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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: 12

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BRENNAN CENTER FOR JUSTICE AT NEW YORK
UNIVERSITY SCHOOL OF LAW,

Index No.:
160541/2016

Petitioner(s)

-against-

NEW YORK CITY POLICE DEPARTMENT and JAMES P.
O'NEILL, in his official capacity as
Commissioner of the New York City Police
Department,

Respondents

-----x

60 Centre Street
New York, New York
August 30th, 2017,

B E F O R E:

HONORABLE BARBARA JAFFE, J.S.C.,

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THE COURT: Good morning. Who is representing Brennan Center.

MS. MERKEL: I will.

THE COURT: You could be seated if you're more comfortable.

So I'll hear from you, Ms. Merkel.

MS. MERKEL: Yes, your Honor.

Your Honor, my name is Ellison Merkel from the law firm of Quinn Emanuel representing the Brennan Center, petitioner in this matter.

This case concerns the Brennan Center's effort to shed some light on NYPD's use of predictive policing policy. You may know this, but the Brennan Center is a nonprofit public advocacy organization that works to do a number of different things, but chief among them is to ensure that law enforcement agencies are in compliance with their constitutional and statutory obligations.

One major way which the Brennan Center tries to achieve its objective is by promoting transparency to ensure the public fully understands what the government and agencies are actually doing.

So one area where the Brennan Center has significant concerns and is looking to promote transparency is with regard to the NYPD's use of predictive technology.

Just so we're on the same page, predictive policing

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2 technology basically means the use of algorithms to assess
3 crime data in order to roughly predict where and when crimes
4 are likely to occur.

5 So the use of predictive policing technology by
6 police departments, means the police department may be
7 making key decisions about how to deploy resources, using
8 data and weightings from algorithms that the public doesn't
9 have insight into.

10 I think it might be useful to exemplify what the
11 concerns are, to take an example, and I'm going to freely
12 admit that I've stolen this example from the Emory Law
13 Journal article that we've cited in our petition, but
14 imagine that a predictive policing program has indicated
15 that there's a likelihood that there will be a car robbery
16 in a particular area at a particular time, and police
17 officers are dispatched there, and they see two woman
18 looking in the windows of a car there, and they stop those
19 women and find out one has an outstanding warrant and other
20 one is in possession of drugs.

21 Had those women had been stopped absent the
22 policing technology that's a real significant question and I
23 think it also implicates whether or not there are reasonable
24 solutions, reasonable suspicions, implicate whether or not
25 policing technology, for example, can be utilized to obtain
26 warrants, search warrant, arrest warrants, etc.

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2 That's one sort of one example to illustrate why it
3 feels the increasing growing focus on this technology is
4 something that bears further scrutiny by the public.

5 Now, the NYPD has confirmed that it's using
6 predictive policing technology, but a lot of information
7 and, in particular, about the inputs of the technology and
8 what the outputs are have been closely guarded secrets. So
9 the technology is a black box. It's a black box that
10 provides residents with no means of understanding exactly
11 how the police are making their decisions.

12 So to shed light on the black box the Brennan
13 Center submitted the FOIL request that is the subject of
14 this petition in June of 2016, seeking nine specific
15 categories of information about the NYPD predictive policing
16 technology. I'd like to in a moment talk about the history
17 of how the NYPD responded to that FOIL request. But if
18 you'll indulge me I just want to focus on where we are today
19 and what it is the Brennan Center is seeking court
20 intervention on in light of the fact that the NYPD did in
21 reply to this petition finally for the first time produce
22 some documentation to the Brennan Center. The Brennan
23 Center has assessed those documents, reviewed them and it's
24 agreed to withdraw three requests in light of the NYPD
25 representation and production. Those are requests one, four
26 and nine of their original FOIL and they are really focused

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on four outstanding categories of information directing the NYPD to produce or undertake.

The first of those categories is inputs and outputs. So data that goes into the algorithm and outputs that come out of the algorithm.

We've read the NYPD's papers. We understand their concerns about releasing the algorithm. We don't necessarily share those concerns, but we do want to have real respect for their law enforcement goals and we don't want to be treading on an area that they feel so strongly needs to be protected but we think this is --

THE COURT: Right now you're saying the data as opposed to the algorithm.

MS. MERKEL: Exactly. What goes into the algorithm. We don't see into the black box to know exactly how that algorithm is interpreting the data. We do also want to see, okay, what are the outputs that the algorithm spits out. In other words, what is the NYPD being told is a likely location or timing of these crimes or really just any information about sort of what they're being told from this algorithm that could be extremely useful.

The other way we tried to tailor this request is by limiting it to historical data. Our request is that the data be produced starting from when the predictive policing algorithm was first put into use and running until the date

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2 six months prior to whenever the Court issues its order.
3 The idea is to just insure that we're not going to get any
4 data that will step on or interfere with any current ongoing
5 policing or allow for anyone to sort of predict where police
6 officers might be today or tomorrow or next week.

7 The next category that the Brennan Center is
8 focused on is areas where the NYPD search was glaringly
9 incomplete. Their search and production was incomplete.
10 There are three requests that fit within this category.

11 The first is the request for past usage and testing
12 information.

13 The second is governing policies. So any policies
14 that govern the use of the predictive policing technology.

15 The third is any audits they may have undertaken.
16 And these are requests three, seven and eight.

17 These are documents that provide really critical
18 and factual information to the public that allows us to
19 understand what the impact of the predictive policing
20 technology has been, how the NYPD is policing itself in the
21 use of this technology and what changes have been made to
22 police work, if any, as a result of these algorithms.

23 So the NYPD's own papers seem to illustrate that
24 they have either not undertaken a full search for these
25 documents. They've sort of read them to be documents only
26 impacting third-party vendor algorithms, rather than the

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2 actual predictive policing algorithm that is in place. Or
3 their own policy suggests that their production is not
4 complete. I'll explain that a little bit further.

5 So, one of the documents that the NYPD did produce
6 to us is a policy from 2009 that they state governs the use
7 of their predictive policing algorithm. And that policy
8 itself indicates that they are required to undertake audits
9 of the use of the sort of predecessor to their predictive
10 policing algorithm, which is the Domain Awareness System.

11 So the terms of the policy that they produced
12 suggest that there must have been audits undertaken of their
13 predictive policing technology and, yet, they haven't
14 produced any information about those audits. Similarly,
15 they produced a paper that describes the predictive policing
16 algorithm along with the full Domain Awareness System. That
17 paper includes statistics about how the predictive policing
18 algorithm has been working and, yet, we didn't receive any
19 underlying data.

20 THE COURT: Is that the Levine paper?

21 MS. MERKEL: Exactly. Contains statistics about
22 effective their algorithm is and, yet, we don't see any
23 evidence of the tests that they undertook to come up with
24 those statistics and we suspect they've kept an ongoing
25 record of it, as they naturally would have, having just put
26 this new policy in place.

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So we feel what they've produced really begs the question of whether their production in the area of these policies has been complete.

The third area where Brennan Center's focused is communications with third-party vendors.

So what the NYPD has explained to the Brennan Center is, even though the current predictive policing algorithm that is in use, is an in-house algorithm that they've developed themselves. Prior to developing that algorithm, they did go through a process of trying out three third-party vendors -- trying out their predictive policing systems, evaluating them and determining whether they want to go ahead and use them.

The Brennan Center's requests clearly call for a number of documents related to those third-party vendors` in particular, communications. They've produced communications to us. They've also withheld a unspecified number of communications, but the communications that they did produce raise some real questions for us because they are redacted past the point of usefulness.

There is no substantive information that we can glean from these e-mails and I think there's a couple of reasons why we feel that this is inappropriate.

Number one, they've sort of issued a blanket objection to producing these documents because they believe

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2 they implicate the competitive and sensitive information of
3 the third-party vendors, but that ignores information that
4 we expect to be in these documents that we feel is not
5 protected by that concern and that's very useful to us. And
6 that is any expression by the NYPD of what it's looking for,
7 what its expectations might be, what standard might be for a
8 predictive policing technology. We feel there is very
9 useful information about the NYPD's use, the use of the
10 technology that can be gleaned from these documents, and we
11 suspect that information has been redacted out with an
12 overly broad brush.

13 Additionally, we don't think it's likely and I'll
14 get into this little more detail, but we don't think it's
15 likely that these vendors had a true expectation of
16 confidentiality over this information. They were competing
17 for the business of the NYPD rather than being in a
18 position, for example, of a regulated entity that's forced
19 to give data to a government entity.

20 Fourth and finally, a simple request, we just ask
21 that the NYPD expand its search to the Counterterrorism
22 Bureau. The papers they have produced to us indicate that
23 the Domain Awareness System, which houses the predictive
24 policing algorithm, was created for the Counterterrorism
25 Unit and continues to be used by the Counterterrorism Unit
26 and, yet, they made a conclusory statement that the three

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2 other units that they searched were the only places
3 responsive documents could reasonably be located.

4 So we think the documents they did produce raised
5 the specter that there must be responsive documents also
6 located in the Counterterrorism Unit and we're asking that
7 they search that unit for documents responsive to all of our
8 requests except for one, four and nine which are the ones
9 we've agreed to withdraw.

10 I just want to talk a little bit about the NYPD's
11 obligations and actions in this case.

12 These categories really reflect the Brennan
13 Center's good faith attempt to narrow their requests to seek
14 their goal of transparency and real evaluation of the
15 predictive policing technology that's in place while giving
16 wide berth of the NYPD concerns about their law enforcement
17 mission.

18 By contrast, the Brennan Center has been met at
19 absolutely every turn by the NYPD's flippant approach to
20 their response to FOIL and resistance to disclosure. It
21 really appears that NYPD believes documents relating in any
22 respects to law enforcement are exempt from disclosure, but
23 if the legislature had wanted to exempt them from the FOIL
24 they could have. And they didn't.

25 So the NYPD has clear obligations under the well
26 known standards of the FOIL and I'm sure you're very

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2 familiar with those standards, but if you'll indulge me I
3 think in this case it bears going over kind of what those
4 obligations are.

5 In the seminal case, which is Gould v NYPD, that's
6 653 NYS 2d 54, from 1996.

7 The Court of Appeals stated that government records
8 are presumptively open for public inspection, copying,
9 unless they fall within a enumerated exemption. Exemptions
10 are very narrowly construed and it's the agency's burden to
11 justify that the exemption applies. In fact, in reviewing a
12 FOIL determination under Article 78, a typical Article 78
13 standard, arbitrary and capricious, does not apply. It's
14 simply a burden on the NYPD, the respondent, to justify the
15 applicability of exceptions.

16 One instructive case I think is Data Tree, LLC,
17 versus Romaine, which is also from the Court of Appeals in
18 2007.

19 In that case the Appellate Division had actually
20 found that the agency only needed to prove an exemption in
21 a, quote, plausible fashion. Once they did that the burden
22 shifted to the petitioner to show that exemption in fact did
23 not apply. The Court of Appeals rejected that and said
24 there's no burden shifting. The burden is still with you to
25 justify denial of access to records.

26 So we think the NYPD has absolutely failed to meet

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2 that burden and I'll talk about that as quickly as I can.

3 The NYPD failed to carry this burden throughout the
4 history of the response to the FOIL request. They first
5 rejected the FOIL request summarily in response to all nine
6 categories. They simply said these are exempt based on
7 872(e) revealing none --

8 THE COURT: Does that matter since they coughed up
9 other things subsequently?

10 MS. MERKEL: I do think it matters because, you
11 know, the Brennan Center has to make decisions based on the
12 justifications that they provide at the time and should not
13 be required to bring a petition in order to inspire the NYPD
14 to comply with their legal obligations. So as I'll talk
15 about -- We think that means we've already in effect
16 prevailed in this matter for purposes of attorney's fees.
17 It simply cannot be the NYPD's policy that they reject FOIL
18 requests out of hand until it turns out that the requester
19 is serious and willing to sue them in order to get
20 information.

21 We do have to evaluate the facts as they currently
22 stand, but we absolutely believe that they're extremely
23 blanket response, both to the original request and then to
24 the appeal, which is a detailed appeal that was, again, met
25 with a blanket list of four different and new exceptions
26 that would apply, really belie refusal to comply with the

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1 obligations of FOIL.

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3 It also made it impossible until our reply brief
4 for the Brennan Center to evaluate what are the documents
5 the NYPD is truly concerned about and why. That's their
6 failure to provide specific and particularized explanation
7 of why these documents should be exempt from FOIL.
8 Certainly, the Brennan Center is willing to be reasonable in
9 its request, but needs to understand what exactly the
10 exceptions are that they believe apply.

11 As I said, I think the belated production certainly
12 makes clear the insufficiency of their actual responses
13 because they've now produced documents that evidence that
14 there are documents that were not exempt that they did not
15 produce in the first instance, but even what they produced
16 now we believe is insufficient.

17 THE COURT: I understand.

18 MS. MERKEL: Reason is that we think the exceptions
19 they cited don't apply.

20 THE COURT: Let's get to the meat.

21 MS. MERKEL: They don't apply to the specific
22 documents we requested.

23 I think the primary exemption that they've relied
24 upon is 872(e), which is non-routine techniques and
25 procedures.

26 NYPD has argued that the information sought

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2 relating to data, algorithms, weighting and machine learning
3 is exempt under this 872(e).

4 Now the animating purpose behind this exemption is
5 to prevent criminals from being apprised in advance of what
6 the police may be doing in a particular investigation or
7 what non-routine techniques they may be using to capture
8 criminals. So the common verbiage is giving the safecracker
9 the combination of the safe. Whether this applies is
10 whether violators could evade detection by deliberately
11 using information provided in response to a FOIL request.
12 And that's the standard set out by Fink v Lefkowitz in 1979.

13 So, importantly, the NYPD is basing its claim for
14 the applicability of this exemption on its concern that the
15 disclosure would allow the public to make the same
16 predictions the NYPD is making. So even if disclosure of
17 the code could pose such a risk, disclosure of this
18 information, disclosure of the information that the Brennan
19 Center is currently seeking, which is inputs and outputs
20 that are six months removed from the present time, would not
21 implicate any of the concerns that the NYPD has laid out.

22 There's a couple of reasons for that.

23 Number one, the algorithm is a very complex
24 algorithm. So this is not something that where it's A plus
25 B plus --

26 THE COURT: Don't we know that people have become

1 Proceedings

2 much more sophisticated about this kind of thing?

3 MS. MERKEL: Absolutely become sophisticated, your
4 Honor, but not the kind of thing that where you can simply
5 reason your way to a prediction.

6 If you look at the Levine article he does go into
7 some detail about how the algorithm works and there's
8 numerous steps in the process that this algorithm goes
9 through. There's a number of different weights that are
10 utilized.

11 More importantly, it utilizes machine learning,
12 which means that as the algorithm runs and sees what's
13 happening and how successful it is, it should be improving
14 itself and getting better and smarter. So by looking at
15 inputs and outputs that are six months removed we're already
16 missing a significant amount of growth and learning in the
17 algorithm. So not only are the inputs and outputs going to
18 be changing over the course of those six months to the
19 present, but the algorithm itself is going to be updating
20 and changing in response.

21 So withdrawing the request for the algorithm we
22 think we've really carved out information that allows the
23 public to evaluate and understand what the NYPD is doing
24 without any threat whatsoever that a member of the public
25 could conceivably come up with its own prediction.

26 THE COURT: I'm a little concerned that Ms. Mbaye

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2 have enough time. If you're going to read from your brief,
3 you don't need to. I've read it and I'll read it again.
4 Just touch the salient point if you could.

5 MS. MERKEL: Sure.

6 I think there's a couple of cases on point that --

7 THE COURT: If they're in your papers I'll look at
8 them.

9 MS. MERKEL: Yes. Historical data is something
10 that the courts have viewed differently than ongoing police
11 investigation and that's what we're calling for now.

12 For the same reasons they cited to the life and
13 safety exemption which is 872(f). This, again, depends on
14 the algorithm being something that could be utilized by the
15 public to effectively predict a crime. So, because we're
16 not asking for the algorithm the same reasoning applies.

17 They've also cited to the technology exemption and
18 I just want to pause on this, because I think that their
19 application of that exemption is a real stretch.

20 The case law makes clear that exemption is designed
21 to protect government and computer programs from things like
22 hacking or attack. We're not looking for anything that
23 would reveal an IP address or information about the security
24 protocol around access to the predictive policing programs.
25 Anything like that that would incidentally be in the papers,
26 they would be welcome to redact those.

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2 It doesn't appear from the case law that this
3 exemption is designed to apply to any material the
4 government has that in some way touches upon technology and
5 that seems to be the way the NYPD is applying it. So we
6 certainly don't think that would be a basis for applying
7 exemption. Once again, as well, with that exemption the
8 NYPD relies upon it a focus on the algorithm, which, again,
9 we withdraw our request for it so the data simply don't
10 raise the same concerns.

11 Moving on to the vender communications that we're
12 focused on. The NYPD has argued that confidential and trade
13 secret information of these vendors is implicated.

14 Now they've made a very conclusory and kind of
15 blanket assessment of whether that applies and redact the
16 vast majority of information reflected in the NYPD's
17 communications.

18 So as an initial matter we don't believe the
19 information being shared -- simply the results of
20 applications of these third-party vendors for predictive
21 policing -- are trade secrets. Trade secrets, I guess, if
22 anything they are algorithms for the NYPD, which I'm certain
23 they did not intend to do. For the vendors there may be
24 competitively implicating information in terms of whether or
25 not their predictive policing technology has been effective,
26 but, again, we don't believe that they had a true

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2 expectation of confidentiality in those results.

3 One major reason we say that is because there were
4 nondisclosure agreements in place governing the exchange of
5 information between the NYPD and the third-party vendors but
6 it only covered NYPD information. There was no
7 countervailing obligation on the part of NYPD to keep that
8 vendor information confidential.

9 We think this is definitely a distinct case from
10 one in which a regulated entity would be required to provide
11 information to a regulator and have an expectation on the
12 confidentiality in it. Rather, this is a entity that is
13 competing for business.

14 We also don't think it's realistic that the NYPD
15 would somehow be competitively harmed itself by revealing
16 this information. They are the largest police department in
17 the country and we would certainly be a very valuable client
18 to any one of these entities.

19 Finally, you know, there's likely to be information
20 in these documents that was redacted that actually reflects
21 the NYPD's expectations, standards and protocols for
22 predictive policing technology. We're interested in seeing
23 that information. If needed, or useful, we think a
24 in-camera review of some of those documents could be useful
25 way to determine what is what.

26 Lastly, your Honor, I just want to touch very

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2 quickly on the issue of attorney's fees.

3 THE COURT: You think you've prevailed?

4 MS. MERKEL: Yes.

5 THE COURT: I'll look at that. I recently looked
6 at that. Thank you.

7 MS. MBAYE: Good morning. Lesley Mbaye, New York
8 City Law Department for New York City Police Department in
9 this case.

10 I'm going to try to keep it brief but I do want to
11 take one step back and give a little context about the
12 Domain Awareness System, about the algorithm, what an
13 algorithm is, how it works, how it's applied, what exists.

14 I think we all came to know the term algorithm when
15 Google became the dominant search engine and it was because
16 its algorithm was so great. It was so good in translating
17 the questions people put in the search engine into the most
18 relevant responses.

19 Domain Awareness System is data collection, is data
20 retention. While it is true that it was originally created
21 to be part of the NYPD's counterterrorism efforts, that an
22 algorithm may be used on some of that data, does not make
23 the algorithm part of NYPD's counterterrorism program.

24 THE COURT: It's not?

25 MS. MBAYE: I did not say that. But as detailed in
26 the Levine affidavit and Levine article, this algorithm in

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2 protective policing model is sent primarily to precincts and
3 cops on the beat to make strategic decisions about how to
4 deploy most effectively their resources. These are the same
5 strategic decisions that police officers have been looking
6 at for hundreds and hundreds of years and the algorithm is
7 simply a new tool that lets them do it, hopefully, a bit
8 more effectively. And that seems to be the case so far.
9 But it's just a tool. It's a highly technical, mathematical
10 tool, and there are different algorithms for different
11 crimes. And they are used on different databases.

12 I just want to sort of lay that out before
13 addressing some of the Brennan Center's particular
14 objections to NYPD's documents production.

15 First they've withdrawn their request for the
16 algorithm and code and have now rewritten their FOIL request
17 to seek historical inputs and outputs from specific period
18 of time. This is not the original FOIL request.

19 THE COURT: I understand that. What about if --

20 MS. MBAYE: So I think NYPD believes that that
21 makes it inappropriate and they're welcome to file a new
22 FOIL request? But moreover, as petitioner recognizes, the
23 algorithm is ever evolving. So if they want to look at data
24 from 2015 and want to know what the outputs were, the
25 algorithm that exists now that would be applied to the 2015
26 data is not the algorithm in existence in 2015.

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So the Levine article, Levine affidavit that NYPD produced goes into a great deal of detail about the databases of information that are used and on which the algorithm is employed to. To ask for general -- if I may just read from that article for a second just to list the. In you've read the article. I know you know. There's a in it would be un --

THE COURT: Well, your point about the 2015 data and algorithm is that it's constantly changing so --

MS. MBAYE: So it would be irrelevant to the Brennan Center's stated purpose to get all data with a new algorithm applied.

THE COURT: Well, isn't that up to them? I mean, if they're seeking so called irrelevant information, is that an exception to FOIL?

MS. MBAYE: That irrelevant information is not an exception to. That is true. However, the burdensome nature of what that request is, which I'm just hearing and thinking about now, would be extraordinarily the number of databases that may have been released, that algorithm may have been wrong and contain enormous amounts of information.

THE COURT: Maybe we can simplify this.

Ms. Merkel, Ms. Mbaye had mentioned that perhaps you should be making a new FOIL request and that with your recent reply request kind of put her at a disadvantage as

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you can see.

MS. MERKEL: I think two things.

Number one, we would absolutely say five and six encompasses this information. So all we've done is narrow the scope of the request. We have not submitted a new request.

Furthermore, the reason it's in our reply papers is because we did not receive a sufficient response from them to our initial request or our appeal. So if it's anyone been disadvantaged it's the Brennan Center. We issued a FOIL request in June of 2016 and we now have to restart that process to get information that is implicated by the original FOIL request seems completely unreasonable.

MS. MBAYE: Petitioners characterized that response to all their FOIL request as flippant. NYPD receives 14,000 FOIL requests every year. In this particular one, once in this court, NYPD, through counsel with petitioner's counsel, engaged in extensive settlement negotiations.

Unfortunately, they fell through and we're here today, but the exemptions that were set forth in response to the original are the exemptions with perhaps one addition that are cited by NYPD now was a thoughtful considered request, considered response, and the mere fact that responsive data, responsive records were found and located only when the case was brought in court is neither, A, a guarantee of having

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2 petitioner be declared substantially prevailing party for
3 purposes of attorney's fees. Nor is it evidence of
4 flippancy on the part of the agency.

5 Petitioner's objections to NYPD invocation of trade
6 secret exemption for the vender adjudication is based on
7 their pure speculation on what they think NYPD must have
8 discussed with these vendors. As set forth in our papers,
9 NYPD contracted with three vendors for a very brief trial of
10 their predictive policing technology. It would certainly
11 impair NYPD's ability to, as set forth in the affidavit of
12 Douglas Williamson.

13 It would impair NYPD's ability to have others bring
14 their products to NYPD for test runs if NYPD then publicized
15 how well or how poorly a vender performed.

16 As for petitioner's speculation of what NYPD must
17 have said, that is not a basis for either overturning the
18 exemption or denying in the invocation of the exemption.
19 That's speculation and nothing more. Petitioner, I suspect,
20 expected to find a lot more when they made their FOIL
21 requests and they are disappointed that the records don't
22 say what they thought that they would. That's not a basis,
23 however, for denying NYPD's invocation of FOIL exemption to
24 protect its technology and its methods.

25 I want to address also petitioner's description of
26 the purpose of the law enforcement exemption for non-routine

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2 investigative or non-routine techniques.

3 This doctrine, this exemption, has been expanded in
4 recent years to apply precisely to new technologies. There
5 are several cases that are cited in our papers, so I won't
6 belabor the Court with them, where the New York State
7 Supreme Court has upheld the NYPD's invocation of that
8 exemption to keep new technologies, to withhold new
9 technologies or data or information about new technologies
10 from disclosure. It is not as narrow as petitioner makes it
11 out to be.

12 There are very recent case law that have clearly
13 expanded it to apply to this kind of technological
14 innovation. That's pages 15, 16 of our papers.

15 Another concern about petitioner's request for
16 historical data is that the assistant commissioner Levine
17 article that was produced to petitioner has now filed
18 publicly with the Court contains one of the algorithms.

19 Now, certainly, there are several algorithms for
20 different crimes and, yes, they use machine learning it's in
21 the public get better and modified over time but it's a
22 starting point. And now it's a public domain and if the
23 data is in the public domain, as well, that creates the sort
24 of dangers that we wrote about in our brief.

25 I also want to just briefly point out that
26 petitioner is still seeking a response to request number

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1
2 eight.

3 If you look at the Hernandez affidavit or
4 affirmation, paragraph ten, it certifies that no responsive
5 documents were found to request number eight. So I believe
6 that petitioner's request for certification of that is moot.

7 To end at petitioner's beginning, the hypothetical
8 of the two women looking into a car. That's behavior that
9 any police officer can potentially find suspicious on any
10 occasion and whether or not they approach that person and
11 make an arrest determined to have had reasonable suspicion
12 for that arrest, that's a judgment for the Court to make,
13 for the Court to make later on and it will be made.

14 Someone's due process rights, if that's what
15 petitioner's concern is really getting at, is not affected
16 by the use of by whether a police officer were to come upon
17 those two women by chance or because a predictive policing
18 algorithm informed them that it was more likely than not
19 that there were car burglaries are going on in that area.

20 The information -- It's like -- The algorithm is
21 just the tool. It doesn't compel the police to take any
22 specific action or take any specific decision. It helps
23 them digest the vast amounts of data that NYPD has and tries
24 to help them make better decisions to better police.

25 THE COURT: Let me ask you something. Let's say
26 there's a Mapp Hearing and it's discovered or the criminal

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1
2 defense lawyer knows that algorithm was used, would that be
3 discoverable in criminal case?

4 MS. MBAYE: Not knowing the laws of criminal cases,
5 so I want this to be a purely hypothetical answer, but if
6 there were trial and defense attorney asked the arresting
7 officer, How did you know to be there -- What made you be
8 there, I believe that's perfectly fine answer to give. NYPD
9 developed Comp Stat.

10 THE COURT: In other words, it's no different than
11 anonymous informants saying, Hey, there are going to be
12 people around this area or even a -- It's hearsay which they
13 are committed to rely on I believe.

14 MS. MBAYE: I don't know if it's hearsay. It's
15 like, for example, when there's a big parade. NYPD knows
16 from the past that big parades often lead to certain
17 conduct, rowdy, drunk, assaultive, who knows, right? So
18 they deploy more officers. The algorithm of predictive
19 policing is that same principle in use of historic knowledge
20 of where crimes tend to be taking place, to predict where
21 they might be likely to take place. It's an electronic
22 brain that can digest more information than the human brain
23 can.

24 THE COURT: Listen, I think we have to stop. I
25 believe I read everything very carefully. It's your
26 application, Ms. Merkel, so I'm going to ask you to please

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file a hard copy of the transcript of this oral argument on
or before September 13th. That's when the case will be
submitted.

* * * *

Certified to be a true and accurate transcript of
the stenographic minutes taken within.

William D. Leone
Senior Court Reporter

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