

2 SUPREME COURT OF THE STATE OF NEW YORK
3 COUNTY OF NEW YORK : CIVIL TERM: PART 17

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4 NEW YORK CIVIL LIBERTIES UNION,

5 Plaintiff,

6 - against -

7 N.Y.P.D.,

8 Defendant.

9 ----- X

10 Index No. 100788/2016 *Hearing*

11 April 11, 2018
12 60 Centre Street
New York, New York 10007

13 B E F O R E: HON. SHLOMO S. HAGLER, Justice

14

15 A P P E A R A N C E S:

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A F T E R N O O N S E S S I O N

THE COURT: Good afternoon. Welcome back again.

This matter was previously on March 8, 2017. At that time this Court had extensive discussions regarding the law. I had encouraged the parties to try to work out a compromise. Unfortunately that did not occur. There are two lingering issues remaining: whether or not the Respondent can redact the names of the, as we say, "Stingray" equipment and the price thereof.

This Court, as was noted in the informal discussions in my robing room, had a hearing in this matter which occurred on December 19, 2017. At that time the Respondent called one witness, Detective Michael Werner. There was direct testimony, cross-examination and redirect and then at the end the Court chimed in and asked a long series of questions -- I had forgotten how long it was -- and for all intents and purposes the detective could not answer the questions because he believed it may divulge confidential information.

In order to resolve the quandary that we were in, the parties and the Court came up with a mechanism whereby the Respondent submits an affidavit from an appropriate individual that could answer my lingering questions. That propounded the problem. How do you submit an affidavit that reveals confidential information? The only way to do

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2 so, as I had seen, was the method which was employed in a
3 previous case that I was involved in and that was the
4 application by *Susan Crawford v. The New York City*
5 *Department of Information, Technology and*
6 *Telecommunications* under Index number 104275 of 2012. In
7 that case the Respondent New York City DoITT -- and I'll
8 just for short say "The City of New York" to make it
9 simple -- made a motion to seal the affidavit of a
10 counterintelligence officer from the NYPD that informed the
11 Court of the dangers that would be inherent in revealing
12 the conduits in the City of New York.

13 This Court, by Decision and Order dated March 20,
14 2014, granted the City's motion to seal that portion of the
15 affidavit of that officer. There was an appeal and the
16 Appellate Division affirmed the sealing of that
17 confidential information. I don't have at this time the
18 citation, but you can find it on your own. It's available
19 and it's been cited in other FOIL cases.

20 So that happened here as well. The Respondent
21 has moved under Sequence No. 002 to seal the unredacted
22 affidavit of Inspector Gregory Antonsen, A-N-T-O-N-S-E-N,
23 that is sworn to on March 7, 2018. As I mentioned, we had
24 an off-the-record discussion in my robing room. I
25 discussed the petitioner's position vis-a-vis respondent's
26 motion to seal said affidavit and I'll allow Petitioner to

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2 state it as well be. What I observed was that petitioner's
3 counsel is essentially consenting to the relief, except
4 that if this Court were to reveal the names of the StingRay
5 devices and the prices, that information in the affidavit
6 should be correspondingly unredacted and be given to
7 Petitioner to review. Obviously, if I do not reveal the
8 information, then it would stay redacted. But I'll allow
9 petitioner's counsel to express whatever opinion he has
10 with regard to simply the Sequence No. 002 sealing motion.

11 MR. HODGSON: Yes, your Honor. Thank you.

12 And as you stated, I think I'll state more
13 generally it is the petitioner's position that for the
14 purpose of this Court considering the merits of the FOIL
15 dispute here, we do not oppose the NYPD filing this sealed
16 unredacted affidavit with the Court, having filed a
17 redacted version of that same document as well and having
18 disclosed that to us.

19 However, as you stated, your Honor, whatever
20 ruling on the merits results from this case, we ask that
21 your Honor unredact the affidavit in line with that ruling
22 to reveal whatever information would no longer be subject
23 to dispute or would no longer be deemed subject to
24 redaction.

25 THE COURT: Counsel for Respondent, you want to
26 add anything?

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2 MR. GIOVANATII: No, your Honor.

3 THE COURT: I believe the sum and substance is
4 exactly what was said in our informal discussion.
5 Therefore, this Court will grant the Respondent's motion to
6 seal the affidavit of Inspector Gregory Antonsen. In order
7 to protect against disclosure of confidential and sensitive
8 information, this Court holds that Respondent has met its
9 burden in demonstrating good cause to seal said affidavit
10 pursuant to 22 NYCRR § 216.1.

11 Accordingly, it is Ordered and Adjudged that
12 Respondent's motion for an Order directing that the
13 affidavit of Inspector Gregory Antonsen be filed under seal
14 pursuant to 22 NYCRR § 216.1 is granted. The clerk of the
15 court is directed to seal the affidavit of Inspector
16 Gregory Antonsen unless access is permitted by further
17 written Order of this Court.

18 Let's move onto the merits of the petition. As I
19 stated off the record, this Court has reviewed both the
20 redacted version of Inspector Antonsen's affidavit, as well
21 as the unredacted affidavit. Simply stated, paragraphs 1
22 through 5 are the same or similar to the unredacted
23 version. Paragraph 6, to the very end, except for the
24 questions that I posed in open Court, are all unredacted.

25 As I stated off the record, it is a very
26 difficult position for both Petitioner's counsel and this

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2 Court to make decisions based upon confidential information
3 that I just sealed moments ago. But, nonetheless, due
4 process requires that Petitioner's counsel have an
5 opportunity to at least have a record and be heard as to
6 the consequences of this eventuality.

7 So, counsel, you can be heard.

8 MR. HODGSON: Thank you, your Honor.

9 So, first of all, I just want to make sure to
10 reassert, because it has been some time, as your Honor
11 pointed out, since we first argued the merits of this case,
12 and since our briefing was completed, I want to reassert
13 the baseline argument that appears in our opening
14 memorandum and in our reply memorandum, and which remains
15 undisturbed, which is that the records that are sought
16 here, these model names and prices for cell-site simulator
17 or StingRay devices are the types of record that have been
18 disclosed by agencies across the country regularly in
19 response to similar requests or proactively by themselves.

20 These are local police departments, federal
21 agencies, state departments in New York. These include, as
22 was established at the hearing and has been established on
23 the record in this case, these include agencies that are
24 active in New York City. These include the New York State
25 police. These include several federal agencies that have
26 devices that have been named that act in New York City.

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2 So I am pointing out that these are not the types
3 of records that are, as the NYPD has characterized them,
4 you know, normally kept secret or deserving of such secrecy
5 that other agencies haven't found it completely appropriate
6 to turn these over in response to similar requests.

7 In addition, the fact that other agencies are
8 regularly acting in New York and using these devices
9 completely undercuts the NYPD's argument that somehow
10 someone seeking to evade detection or some criminal who
11 wanted to know what the capabilities that they were facing
12 in terms of cell phone surveillance might be. These
13 criminals would not know based on a revelation of the
14 NYPD's specific model names what they were facing because
15 there is always the possibility that other agencies are out
16 there surveilling them with these very same devices, state
17 agencies, federal agencies, that the NYPD is somehow
18 borrowing a device from an agency.

19 Again, the specific scenarios, what they're
20 charged with doing here in order to meet a very high burden
21 of an exemption under the FOIL law is to explain how the
22 revelation of this information would specifically and
23 realistically cause someone to evade detection.

24 I'll also point out that StingRays themselves are
25 not the supersecret counterterrorism tools that the NYPD is
26 making them out to be. The records they did turn over to

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2 us reveal that they have been used over a thousand times,
3 that these are used not exclusively in anti-terrorism
4 activities. These are used in routine investigations,
5 routine police procedures. They talk in Detective
6 Antonsen's or Inspector Antonsen's affidavit, his first
7 affidavit, of using them to track a missing person, a lost
8 elderly woman, by her cell phone, using them in a number of
9 routine scenarios that have nothing to do with
10 counterterrorism.

11 These are the types of devices, as we point out
12 in our briefing, the specifics of which are regularly
13 revealed in response to FOIL requests and in the everyday
14 public disclosure of the types of technologies that the
15 NYPD and other departments have. This is, as our expert,
16 Christopher Soghoian expressed in his affidavit, explaining
17 why it would not endanger anyone and why it would not
18 reveal any non-routine investigative techniques to reveal
19 the names of these things.

20 This is akin to revealing that the NYPD has
21 a certain type of -- NYPD officers have a certain type of
22 cell phone or have a certain type of gun, a certain type of
23 car. Yes, to some extent, it is revealing the capabilities
24 of the NYPD to know that they have and SUV versus that they
25 have a sedan, or that they have a particular type of rifle
26 as opposed to a handgun. And, yes, people could, in some

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2 general sense, use that to have a better sense of what
3 they're up against. This is not the type of information
4 that creates a specific scenario where a person would be
5 evading detection.

6 Regarding the hearing that happened in December,
7 what was established on the record by their expert was that
8 they only raised two scenarios. I looked through this
9 transcript again. They raised two scenarios where they
10 were originally arguing that by revealing the model names
11 here while maintaining the redactions on software upgrades,
12 a particular criminal could somehow use that information to
13 evade detection.

14 The first was that the person, by knowing which
15 models they have and knowing that certain models cover
16 certain carriers, certain phone carriers, AT&T, Verizon,
17 et cetera, that they could use that information to choose a
18 carrier that's not covered. It was established very
19 clearly, asked and answered that that is not the case. It
20 was admitted by their witness that -- I asked the
21 question --

22 THE COURT: What page?

23 MR. HODGSON: This is on page 22, lines 9 through
24 13 of the transcript from December. I said: "So to
25 address the issue that was raised in the affidavit of
26 Inspector Antonsen" -- so that's referring to the first

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2 affidavit of Inspector Antonsen filed in 2016, in which he,
3 Inspector Antonsen, had suggested that revealing the model
4 names would somehow implicate which carriers are
5 detectable, I asked the question of Detective Werner:

6 "Question: Revealing the model names here
7 would not in any way implicate which carriers,
8 which service providers are detectable by the
9 NYPD; correct?

10 "Answer: That is correct."

11 So that specific scenario has been dealt with.
12 This is not going to reveal which carriers are covered.

13 The second scenario that they raised was that
14 certain versions of StingRay technology, certain upgrades
15 could detect specific protocols of cell phones. We're
16 talking about 3G, 4G, LTE, et cetera, and that by revealing
17 the model names a particular criminal could know, for
18 example, that the NYPD either does or doesn't have the
19 capability of detecting their 4G phone.

20 However, through the course of this testimony,
21 the witness repeatedly confirmed that because upgrades are
22 available -- again, these are upgrades that would be
23 redacted in the purchase agreements, the documents that are
24 at issue here -- because upgrades are available to turn
25 essentially any device, be it a KingFish, a StingRay I, a
26 StingRay II, et cetera, into a Hailstorm device that,

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2 because of that fact, revealing the model name of the
3 actual model that was purchased would not reveal which
4 protocol ultimately -- which protocols the NYPD is capable
5 of detecting and would not give that criminal who was
6 seeking to evade detection any sense of security that they
7 were, in fact, using a protocol that is not detectable by
8 the NYPD.

9 Obviously, Inspector Antonsen's second affidavit,
10 the redacted version of which I have reviewed and, as your
11 Honor pointed out, which includes several redacted
12 paragraphs that I have not seen, obviously he's answering
13 specific questions that your Honor posed about whether
14 there is any technology beyond a Hailstorm. I want to
15 point out that whether or not there is technology beyond a
16 Hailstorm, the answers to the question that Detective
17 Werner, you know, answered remain the same. Revealing that
18 the NYPD has a KingFish, has a StingRay, has a StingRay II
19 or has a Hailstorm is not going to let a criminal know
20 which protocols it can use, or he or she can use, to avoid
21 detection.

22 To the extent that this affidavit, you know,
23 suggests there is additional technology beyond a Hailstorm
24 and, therefore, revealing a model name that goes beyond a
25 Hailstorm would somehow reveal additional capabilities, I
26 would submit, number one, does this affidavit answer the

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2 question that -- our previous question and answer with
3 Detective Werner answered of is there an update to any of
4 these other technologies that would upgrade their devices
5 to whatever is beyond a Hailstorm? If it doesn't answer
6 that, I would suggest that there needs to be more factual
7 inquiry into that very question, because if that is the
8 case, then the answer comes out the same. Revealing the
9 model names would not, in fact, reveal that they have not
10 upgraded it to something that can capture any protocol.

11 Beyond that, I will point out that if this
12 reveals there is nothing beyond a Hailstorm, this doesn't
13 change the facts, this doesn't change the answers that
14 they've given. I think it's important to note that they
15 have to articulate a particular scenario where someone will
16 evade detection based on this information, the specific
17 model name being out there. If the revelation of model
18 names reveals that the NYPD is completely up to date or
19 somehow has all of the technology that's out there, that is
20 not giving anyone the information that would allow them to
21 evade detection. That is just letting them know that the
22 NYPD has all the technology out there.

23 If the information reveals that the NYPD somehow
24 has something less than everything available, again, it
25 does not let a criminal know that they are not otherwise
26 going to be detected among the myriad ways they can be

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2 detected for using their cell phone, either by a separate
3 agency, a separate department --

4 THE COURT: Counsel, you actually beg the
5 question: If a bad actor is not involved in an activity
6 that doesn't give rise to the authority or the jurisdiction
7 of a federal agency, let's say a kidnapping, for instance,
8 why would the bad actor believe, for instance, the FBI is
9 surveilling them? Why would I give that information to
10 that bad actor so the bad actor can evade detection?

11 MR. HODGSON: Well, I think there are couple of
12 answers to that. Number one, as was established in the
13 record of various exhibits that we submitted, along with
14 our reply, it is common practice for federal agencies to
15 either loan their devices or otherwise allow other agencies
16 to use their devices.

17 THE COURT: The testimony of the witness,
18 Detective Werner, was the opposite of what you said. They
19 don't loan their StingRay devices. Sometimes they do work
20 in coordination with the various federal and other
21 agencies. So that is a misnomer. That is not what the
22 factual evidence has been presented to this Court.

23 MR. HODGSON: Right. So they work in
24 coordination --

25 THE COURT: And not always. You're assuming they
26 always work together.

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2 MR. HODGSON: This rises to the level of a very
3 speculative situation where a criminal is not going to know
4 the specifics of what jurisdiction they might fall under or
5 what they might be -- who might be surveilling them or who
6 might be tracking them for various reasons. This isn't the
7 level of specificity that a person acting -- even a person
8 with a lot of sophistication --

9 THE COURT: But that was your scenario. You're
10 saying that it doesn't really matter because the bad actor
11 would then understand that he should be aware because there
12 are other agencies coordinating with NYPD. I'm saying the
13 opposite. I'm saying why would you make that assumption,
14 in the very first instance?

15 MR. HODGSON: Okay. So even if -- again, I'll
16 stress that there are multiple alternate arguments here.
17 Number one, of course, is that this is not the type -- this
18 is still at the level of generality and speculation that
19 does not rise to the level of an exemption here.

20 THE COURT: Have you read the last pronouncement
21 by the Court of Appeals on this issue?

22 MR. HODGSON: I have, your Honor. I think, you
23 know, if you want to --

24 THE COURT: The *Rashid* case.

25 MR. HODGSON: Sure. *Abdur-Rashid*, to be clear,
26 was a case about the question of whether or not the NYPD

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2 could issue a Glomar response and neither confirm or deny
3 the existence of --

4 THE COURT: It was more than -- that was the
5 specific issue, but they went through the law, and in the
6 prior cases of *Leshner* and other cases where they talk about
7 what is speculation, what is not speculation. Quite
8 frankly, you're basically reiterating dissent. The
9 majority went the opposite of what you just said.

10 MR. HODGSON: Well, to be fair, again, the
11 majority was talking about what justifies a "neither
12 confirm or deny" response, not what justifies a response
13 like we have here.

14 THE COURT: I agree that it is not the same
15 particular issue, but it goes to what is considered
16 speculation, what is sufficient for the burden to be met.
17 That was discussed by the majority and it was actually,
18 quite adamantly, opposed by the dissent. I think it was
19 Judge Stein.

20 MR. HODGSON: So, obviously, *Abdur-Rashid* also
21 talked about a great deal about the extent to which
22 publicly revealing information or information that has been
23 revealed publicly would certainly undercut any claim that
24 something is subject to a FOIL exemption.

25 THE COURT: Is there public information that says
26 that NYPD has any of these StingRay devices?

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2 MR. HODGSON: Your Honor, obviously that's at
3 issue in this case. What we're talking about is --

4 THE COURT: That's not my question. Just because
5 there is information out there on the Internet and you have
6 FOIL and others have FOILED this information, as far as I
7 know, you have not put out any public information that says
8 whether or not the NYPD maintains any one of the StingRay
9 technology.

10 MR. HODGSON: Well, certainly the documents that
11 they've disclosed are in response to a request to whether
12 they have StingRay technology and they have disclosed
13 purchase orders that reflect all the money they've spent on
14 StingRay technology. So, yes, they have acknowledged that
15 they have StingRay technology.

16 THE COURT: That's not my question. Which ones
17 they have.

18 MR. HODGSON: No. Your Honor, the point I was be
19 making is that other departments, other agencies are
20 regularly revealing this information. The fact that
21 departments have, for example, a Hailstorm or have
22 purchased a StingRay II or have purchased a device that
23 would allow or fly over, you know, cell-site surveillance
24 from the Department of Homeland Security, this is the type
25 of public information that strongly undercuts the NYPD's
26 claim that they have some sort of special exemption. This

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1 information is regularly revealed; it is not supersecret.

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3 And that, you know, again, to get back to
4 *Abdur-Rashid*, that was something that the Court of appeals
5 found to be indicative of a FOIL exemption not being
6 warranted when there was public information out there about
7 a particular thing or about the existence of a particular
8 item.

9 I think I also just want to point out the fact
10 that Inspector Antonsen obviously filed an affidavit over a
11 year ago now in this case where he ostensibly was
12 addressing all the concerns the NYPD wanted to raise about
13 revealing model names and numbers. I will point out again
14 that the only example of a potential harm that he discussed
15 specifically about revealing model names was the idea that
16 people would know which phone carriers are not detected by
17 that particular model. That's something, as we
18 established, that Detective Werner then disclaimed.

19 The fact that Inspector Antonsen has now filed a
20 new affidavit revealing previously unalluded-to
21 information, only after Detective Werner essentially
22 conceded that the two arguments they had previously put
23 forth did not hold up under scrutiny, I think that calls
24 into question whether or not this is, in fact, something
25 that they either should have brought up before or why they
26 are bringing it up now.

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2 Obviously, I'm at a disadvantage not knowing what
3 they're saying, but I would point out just, again, the fact
4 that other departments, other departments regularly reveal
5 this and they have not articulated -- and, again, I don't
6 know whether they do in this affidavit, but I would ask
7 that the Court look very closely to see if they have
8 actually articulated a specific scenario where this
9 specific information would lead a person to be able to
10 evade detection in a real way, as opposed to the various
11 ways that they threw out in Detective Werner's testimony,
12 that then, upon further consideration, upon further
13 questioning, revealed to be flawed and, in fact, revealed
14 not to reveal any dangerous information to a particular
15 criminal.

16 THE COURT: Thank you.

17 Counsel in opposition.

18 MR. GIOVANATII: Your Honor, just a couple of
19 very brief points. What this comes back to is would
20 releasing the names of the StingRay model names themselves
21 disclose the capabilities of NYPD's StingRay capabilities
22 and Detective Warner testified at length about how
23 different model names have different protocols associated
24 with them and if you know the particular type of model
25 name, then you, therefore, also will know the type of
26 protocol that would be able to -- would be able to monitor

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2 any phone that is on those particular protocols.

3 There's a variety of arguments the Petitioner
4 just made. I think the Court addressed the fact that other
5 agencies in the city have StingRay devices. These are
6 federal agencies, as Detective Warner testified to. These
7 agencies have different jobs, different scopes. While they
8 may work in collaboration on certain things, there's no
9 evidence submitted by the Petitioner that the other
10 agencies are going to swoop in and help the NYPD if one of
11 their StingRays is unable to find a particular individual,
12 regardless of what the crime may be.

13 And, your Honor, it's a little hard for me to
14 make an argument based on things that are in the redacted
15 affidavit. So I'll just refer your Honor to the statements
16 that are in that affidavit.

17 MR. HODGSON: Your Honor, I apologize. Can I
18 make one additional point?

19 THE COURT: Yes.

20 MR. HODGSON: So I did also want to point out and
21 this is something that we raised in our reply brief, but I
22 want to reiterate it because I do think it is relevant,
23 particularly in light of various rulings that have come
24 down. This is also the type of information that will be or
25 should be revealed in the context of criminal cases. There
26 have been cases when a defendant seeks to find out more

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2 about the NYPD's acquisition of information, acquisition of
3 evidence regarding them. They have challenged whether a
4 warrant is sufficient or was sufficiently explained to a
5 judge to obtain that information through the use of
6 cell-site simulator technology.

7 I think we point to a Court of Appeals case in
8 Maryland where the Court very clearly said that the
9 specific capabilities of those devices -- it was a
10 Hailstorm in that case -- were relevant to the question of
11 whether a warrant was justified and, therefore, had to be
12 revealed to defense counsel and had to be revealed to the
13 court.

14 To the extent that this is the type of
15 information that can and should and must, in fact, be
16 revealed to defense counsel in the context of a routine
17 criminal prosecution, again I point out that this
18 information is going to come out, it needs to come out,
19 it's going to come out in the context of criminal cases and
20 it should also -- this is another reason why it isn't the
21 type of information that can be kept secret pursuant to a
22 FOIL exemption here.

23 We pointed in our briefing to the Court of
24 Appeals case in Maryland and we also pointed to the Legal
25 Aid case, of course, out of Brooklyn, where similarly a
26 request -- a pen register request was deemed to be

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2 insufficient and more details were required for a judge to
3 determine whether cell-site simulator technology was
4 justified in obtaining evidence against a defendant.

5 I think the fact that this is the type of
6 information that's relevant to that inquiry, specific
7 capabilities of this technology, and the fact that these
8 names and model numbers have come up in the context of
9 criminal cases is, again, very relevant to this question of
10 what type of information is this. Is it the type of
11 information that is generally available to the public? So
12 I'll reiterate that it is. It's going to come up in this
13 criminal context as well and I know that we haven't brought
14 it up since our reply, so I wanted to reiterate that here.

15 THE COURT: Just for the record, can Respondent
16 just state what the exemptions are that you're going under
17 again, just to make the record clear?

18 MR. GIOVANATII: So there's two exemptions that
19 we're claiming in this case, your Honor. The first is
20 colloquially the technology exemption § 87(2)(i). And then
21 the second exemption is the law enforcement
22 exemption § 87(2)(e). The analysis when it comes to
23 technology like this is essentially the same under both of
24 those provisions.

25 THE COURT: Okay. Thank you.

26 I'd like to thank the parties for the arguments,

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2 the papers that were put in in support and in opposition to
3 the FOIL request. I had set forth the standard in the
4 *Crawford* case. I'm just going to read it so that we have a
5 full record that we understand what the standard is. So
6 pardon the reading and then I'll get to the meat of this
7 case a little later.

8 The clear purpose of FOIL was to make our state
9 government more transparent and open to broad public
10 disclosure of information unless otherwise specifically
11 exempted by POL § 87 (*Matter of Data Tree, LLC v. Romaine*,
12 9 NY3d 454 [2007]). These exemptions are to be narrowly
13 construed to provide maximum access to public disclosure of
14 information (*Matter of Capital Newspapers Division of*
15 *Hearst Corporation v. Burns*, 67 NY2d 562, 566. This is a
16 Court of Appeals case from 1986. The Legislature also
17 recognized a "legitimate need on the part of government to
18 keep some matters confidential" (*Matter of Fink v.*
19 *Lefkowitz*, 47 NY2d 567, 571. This is a 1979 Court of
20 Appeals case. In order to deny disclosure under FOIL, the
21 governmental agency must show that the requested
22 information "falls squarely within a FOIL exemption by
23 articulating a particularized and specific justification
24 for denying access" (*Matter of Capital Newspapers Division*
25 *of Hearst Corporation v. Burns*, 67 NY2d at 566). Thus, the
26 burden of proof rests on the agency to justify the denial

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2 of access to the requested information (*Matter of Data*
3 *Tree, LLC v. Romaine*, 9 NY3d 463).

4 As you just heard, Respondent's counsel have
5 articulated two exemptions, the IT exemption and law
6 enforcement exemptions. The Respondents bear the burden of
7 articulating the particularized need for those exemptions.
8 As this Court reiterated earlier, the Court of Appeals came
9 out with a case just a few days ago, March 29, 2018, *Matter*
10 *of Abdur-Rashid v. New York City Police Department*. The
11 unofficial citation is 2018 NY Slip Op 02206.

12 In this latest pronouncement, the Court of
13 Appeals went through the standard, essentially cited the
14 cases I did, in determining the standard that the courts
15 must employ in resolving these cases. The Court of Appeals
16 stated with regard to law enforcement exemption the
17 following: "For example, the law enforcement exemption and
18 the public safety exemption, which the NYPD relied on here,
19 protect records that, if disclosed, would interfere with
20 law enforcement investigations or judicial proceedings,
21 reveal nonroutine criminal investigative techniques or
22 endanger the life or safety of any person (Public Officers
23 Law § 87[2][e][i] and [e][iv][f]. When interpreting these
24 provisions, we have emphasized that 'the purpose of FOIL is
25 not to enable persons to use agency records to frustrate
26 pending or threatened investigations nor to use that

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2 information to construct a defense to impede prosecution.'
3 FOIL was not designed to assist wrongdoers in evading
4 detection or, put another way, 'to furnish the safecracker
5 with the combination to the safe' (*Fink*, 47 NY2d at 573)."

6 The Court of Appeals went on to state, "As this
7 Court has acknowledged, disclosure of information acquired
8 by the police during a criminal investigation 'could
9 potentially endanger the safety of witnesses, invade
10 personal rights and expose confidential information of
11 nonroutine police procedures'" (*Matter of Gould v. New York*
12 *City Police Department*, 89 NY2d 267 [1996]).

13 The Court of Appeals went on to discuss how a
14 respondent agency can meet its burden. The Court of
15 Appeals stated: "Petitioners' request for information
16 concerning a recent or ongoing investigation by a law
17 enforcement agency implicate the core concerns underlying
18 the law enforcement and public safety exemptions (*Matter of*
19 *Leshner v. Hynes*, 19 NY3d 57 [2012] Court of Appeals). The
20 agency could meet its obligation to provide a factual basis
21 for the exemptions by identifying the generic kind of
22 records for which the exemption was claimed and the generic
23 risks posed by disclosure of those type of records."

24 I'm going to skip the next line. "Without
25 revealing any specific information about these
26 petitioners" -- I'm putting in the officer's name in that

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2 case was Galati -- "the affidavit explained in extensive
3 detail how disclosing information sought - i.e., who has
4 been the subject of investigation or surveillance - would
5 imperil its ongoing counterterrorism efforts to protect New
6 York City."

7 Let's move on. That is the standard. I spent a
8 lot of time on the standard because it's important. Now
9 let's move on to what really occurred here. We are
10 focusing on a narrow scope of documents. I want to thank
11 both sets of counsel to limiting the scope of our inquiry.
12 We're now only discussing documents responsive to the names
13 of the StingRay devices and the prices thereof. There is
14 no other document in dispute. So, therefore, this Court
15 will not opine on any other request as that has been
16 resolved amicably by counsel.

17 Let's talk about what was testified in the
18 hearing in December of 2017 by Detective Michael Werner.
19 I'll refer to him as "Detective" or "Detective Werner."

20 On page 9, line 25, I'll allow you to look at it
21 as I read it:

22 "Question: If NYPD was to disclose the
23 names of the StingRay devices that it owned,
24 would that impact NYPD's ability to use StingRay
25 technology?" We're now on page 10, line 3.

26 "Answer: Yes.

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"Question: In what way?

"Answer: It would be detrimental.

Information out there is available of what the capabilities and limitations of this equipment are and I feel that if this information was released, that criminal actors would utilize that information to avoid detection."

Page 31, line 12.

Detective Werner testified: "Where the limitations lie with our equipment being that there is certain protocols now, that there may be a gap. Criminals know what the latest generation of the equipment is and we upgraded from the previous. It would then be aware of what a department like the FBI does in fact."

Thereafter, I had asked a series of questions to Detective Werner that he could not answer on the record. As I stated earlier, I received an affidavit, which we mentioned earlier in the record, that essentially reiterates what Detective Werner said on the record, that revealing the technology names would assist bad actors in evading detection from the New York City Police Department.

The latest pronouncement from the Court of Appeals, the *Abdur-Rashid* case, essentially states that the Respondent has the burden and Respondent can meet that

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2 burden with an affidavit setting forth the reason for the
3 exemption. Here, it's crystal clear that if this Court
4 were to disclose the names of the StingRay devices, that
5 would provide the bad actors with the capabilities of the
6 NYPD's technology. They can then use that to evade
7 detection. There's really nothing else that would
8 controvert that. There was no testimony submitted in
9 opposition. There was an affidavit. This Court credited
10 the testimony of Detective Werner, in contrast to no expert
11 whatsoever, except for a lifeless affidavit that cannot be
12 cross-examined, the new affidavit setting forth my answers,
13 more specifically, answers to questions why the bad actors
14 would be able to evade detection. Unfortunately I can't go
15 into greater detail.

16 The case law is clear, as I set forth in my
17 *Crawford* decision. "It is bad law and bad policy to
18 second-guess the predictive judgments made by the
19 government's intelligence agencies" (*American Civil*
20 *Liberties Union v. Department of Justice*, 681 F3d 61, 70-71
21 [2d Cir 2012], citing to *Wilner v. NSA*, 592 F3d 60, 76 [2d
22 Cir 2009]). Therefore, this Court will defer to Detective
23 Werner, as well as to Inspector Gregory Antonsen's
24 expertise, that disclosure of the names of the StingRay
25 devices, as well as the prices, would pose a substantial
26 threat and would reveal the nonroutine information to bad

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actors that would use it to evade detection.

Therefore, it is Ordered and Adjudged that this Court denies the petition for the reasons stated on the record. This proceeding is therefore dismissed.

Thank you. You may order the record.

(Proceedings concluded.)

* * *

C E R T I F I C A T E

I, Debra Lynn Salzman, an Official Court Reporter of the State of New York, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes.

Debra Lynn Salzman, RMR
Official Court Reporter