two PowerPoint presentations, asserting that portions of the disclosed documents had been redacted and/or withheld pursuant to statutory exemptions to FOIL.¹ The NYPD withheld the remainder of the requested records, citing six distinct exemptions in New York Public Officers Law.²

Rather than provide a particularized and specific justification for these exemptions, as required by law, the NYPD merely parroted statutory FOIL exemptions in response to the Request. Further, the NYPD neglected to indicate which exemptions purportedly pertain to which of the six enumerated requests, making it difficult to discern the applicability of the exemptions cited.

¹ The NYPD cited the following sections of N.Y. Pub. Off. Law: § 87(2)(e)(iv), 87(2)(e)(iii), 87(2)(b), and 87(2)(f). *See* Exhibit C.

² In addition to these statutory exemptions, the NYPD denied an unspecified portion of the Request because the "records are not maintained in the manner you described." *See* Exhibit C.



We therefore appeal the NYPD's determination on two grounds. First, the Department's recitation of FOIL subsections is inadequate to meet its burden of providing a "particularized and specific" justification for both the redacted/partially withheld documents provided, and the nondisclosure of the remainder of the records requested under FOIL. Second, the NYPD improperly invoked and/or incorrectly applied six FOIL exemptions to deny records for the six enumerated categories in the Request.

We begin by addressing the inadequacy of the NYPD's response to the Request, followed by a discussion of the inapplicability of the FOIL exemptions cited in the NYPD's response.

I. The NYPD's response to the Request does not comport with FOIL requirements.

The Freedom of Information Law imposes a duty on the NYPD to provide information or an explanation as to why it asserted an exemption to withhold requested records.³ Specifically, as an agency, the NYPD must articulate a "particularized and specific justification" for invoking a FOIL exemption to withhold requested records.⁴ Such an explanation is necessary to ensure individuals seeking information pursuant to FOIL can properly ascertain and evaluate the applicability of exemptions to the records requested.

The NYPD's letter in response to the Request failed to comport with these FOIL requirements. Although the NYPD arguably provided *some* minimally responsive information, it refused to disclose the vast majority of the requested information. Nor did it articulate a particularized or specific justification. Rather, the NYPD's response letter merely recited statutory language as a purported justification for its refusal to disclose the requested information.⁵ Parroting statutory language, without more, constitutes a failure by an agency to explain the reasons for its denial. As such, the NYPD's response to the Request concerning undisclosed records was inadequate.

The NYPD also neglected to provide sufficient justification for redacting and partially withholding the documents it did disclose. The NYPD provided eight NYPD Patrol Guide Procedures and two PowerPoints with the caveat that it had redacted and withheld unspecified portions of the disclosed documents pursuant to FOIL exemptions. In so doing, the NYPD not only failed to indicate which of the enumerated requests the documents were purportedly

³ *Gould v. NYPD*, 89 N.Y.2d 267, 275 (1996).

⁴ *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979).

⁵ To underscore this point, the NYPD provided an identical response to a different FOIL Request submitted by LDF and CCR on December 20, 2017, even though that request sought different information than this Request. Please see attached as Exhibit D. The December 20 Request sought records concerning five different enumerated requests related to the criteria the NYPD uses to identify gang/crew members and gang/crews, de-identified demographic data about people identified as gang/crew members, a copy of Gang/Group Incident Report (PD377-158), and how the Domain Awareness System is used to identify and monitor gang/crew members. In contrast, this Request seeks information concerning the due process implications of inclusion in a gang database. Despite the clear differences between the first and second Requests, the NYPD's response to the December 20 Request was substantively the same response, verbatim, as the response at hand.



responsive to, but also neglected to denote the specific portions of the disclosed documents that were subject to redactions/withholding. Relatedly, the NYPD did not explain the purported applicability of the exemptions to the redacted or withheld documents. Without this information, we are unable to determine which portions of the disclosed materials were redacted by the NYPD or the justifications for each cited exemption. Moreover, the NYPD did not articulate any particularized or specific justification for invoking each exemption. Instead, the response letter merely lists four exemptions with parroted statutory language from each exemption.

As with denial responses, FOIL imposes a duty on the NYPD to articulate a particularized and specific justification for relying on exemptions to redact or withhold portions of disclosed information or records.⁶ Conclusory statements, combined with merely reciting statutory language, cannot substitute for particularized and specific justifications to invoke any of the cited exemptions. For these reasons, we appeal the sufficiency of the NYPD's response.

II. The FOIL exemptions cited by the NYPD do not apply to the records sought in the Request.

The NYPD cited six different FOIL exemptions to deny the Request; however, the Department did not specify which of the six statutory exemptions—§ 87(2)(b), 87(2)(g), 87(2)(i), 87(2)(e)(iii), 87(2)(e)(iv), 87(2)(f), and 87(2)(g)(iii)⁷—purportedly apply to each of the six separately enumerated requests. Although the NYPD did not provide sufficient justification for each exemption cited, caselaw and the Committee on Open Government's advisory opinions make clear that the cited exemptions are facially inapplicable to the six enumerated categories. As discussed in detail below, the NYPD cannot rely on any of these six exemptions to withhold records responsive to the six enumerated requests. For this reason, we appeal the NYPD's response to the Request on the merits.

A. New York Public Officers Law § 87(2)(b)

New York Public Officers Law § 87(2)(b) permits an agency to withhold records if disclosing such records would constitute “an unwarranted invasion of personal privacy under the provisions of subdivision two of section eight-nine of this article.” The types of documents FOIL intended to protect from disclosure under this exemption include “information of a personal nature,” such as: an individual's employment, medical, or credit history; information that would result in economic or personal hardship to an individual if disclosed; items involving the medical/personal records of a client/patient in a medical facility; lists of names intended to be used for solicitation or fundraising; information reported to an agency in confidence that is not relevant to the ordinary work of the agency; and individuals' worker's compensation records.⁸

The Request makes clear that we are not seeking any personal information about NYPD personnel, witnesses, sources, or complainants. None of the records sought constitutes personal

⁶ *Gould*, 89 N.Y.2d at 275; see also *Yonamine v. NYPD*, No. 108310/2011, 2012 WL 255022 (N.Y. Sup. Ct. Jan. 20, 2012).

⁷ For purposes of this appeal, we have analyzed § 87(2)(g) and 87(2)(g)(iii) together as a single exemption.

⁸ N.Y. Pub. Off. Law § 89(2)(b).



information, let alone “an unwarranted invasion of personal privacy” as contemplated by FOIL. To the extent that the requested records include “identifying details,” New York Public Officers Law § 87(2)(c)(i) clarifies, “disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision when identifying details are deleted.” None of the records sought in requests one, two, three, five, or six include any “identifying details” about any individual. They are therefore subject to disclosure.

The fourth enumerated category requests information regarding challenges that individuals have lodged to their designation as gang/crew members and inclusion in a gang/crew database. While the information sought pertains to individuals, the NYPD need not disclose any personally identifiable information to comply with this request. Rather, to the extent that the requested records contain personally identifiable information, the NYPD may redact that information and respond with de-identified data on challenges to inclusion in the gang database.⁹

For these reasons, New York Public Officers Law § 87(2)(b) does not apply to any of the information sought in the Request.

B. New York Public Officers Law § 87(2)(e)(iii)

“[T]he law enforcement exemption, as originally enacted in FOIL in 1974, shielded ‘information that is . . . part of investigatory files compiled for law enforcement purposes.’”¹⁰ Under Public Officers Law § 87(2)(e)(iii), law enforcement agencies may withhold records that are “compiled for law enforcement purposes and which, if disclosed, would [either] identify a confidential source or disclose confidential information relating to a criminal investigation.” This confidential source statutory exemption does not apply to the records sought in the Request.

In 2017, the New York Court of Appeals clarified the standard for exemption for confidential sources and information under FOIL.

The legislature’s policy of broad public access, as expressed in FOIL, dictates that the exemption for confidential sources and information be narrowly circumscribed. Therefore disclosure under FOIL can only be refused pursuant to section 87(2)(e)(iii) if the agency presents a “particularized and specific justification for denying access,” *In re Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566 (1986), based on an express promise of confidentiality to the source, or by establishing that, under the circumstances of the particular case, the confidentiality of the source or information can be reasonably inferred.¹¹

The NYPD has neglected to present a “particularized and specific justification” for denying access to the requested records based on the confidential source FOIL exemption. It has not indicated that it has withheld documents based on a promise of confidentiality to a source, nor has

⁹ *Thomas v. N.Y.C. Dep’t of Educ.*, 962 N.Y.S.2d 29, 32 (App. Div. 2013) (citing N.Y. Pub. Off. Law § 87(2)(c)(i) and explaining that N.Y. Pub. Off. Law § 89(2)(b) “does not create a blanket exemption”).

¹⁰ *In re Leshner v. Hynes*, 19 N.Y.3d 57, 64 (2012).

¹¹ *In re Friedman v. Rice*, 30 N.Y.3d 461, 481 (2017).



it suggested that the identity of any confidential source may be reasonably inferred. This is likely because none of the six enumerated requests could possibly rely on information provided by a confidential source. Rather, requests two through five seek information about NYPD policies and procedures affecting the due process rights of individuals already implicated in the Department's gang database; they do not seek information concerning *how* these individuals were originally identified for inclusion in the database. For that reason, the information requested could not possibly rely on a confidential source. The first request merely seeks the NYPD's definition of certain terms. Likewise, the sixth request seeks only a list of agencies/organizations that the NYPD shares its information with, not the underlying sources of the information. These two requests in no way implicate confidential sources.

For these reasons, the NYPD cannot rely on the confidential source exemption to withhold the requested records.

C. New York Public Officers Law § 87(2)(e)(iv)

Public Officers Law § 87(2)(e)(iv) exempts agencies from revealing records compiled for law enforcement purposes if disclosure would reveal non-routine criminal investigative techniques and procedures. Put differently, agencies must disclose routine criminal investigative techniques and procedures.¹²

None of the records sought request any information about NYPD investigatory procedures, routine or otherwise. To begin, the sixth request merely seeks a list of agencies/companies with whom the NYPD has shared its gang database; a response to this request does not require the NYPD to divulge any "technique" or procedure. To the extent that the remainder of the enumerated categories include requests for NYPD policies and procedures, none relate to "investigatory" procedures, which is the crux of this exemption. Rather, the narrow scope of each of the procedure-related requests seeks policies and procedures that directly implicate individuals' due process rights. Certainly, disclosure of these procedures could not be said to "give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by [an] agency."¹³

For the reasons detailed above, Public Officers Law §87(2)(e)(iv) does not apply to the Request.

D. New York Public Officers Law § 87(2)(f)

Public Officers Law § 87(2)(f)—commonly known as the public safety exemption—allows an agency to withhold records if disclosure "could, by its inherent nature, give rise to the implication that its release, in unredacted form, could endanger [] [someone's] life and safety."¹⁴ The exemption does not apply to the Request.

¹² *Fink*, 47 N.Y.2d at 567.

¹³ *Id.* at 572.

¹⁴ *In re Johnson v. NYPD*, 694 N.Y.S.2d 14, 19 (App. Div. 1999).



Courts have interpreted the public safety exemption to prevent the disclosure of records that reveal personal information about individuals or sensitive information about law enforcement techniques that create the possibility of endangerment. For instance, the First Department held that the NYPD properly invoked the public safety exemption to withhold documents revealing the identities of individuals who spoke to the police during an investigation into a gang-related homicide.¹⁵ Similarly, the public safety exemption was properly relied upon to withhold the home addresses of hand gun licensees.¹⁶ More recently, the First Department upheld the denial of access to records from the NYPD Intelligence Division, reasoning that “sensitive information about the unit’s methods and operations, which could be publicly disseminated and potentially exploited by terrorists, would create ‘a possibility of endangerment.’”¹⁷

In contrast, disclosure of the records sought in the Request in no way endangers individuals’ lives or safety. Apart from the fourth request, none of the enumerated requests seek any personally identifiable information, nor do they seek information about law enforcement techniques. Indeed, the first and sixth requests are merely for definitions of terms and a list of agency/organization names, respectively. To the extent that requests two and three seek records about law enforcement policies, the procedures requested concern individuals’ due process rights, not the strategies and techniques used to combat criminal behavior as contemplated by the public safety exemption. While the fourth request seeks information about individuals’ challenges to their inclusion in a gang database and may reveal personal information, it can hardly be said that public disclosure of this information risks endangering someone’s life or liberty.¹⁸ Far from endangering a person’s life, the requested records safeguard individuals from the arbitrary denial of their lives, liberty, and property.¹⁹ Certainly, the public has every right to know whether the

¹⁵ *In re Bellamy v. NYPD*, 930 N.Y.S.2d 178, 189 (App. Div. 2011), *aff’d*, 20 N.Y.3d 1028 (2013); *see also Johnson*, 694 N.Y.S.2d at 19-20 (“The determination of which disclosures represent a potential danger to witnesses should not necessarily depend on whether petitioner has articulated a threat against them . . . [C]ertain information found in DD-5s could, by its inherent nature, give rise to the implication that its release, in unredacted form, could endanger the life and safety of witnesses or have a chilling effect on future witness cooperation.”).

¹⁶ *In re N.Y. Times Co. v. NYPD*, 959 N.Y.S.2d 171, 173 (App. Div. 2013).

¹⁷ *In re Asian Am. Legal Def. & Educ. Fund v. NYPD*, 5 N.Y.S.3d 13, 15 (App. Div. 2015).

¹⁸ In California, the process of challenging inclusion in the statewide gang database is decidedly public. *See, e.g., Brooke Ruth, et al., San Diego Man’s Challenge to California Gang Database Fails*, KPBS (Mar. 26, 2018), <http://www.kpbs.org/news/2018/mar/26/challenge-californias-gang-database-fails/>.

¹⁹ *See Curtis Black, Gang Database Compromises Chicago’s Sanctuary City Protections*, CHI. REPORTER (Sept. 14, 2017), <http://www.chicagoreporter.com/gang-database-compromises-chicagos-sanctuary-city-protections/>. Concerns about the lack of due process protections motivated the passage of A.B. 2298 in California, which provided a process for a person to challenge their inclusion on CalGang. Dave Maass, *Victory! Gov. Brown Signs Bill to Overhaul California’s Broken Gang Database*, ELECTRONIC FRONTIER FOUND. (Sept. 28, 2016), <https://www.eff.org/deeplinks/2016/09/gov-brown-signs-bill-overhaul-californias-broken-gang-databases>.



NYPD protects against erroneous gang/crew designations and if so, what that process is, as contemplated by the fifth enumerated request.²⁰

For the reasons stated above, the Request does not seek any information or records which, if disclosed, would endanger or impair the lives and safety of any law enforcement personnel or members of the public. Thus, the NYPD cannot assert the public safety exemption to deny the Request.

E. New York Public Officers Law § 87(2)(g)

New York Public Officers Law § 87(2)(g) allows an agency to withhold records that are “inter-agency or intra-agency materials.” This exemption does not apply to the Request.

“[U]nder a plain reading of section 87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision’s four enumerated exceptions.”²¹ These exceptions to the exemption include: (1) statistical or factual tabulation or data; (2) instructions to staff that affect the public; (3) final agency policy or determinations; and (4) external audits.²² Put differently, factual data, instructions to staff that affect the public, final agency policies, and external audits are all subject to disclosure under FOIL.

All six enumerated requests clearly qualify as factual data that must be disclosed under Section § 87(2)(g)(i). While there is no statutory definition of “factual data” under FOIL, the New York State Court of Appeals in *Gould v. NYPD* defined factual data as “objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making.”²³ Requests one and six fit squarely within this definition of factual data, as they request definitions and a list of agencies/organizations, respectively. This information is purely objective and factual. Likewise, information responsive to requests two and three may be characterized as factual data as these requests seek objective information about NYPD policies and procedures, namely, the process by which an individual designated as a

²⁰ Jacqueline Serrato, *Chicago Police Admits Gang Database Error that Enabled ICE Raid*, CHI. TRIB. (Dec. 6, 2017), <http://www.chicagotribune.com/hoy/ct-chicago-police-admits-gang-database-error-20171206-story.html>; Richard Winton, *California Gang Database Plagued with Errors, Unsubstantiated Entries, State Auditor Finds*, L.A. TIMES (Aug. 11, 2016), <http://www.latimes.com/local/lanow/la-me-ln-calgangs-audit-20160811-snap-story.html> (“In one of the most telling examples, auditors found the names of 42 people whose birth dates indicated they were one year of age or younger at the time they were entered into the database. Of those, 28 were entered for ‘admitting to being gang members,’ according to State Auditor Elaine M. Howle.”).

²¹ *Gould*, 89 N.Y.2d at 276 (citing *In re Farbman & Sons v. N.Y.C. Health & Hosps. Corp.*, 62 N.Y.2d 75, 83 (1984); *In re MacRae v. Dolce*, 515 N.Y.S.2d 295 (App. Div. 1987)).

²² Letter from Robert J. Freeman, Exec. Director, N.Y.S. Comm. on Open Gov’t, Opinion No. 16671 (July 18, 2007), <https://docs.dos.ny.gov/coog/ftext/fl6671.htm> “It is noted that the [§ 87(2)(g)] language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted.”).

²³ *Gould*, 89 N.Y.2d at 276 (citing *Farbman & Sons*, 62 N.Y.2d at 83; *MacRae*, 515 N.Y.S.2d at 295).



gang/crew member in a gang database is notified of such, and the process by which an individual may challenge her inclusion in the database. Moreover, these records also qualify as final agency policies or determination, subject to disclosure under New York Public Officers Law § 87(2)(g)(iii).

The information sought in the fourth request—records concerning individual challenges to inclusion in an NYPD gang database—must also be disclosed. The Court in *Gould*, relying on its definition of “factual data,” held that police complaint follow-up reports—which contained the names and addresses of crime victims and witnesses—were “factual data” subject to release under FOIL.²⁴ The information sought in the fourth request is similar to the information embedded within the complaint follow-up reports that the Court in *Gould* deemed subject to release. If “a witness statement constitutes factual data insofar as it embodies a factual account of the witness’s observations,” individuals’ challenges to their designation as gang/crew members must also represent “purely factual data” subject to disclosure under *Gould*.²⁵

The fifth request seeks information about the manner in which the NYPD reviews/audits its gang database for accuracy. While this exemption includes an exception for external audits, “there is nothing in the language of the Freedom of Information Law that pertains specifically to internal audits or that exempts them from disclosure.”²⁶ Indeed, courts have made clear that “[h]ad the legislature intended to completely exclude internal audit reports from disclosure it could have easily done so.”²⁷ As such, the NYPD’s internal audits and policies concerning internal audits of its gang database must be disclosed under FOIL.²⁸

We recognize that the exemption allows an agency to deny a request that would release opinions, ideas, or advice exchanged as part of the consultative or deliberative decision-making process.²⁹ To the extent the requested information or records includes these types of exempted examples, the NYPD can redact those portions and provide the requested items.

For these reasons, Public Officers Law § 87(2)(g) compels disclosure of the records sought in the Request as either statistics and factual data and/or final agency policies and determinations.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Letter from Robert J. Freeman, Exec. Director, N.Y.S. Comm. on Open Gov’t, Opinion No. 16706 (Aug. 2, 2007), <https://docs.dos.ny.gov/coog/ftext/f16706.htm> (hereinafter “Aug. 2, 2007 Freeman Letter”).

²⁷ *In re Gannett Co. v. Rochester City Sch. Dist.*, 684 N.Y.S.2d 757, 760 (Sup. Ct. 1998), *aff’d*, 701 N.Y.S.2d 679 (App. Div. 1999); *In re Newsday, Inc. v. N.Y.S. Urban Dev. Corp.*, 580 N.Y.S.2d 1015 (Mem.), 1016 (App. Div. 1992) (holding statistical data contained within an internal audit report must be disclosed); *see also* Aug. 2, 2007 Freeman Letter, *supra* note 26 (“Because the provision cited above refers to “external audits”, it has been contended that internal audits may be withheld in their entirety. Nevertheless, there is nothing in the language of the Freedom of Information Law that pertains specifically to internal audits or that exempts them from disclosure.”).

²⁸ *See Gould*, 89 N.Y.2d at 274-75 (“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).”).

²⁹ *Id.* at 278.



F. New York Public Officers Law § 87(2)(i)

Public Officers Law § 87(2)(i), commonly known as the “information technology exemption,” permits an agency to withhold records or portions of records which, if disclosed, “would jeopardize an agency’s capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures.” This exemption does not apply to any records requested.

The information technology exemption to FOIL “is concerned with ensuring the security of information technology” and “has been construed to avoid the risk of electronic or cyber attack. . . . This security consideration is not merely focused on the method of attack, but on the preservation of both the electronic data and the physical system or infrastructure that carries the data.”³⁰ Agencies have relied on this exemption to prevent the disclosure of IP addresses.³¹ By way of example, in *In re Miller v. New York State Division of Human Rights*, the petitioner filed a FOIL request seeking an agency’s “Case Management System Legal Resources Notebook,” “a software application providing the means of accessing the information in its electronic file system,” as well as the user’s manual for the application.³² The court cited the information technology exemption to deny the request for the application’s user’s manual.³³

In contrast, disclosure of the records sought in the Request in no way jeopardizes the security of any of the NYPD’s electronic information systems. The request does not seek information about the technical underpinnings of any electronic database or system, but rather records reflecting the due process implications for individuals implicated in an electronic system. If interpreted in the manner the NYPD suggests, Public Officers Law § 87(2)(i) would exempt the NYPD from providing any information housed within any electronic system or database. This is not the law. To the contrary, “if a government agency has the ability, with reasonable effort, to extract and disclose information maintained electronically, it must do so to comply with FOIL.”³⁴ Indeed, Public Officers Law § 89(3)(a) states, “[w]hen an agency has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort, it shall be required to do so.” Therefore, to the extent that the records requested rely on information that is housed in an electronic system or database, the NYPD cannot use the information technology exemption to withhold the requested records.

³⁰ *In re Crawford v. N.Y.C. Dep’t of Info. Tech. & Telecomms.*, 982 N.Y.S.2d 725, 729 (Sup. Ct. 2014) (citing *In re TJS of N.Y., Inc. v. N.Y.S. Dep’t of Taxation and Fin.*, 932 N.Y.S.2d 243 (App. Div. 2011)).

³¹ Letter from Camille S. Jobin-Davis, Ass’t Director, N.Y.S. Comm. on Open Gov’t, Opinion No. 17236 (July 3, 2008), <https://docs.dos.ny.gov/coog/ftext/f17236.html> (“Unlike security codes or passwords utilized to gain access to a particular database, it is our understanding that disclosure of IP addresses would permit a person to implement an attack on agency’s computers with precision and accuracy.”).

³² 996 N.Y.S.2d 30, 32 (App. Div. 2014).

³³ *Id.*

³⁴ Letter from Robert J. Freeman, Exec. Director, N.Y.S. Comm. on Open Gov’t, Opinion No. 19150 (June 26, 2014), <https://docs.dos.ny.gov/coog/ftext/f19150.html>.



For these reasons, and because the NYPD failed to explain how or why disclosure of the requested information would jeopardize the security of information technology assets,³⁵ the NYPD cannot rely on the information technology exemption to deny the Request.

G. Records Not Maintained in a Manner Described

In addition to listing a series of statutory exemptions to FOIL, the NYPD withheld the requested records at least in part because “the records are not maintained in the manner you described.”³⁶ We interpret this to mean the NYPD does not possess or maintain at least some of the records requested. If the NYPD does not possess certain requested records or if the requested records could not be located after diligent search upon review, we request that the NYPD (1) identify the specific enumerated request(s) for which this purported justification for denial applies, and (2) certify that it does not possess these records and/or that these records could not be located after a diligent search.³⁷

If, on the other hand, the NYPD intended the phrase “the records are not maintained in the manner you described” to mean the records requested were not “reasonably described” pursuant to Public Officers Law § 89(3)(a), the NYPD should have sought clarification or asked for more information as necessary to enable a complete response to the requested categories.³⁸ In this case, we request the NYPD to identify the specific enumerated request(s) that did not “reasonably describe” the record(s) requested and explain why “the descriptions were insufficient for purposes of locating and identifying the documents sought.”³⁹

* * *

For the reasons cited above, we appeal (1) the sufficiency of the NYPD’s determination to redact and partially withhold documents that it disclosed in response to the Request, and (2) the sufficiency and the merits of the NYPD’s determination that the remaining requested records are exempt from disclosure.

Please respond within ten business days of receiving this appeal, stating whether the Request is granted or denied in full or in part.⁴⁰ If the appeal is granted, please state a specific date by which the requested records will be produced. As requested in our initial letter, please produce

³⁵ See *In re Gallogly v. City of New York*, 21 N.Y.S.3d 867, 869 n.2 (Sup. Ct. 2016).

³⁶ Exhibit B at 1.

³⁷ N.Y. Pub. Off. Law § 89(3); Letter from Camille S. Jobin-Davis, Ass’t Director, N.Y.S. Comm. on Open Gov’t, Opinion No. 19074 (Sept. 20, 2013), <https://docs.dos.ny.gov/coog/ftext/f19074.html> (noting that N.Y. Pub. Off. Law § 89(3) provides in part that on request, an agency “shall certify that it does not have possession of such record or that such record cannot be found after diligent search”).

³⁸ 21 N.Y.C.R.R. § 1401.2(b)(2); see also Letter from Robert J. Freeman, N.Y.S. Comm. on Open Gov’t, Opinion No. 16340 (Dec. 14, 2006), <https://docs.dos.ny.gov/coog/ftext/f16340.htm> (noting that a response to a FOIL request should “indicate in any way which among the records could not be located based on the terms of [the] request” and the agency should make an effort to assist the requester with “reasonably describing” the records requested).

³⁹ *Farbman & Sons*, 62 N.Y.2d at 83.

⁴⁰ See N.Y. Pub. Off. Law § 89(4)(a).



electronic records in their unlocked native format with all original metadata and original file names. Paper documents should be scanned and produced as Adobe PDF files or TIF files. Emails produced should be grouped together with any attachments. Please send the documents to: Marne Lenox, NAACP Legal Defense and Educational Fund, Inc., 40 Rector Street, 5th Floor, New York, NY 10006 or mtenox@naacpldf.org.

If the appeal is denied in whole or in part, please name the records being withheld and state with particularity the reasons for each record being withheld. In addition, please note that FOIL directs that all appeals and the determinations that follow be sent to the Committee on Open Government, Department of State, 41 State Street, Albany, New York 12231.

In anticipation of litigation, please preserve and be prepared to produce any and all records regarding the Records Access Officer's efforts to identify and produce records responsive to the Request, and any and all records regarding the Request, including, but not limited to, electronic and other communications, and other records referring to the Request or containing or referring to information about or relating to the Request.

Thank you for your attention to this matter.

Yours truly,

/s/ Marne Lenox
Marne Lenox, Assistant Counsel
John S. Cusick, Equal Justice Works Fellow

NAACP Legal Defense and Educational
Fund, Inc.

/s/ Darius Charney
Darius Charney, Senior Staff Attorney

Center for Constitutional Rights

EXHIBIT A

February 22, 2018

VIA EMAIL AND FEDEX

New York City Police Department
Records Access Officer
FOIL Unit, Legal Bureau
One Police Plaza, Room 110-C
New York, New York 10038

Re: Freedom of Information Request

Dear Freedom of Information Officer:

The NAACP Legal Defense & Educational Fund, Inc. (“LDF”) and Center for Constitutional Rights (“CCR”) make this request for records, regardless of format, medium, or physical characteristics, and including electronic records and information, pursuant to New York Public Officers Law §§ 84-90. We respectfully request that you provide us with the following information within five business days of your receipt of this letter:

- (1) All documents, including but not limited to training materials, policies, procedures, regulations, protocols, and guidelines, drafted and/or utilized by the NYPD from January 1, 2010, to the present that reflect the NYPD’s definition of the following terms:
 - a. Crew
 - b. Gang
- (2) All documents, including but not limited to training materials, policies, procedures, regulations, protocols, and guidelines, drafted and/or utilized by the NYPD from January 1, 2010, to the present, regarding the process by which an individual identified as a suspected or confirmed member, associate, and/or affiliate of any gang and/or crew in any database, log, list, and/or electronic system is notified about his/her inclusion in such database, log, list, and/or electronic system.
- (3) All documents, including but not limited to training materials, policies, procedures, regulations, protocols, and guidelines, drafted and/or utilized by the NYPD from January 1, 2010, to the present, regarding the process by which an individual identified as a suspected or confirmed member, associate, and/or affiliate of any gang and/or crew in



any database, log, list, and/or electronic system may seek to challenge his/her inclusion in such database, log, list, and/or electronic system.

- (4) All documents, including but not limited to training materials, policies, procedures, regulations, protocols, and guidelines, drafted and/or utilized by the NYPD from January 1, 2010, to the present, regarding any challenge by an individual identified as a suspected or confirmed member, associate, and/or affiliate of any gang and/or crew in any database, log, list, and/or electronic system regarding his/her inclusion in such database, log, list, and/or electronic system and the current status of that challenge.
- (5) All documents, including but not limited to training materials, policies, procedures, regulations, protocols, and guidelines, drafted and/or utilized by the NYPD from January 1, 2010, to the present, regarding the process by which any database, log, list, and/or electronic system that identifies an individual as a suspected or confirmed member, associate, and/or affiliate of any gang and/or crew is reviewed, audited, and/or modified for accuracy.
- (6) A list of all public and/or private companies, agencies, and/or organizations, including but not limited to the New York City Department of Education (DOE), the New York City Housing Authority (NYCHA), and the U.S. Immigrations and Customs Enforcement (ICE), with whom the NYPD has shared any database, log, list, and/or electronic system that identifies an individual as a suspected or confirmed member, associate, and/or affiliate of any gang and/or crew from January 1, 2010, to the present.

Format

Electronic records should be produced in their unlocked native format with all original metadata and original filenames. Paper documents should be scanned and produced as Adobe PDF files or TIF files. Emails produced should be grouped together with any attachments. When searching emails, please search all folders, including inbox, subject matter folders, sent items, archived items, and deleted items. Please produce all metadata fields for emails, including BCC.



Fee Waiver and Expedited Processing

The above requests are a matter of public interest. Accordingly, we request a fee waiver and expedited processing. The disclosure of the information sought is not for commercial purposes; instead, it will contribute to the public's understanding of government operations.¹

LDF and CCR are non-profit organizations dedicated to civil and human rights, with a proven track-record of compiling and disseminating information and reports to the public about government functions and activities, including policing. We have undertaken this work in the public interest and not for any private commercial interest. Similarly, the primary purpose of this Request is to obtain information to further the public's understanding of important policing policies. Access to this information is crucial for LDF, CCR, and the communities we serve to evaluate such policies and their effects.

Conclusion

As indicated above, the Freedom of Information Law ("FOIL") requires that an agency respond within five business days of receipt of a FOIL request. If you are unable to comply with our records request within five business days, please provide us with a copy of the internal report explaining the delay in accordance with 211-17 of the New York Police Department Guide, Section 9, and let us know when we may expect the requested records.

If this request is denied in whole or in part, please identify the appropriate specific appellate authority and justify all specific deletions by reference to exemptions in the statute. Please do not redact any non-responsive information from any records; we request the complete copies of any records with any responsive information. Additionally, please inform us of the reason(s) for such denial in writing, and provide the name, mailing address, and email address of the person or body to whom an appeal should be directed.

Please direct correspondence related to this request to the undersigned via telephone at (212) 965-2256, email at mtenox@naacpldf.org, or by mail at 40 Rector Street, 5th Floor, New York, NY 10006.

¹ Letter of Robert Freeman, Executive Director, NYS Committee on Open Government, Opinion No. 11745, <http://docs.dos.ny.gov/coog/ftext/f11745.htm> (last visited Sept. 6, 2017) ("[T]here is nothing in the Freedom of Information Law that prohibits an agency from waiving the fee for copies.").



Thank you for considering our request.

Sincerely,

\s\ Marne Lenox

Marne Lenox

Assistant Counsel

NAACP Legal Defense and Educational Fund, Inc.

\s\ Darius Charney

Darius Charney

Senior Staff Attorney

Center for Constitutional Rights

EXHIBIT B



POLICE DEPARTMENT
LEGAL BUREAU
F.O.I.L Unit, Room 110C
One Police Plaza
New York, NY 10038

03/01/18

Mr. Matt Bailey
NAACP Legal Defense and Educational Fund, Inc.
MBailey@naacpldf.org

FOIL Req #: 2018-PL-3418
Your File #:
Re: Crew, Gang

Dear Sir or Madam:

This is in response to your letter dated 02/22/18, which was received by this office on 02/22/18, in which you requested access to certain records under the New York State Freedom of Information Law (FOIL).

Your request has been assigned to Detective Halk (646-610-6430) of this office. Before a determination can be rendered, further review is necessary to assess the potential applicability of exemptions set forth in FOIL, and whether the records can be located. I estimate that this review will be completed, and a determination issued, within ninety business days of this letter.

This is not a denial of the records you requested. Should your request be denied in whole or in part, you will then be advised in writing of the reason for any denial, and the name and address of the Records Access Appeals Officer.

Very truly yours,

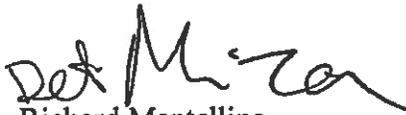
for 
Richard Mantellino
Lieutenant
Records Access Officer

EXHIBIT C



**POLICE DEPARTMENT
LEGAL BUREAU**
F.O.I.L. UNIT, ROOM 110C
ONE POLICE PLAZA
NEW YORK, NY 10038

May 1, 2018

Matt Bailey
NAACP Legal Defense and Educational Fund, Inc.
mbailey@naacpldf.org

File # 2018-PL-3418

Dear Sir:

This is in further response to your letter dated, 02/22/2018 in which you request access to certain records under the New York State Freedom of Information Law ("FOIL").

Responsive to your request, the following documents have been accessed and copied: two power point presentations and eight NYPD Patrol Guide Procedures.

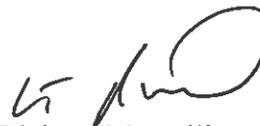
Redaction and withholdings have been made to the documents on the basis of Public Officers Law Section 87(2)(e)(iv) as such information, if disclosed, would reveal non-routine techniques and procedures; Public Officers Law Section 87.2(e)(iii), in that the release of such information would identify a confidential source or disclose confidential information; Public Officers Law Section 87(2)(b) as such information, if disclosed, would constitute an unwarranted invasion of personal privacy; and Public Officers Law Section 87(2)(f) as such records/information would endanger the life or safety of any person.

I must deny the remainder of your request on the basis of the following: Public Officers Law Section 87(2)(b) as such information, if disclosed, would constitute an unwarranted invasion of personal privacy; Public Officers Law Section 87(2)(g) as such records are inter-agency and/or intra-agency materials; Public Officers Law Section 87(2)(i) as such records, if disclosed, would jeopardize the capacity of an agency or an entity that has shared information with an agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures; Public Officers Law Section 87.2(e)(iii), in that the release of such information would identify a confidential source or disclose confidential information; Public Officers Law Section 87(2)(e)(iv) as such information, if disclosed, would reveal non-routine techniques and procedures; Public Officers Law Section 87(2)(f) as such records/information would endanger the life or safety of any person; Public Officers Law Section 87(2)(g)(iii) as such, these records do not represent a final agency determination; and/or the records are not maintained in the manner you described.

COURTESY • PROFESSIONALISM • RESPECT

You may appeal this decision or any portion thereof. Such an appeal must be made in writing, within 30 days of the date of this letter, and must be forwarded to: Sergeant Jordan S. Mazur, Records Access Appeals Officer, New York City Police Department, One Police Plaza, Room 1406, New York, N.Y. 10038. Your appeal may also be submitted via email to FOILAppeals@NYPD.org. Please include copies of the FOIL request and this letter with your appeal.

Sincerely,

A handwritten signature in black ink, appearing to read 'Richard Mantellino', written in a cursive style.

Richard Mantellino
Lieutenant
Records Access Officer

EXHIBIT D



**POLICE DEPARTMENT
LEGAL BUREAU**
F.O.I.L. UNIT, ROOM 110C
ONE POLICE PLAZA
NEW YORK, NY 10038

May 1, 2018

Marne Lenox
NAACP Legal Defense and Educational Fund, Inc.
mlenox@naacpldf.org

File # 2017-PL-17643

Dear Madam:

This is in further response to your letter dated, 12/20/2017 in which you request access to certain records under the New York State Freedom of Information Law ("FOIL").

Responsive to your request, the following documents have been accessed and copied: two power point presentations and eight NYPD Patrol Guide Procedures.

Redaction and withholdings have been made to the documents on the basis of Public Officers Law Section 87(2)(e)(iv) as such information, if disclosed, would reveal non-routine techniques and procedures; Public Officers Law Section 87.2(e)(iii), in that the release of such information would identify a confidential source or disclose confidential information; Public Officers Law Section 87(2)(b) as such information, if disclosed, would constitute an unwarranted invasion of personal privacy; and Public Officers Law Section 87(2)(f) as such records/information would endanger the life or safety of any person.

I must deny the remainder of your request on the basis of the following: Public Officers Law Section 87(2)(b) as such information, if disclosed, would constitute an unwarranted invasion of personal privacy; Public Officers Law Section 87(2)(g) as such records are inter-agency and/or intra-agency materials; Public Officers Law Section 87(2)(i) as such records, if disclosed, would jeopardize the capacity of an agency or an entity that has shared information with an agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures; Public Officers Law Section 87.2(e)(iii), in that the release of such information would identify a confidential source or disclose confidential information; Public Officers Law Section 87(2)(e)(iv) as such information, if disclosed, would reveal non-routine techniques and procedures; Public Officers Law Section 87(2)(f) as such records/information would endanger the life or safety of any person; Public Officers Law Section 87(2)(g)(iii) as such, these records do not represent a final agency determination; and/or the records are not maintained in the manner you described.

COURTESY • PROFESSIONALISM • RESPECT

You may appeal this decision or any portion thereof. Such an appeal must be made in writing, within 30 days of the date of this letter, and must be forwarded to: Sergeant Jordan S. Mazur, Records Access Appeals Officer, New York City Police Department, One Police Plaza, Room 1406, New York, N.Y. 10038. Your appeal may also be submitted via email to FOILAppeals@NYPD.org. Please include copies of the FOIL request and this letter with your appeal.

Sincerely,

A handwritten signature in black ink, appearing to read 'LT RD', is positioned above the printed name.

Richard Mantellino
Lieutenant
Records Access Officer