

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

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In the Matter of,	:	
	:	
NEW YORK CIVIL LIBERTIES UNION,	:	Index No. _____
	:	
Petitioner,	:	
	:	
-against-	:	
	:	
NEW YORK CITY POLICE DEPARTMENT,	:	
	:	
Respondent,	:	
	:	
For a Judgment Pursuant to Article 78	:	
of the Civil Practice Law and Rules.	:	
-----X		

**MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION**

NEW YORK CIVIL LIBERTIES UNION  
FOUNDATION, by

Stefanie D. Coyle  
Christopher Dunn  
New York Civil Liberties Union Foundation  
125 Broad Street, 19<sup>th</sup> Floor  
New York, New York 10004  
Telephone: (212) 607-3300  
Facsimile: (212) 607-3329  
scoyle@nyclu.org

*Counsel for Petitioner*

Dated: August 26, 2020  
New York, N.Y.

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## PRELIMINARY STATEMENT

This Article 78 proceeding seeks to vindicate the public’s rights to know basic facts about the New York City Police Department’s (“NYPD”) presence in New York City public schools. At a time when the entire nation is grappling with the impact of police practices on communities of color, it is more important than ever for families to understand how the NYPD intersects with and deploys Department of Education (“DOE”) resources, and the potential adverse impact police officers have on students’ education and wellbeing.

The NYPD’s School Safety Division has more than 5,200 sworn officers, making it one of the largest police forces in the country. These officers (or “agents” as they are sometimes referred to) are deployed to every school building in the city, although little is known about their distribution or concentrations in certain schools and neighborhoods, or the justification for those decisions. Among other things, these officers operate the NYPD’s metal-detector program in which students in certain middle and high schools are subjected to either daily or random metal-detector scanning (and every middle and high school is subject to periodic “unannounced” scanning).

Since 2005, the NYPD has been required, pursuant to the New York City Administrative Code, to produce information regarding the deployment of school safety agents and police officers across DOE schools. Since 2016, the NYPD has similarly been required to produce data about its metal-detector program—including the location of magnetometers (permanent and roving), requests by principals to remove a magnetometer, and items confiscated through scanning. Both sets of information are of intense public interest, as reflected by the New York City Council’s (“City Council”) decision to pass this legislation and its many oversight hearings on the topic of

school safety policies and protocols since the NYPD took control in 1998. Yet the NYPD does not fully comply with either reporting mandate.

On January 3, 2020, the New York Civil Liberties Union (“NYCLU”) submitted a request under the Freedom of Information Law (“FOIL”) to the NYPD. The NYCLU sought to obtain records about officer deployment and magnetometer use that contain the same data required to be reported by the Administrative Code. After the NYCLU’s first appeal, the NYPD produced two charts that were incomplete and unresponsive. Then, after the NYCLU diligently appealed a second time, the NYPD referred us to public data already posted on its website. It then inappropriately denied the NYCLU’s request for access to the remaining records, invoking an exception that is not recognized under FOIL and an exemption for purported “public safety.” The NYPD claimed, unbelievably, that public knowledge of the distribution of school safety agents and magnetometers across New York City’s public schools would “endanger the life or safety of a person.”

This response is not based on a legitimate interpretation of the law, but rather on the NYPD’s desire to shield this information from public scrutiny. Time after time, the NYPD has resisted sharing information with the public. Invariably, the data it withholds demonstrates deeply troubling racial inequities and sometimes outright discrimination.<sup>1</sup> The records the NYCLU requested would help to shine a critical light on the racially disproportionate impact that the deployment of metal detectors and school safety agents have on students of color. The data would help educators, parents, advocates, and legislators engage with and intelligently review and revise school safety policies to have a more equitable and less discriminatory impact. It would provide

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<sup>1</sup> See, e.g., NYCLU, Student Safety Act Data, <https://www.nyclu.org/en/student-safety-act-data>; NYCLU, The Student Safety Act, <https://www.nyclu.org/en/student-safety-act#:~:text=The%20Student%20Safety%20Act%20mandates%20quarterly%20reporting%20by,penal%20code%2C%20patrol%20borough%2C%20gender%2C%20race%20and%20age.>



families with important information about the schools their children attend and taxpayers with insight into how New York City is spending substantial public funds.

Based on the information that is publicly accessible, the NYPD and DOE's purported need for metal detectors and school safety agents to combat crime is not borne out. For example, schools at the Bayard Rustin Educational Campus, a campus in Chelsea that serves predominantly students of color and that is home to multiple schools for over-age and under-credited students, have been repeatedly subjected to unannounced metal-detector screening. Principals and students on the campus were informed that the metal detectors were necessary because of reports of crime in the neighborhood. However, the NYC Lab School for Collaborative Studies, a school with a predominantly white and high-achieving student body, located not only in the same neighborhood but directly across the street, has not had repeated metal-detector scanning. The NYPD's explanation does not appear credible and the real story remains obscured because of the NYPD's noncompliance with multiple provisions of the New York City Administrative Code.

New York City is experiencing a historic convergence of social-justice issues and school safety policy is at the intersection. First, New Yorkers are crying out for an end to police abuses in communities of color, and public data and anecdotal reports show that Black and Latinx students are far more likely to bear the brunt of in-school arrests, handcuffs, and use of force by the police. Second, a pandemic has made in-person education fraught and complicated, and New Yorkers are uncertain how school safety fits into that puzzle. Third, the City's economy and its education budget are on the brink of disaster, while hundreds of millions of dollars flow to the NYPD each year. In the recently adopted municipal budget, school safety was the centerpiece of the Mayor's promise to "defund" the NYPD, as he has pledged to return those funds to the DOE by the

beginning of the 2021 school year. All of these things are happening without a full public accounting of the NYPD's school safety practices.

Given this, and after the NYPD's repeated refusal to disclose all of this crucial information about the deployment of school safety agents and metal detectors, the NYCLU now seeks judicial relief to compel the NYPD to produce records responsive to its request. The NYCLU also seeks an award of attorneys' fees and costs in light of the NYPD's failure to adhere to FOIL's requirements.

### FACTUAL BACKGROUND

The NYCLU has a long and vested interest in the campaign to increase transparency of the data sought in this request. In 1998, the Department of Education voted to transfer the responsibility for school safety to the NYPD.<sup>2</sup> In 2005, as a result of an increased focus on school safety, the Administrative Code of the City of New York was amended to require the NYPD to submit information regarding school safety agents to the City Council in the form of a report:

detailing the number of uniformed personnel and civilian personnel assigned to each and every patrol borough and operational bureau performing an enforcement function within the police department... *and such report shall also include, for each school operated by the department of education to which school safety agents are assigned, the number of school safety agents, averaged for the quarter, assigned to each of those schools.*<sup>3</sup>

In 2007, following several high-profile arrests of teachers, students, and principals, the NYCLU convened the School Safety Coalition, a network of community-based and advocacy organizations to push for increased transparency and accountability.<sup>4</sup> Following four years of

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<sup>2</sup> Randal C. Archibold, *New Era as Police Prepare to Run School Security*, The New York Times (Sept. 16, 1998), <https://www.nytimes.com/1998/09/16/nyregion/new-era-as-police-prepare-to-run-school-security.html>.

<sup>3</sup> Administrative Code of the City of NY § 14-150 (a) (3) (emphasis added).

<sup>4</sup> Sewell Chan, *Bronx: Two Teachers Sue The Police*, The New York Times (March 6, 2006) <https://www.nytimes.com/2006/03/06/nyregion/education/metro-briefing-new-york-bronx-two-teachers-sue-the.html>; Jennifer Medina, *Police Arrest a Student, Then Her Principal, Too*, The New York Times (Oct. 10, 2007), <https://www.nytimes.com/2007/10/10/nyregion/10school.html>; see also New York Civil Liberties Union, *The*

advocacy and despite active resistance by the NYPD and then-Mayor Michael Bloomberg, the City Council adopted the Student Safety Act in 2011.<sup>5</sup> The Student Safety Act was a landmark transparency bill that, when originally adopted, served as the high-water mark for school safety transparency in the nation. The act amended the Administrative Code of the City of New York to require the NYPD to provide quarterly reports to the City Council on agency activity, including:

- (i) a list of school buildings with permanent metal detectors; (ii) a list of school buildings subjected to random scanning; (iii) a list of schools that have requested the removal of metal detectors; and (iv) a list of schools for which a requested removal of metal detectors has been honored. In addition, the department shall on an annual basis report on the amounts and types of contraband seized as a result of metal detector scanning, disaggregated by school building. Such types shall include but not be limited to firearms, knives, box cutters and laser pointers.<sup>6</sup>

Despite these explicit provisions in the Administrative Code designed to promote transparency around the NYPD's activities, the NYPD has repeatedly sought to avoid public disclosure and compliance with the letter and spirit of the law. In 2009, then-City Councilmember Albert Vann requested the NYPD to produce data pursuant to Section 14-150 (a) (3) of the Administrative Code (Coyle aff exhibit 1) as the department had failed to report as required by the 2005 amendments, which Councilmember Vann had introduced.<sup>7</sup> Likewise, even though the Student Safety Act was signed in 2011, it was not until 2016 that the NYPD publicly first reported

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*Student Safety Act*, <https://www.nyclu.org/en/student-safety-act#:~:text=The%20Student%20Safety%20Act%20mandates%20quarterly%20reporting%20by,penal%20code%2C%20patrol%20borough%2C%20gender%2C%20race%20and%20age.>

<sup>5</sup> Int 0442-2010, Local Law No. 6 of the City of NY, *A Local Law to amend the administrative code of the city of New York, in relation to reports on school discipline and police department activity relating to schools* (Jan. 6, 2011), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=821375&GUID=BE5ED174-255F-4944-A1D5-331DD105E8CB&Options=ID|Text|Search=14-152.>

<sup>6</sup> Administrative Code of the City of NY § 14-152 (e).

<sup>7</sup> Transcript of the Minutes of the Committee on Education, NYC Council (Jan. 4, 2005), <https://legistar.council.nyc.gov/View.aspx?M=F&ID=664876&GUID=1EA8DB85-006E-4692-BE15-C6C87E283862.>

the total number of arrests of students in school and only after the law was amended to explicitly require it.<sup>8</sup>

For more than two decades, the NYPD has operated with minimal public visibility into whether its activities—particularly those concentrated in schools serving predominantly students of color—are in response to any real threat, support improving school climate, or are simply an extension of the NYPD’s pattern of over-policing Black and Latinx New Yorkers. Even principals have faced difficulties figuring out why their school was the site of more or fewer police, or why they had or did not have metal-detector scanning in place.

The NYCLU seeks to shine light on these matters of public import. On March 7, 2019, the NYCLU submitted a FOIL request to the City Council seeking data on the use of metal detectors that had been produced by the NYPD pursuant to Section 14-152 (e) (Coyle aff exhibit 2). On March 19, 2019, the City Council’s FOIL officer responded that “the New York City Council does not have responsive documents to the portion of your request that has asked for documentation provided to the New York City Council by the New York Police Department” (Coyle aff exhibit 3) because, despite its mandate, the NYPD did not report to the City Council the required information under § 14-152 (e) of the Administrative Code.

### PROCEDURAL HISTORY

On January 3, 2020, the NYCLU submitted a FOIL request (the “Request”) to the NYPD for records related to metal detectors in schools and the assignment of school safety agents across

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<sup>8</sup> *New NYC Law Would Mandate Reporting on School Metal Detectors*, CBS New York (Sept. 29, 2015), <https://newyork.cbslocal.com/2015/09/29/school-safety-act-amendment/>; *Report of the Human Services & Governmental Affairs Divisions*, NYC Council (Dec. 16, 2010), Int. No. 442, <https://legistar.council.nyc.gov/View.ashx?M=F&ID=1119814&GUID=02837A23-6BD2-429E-8133-FA435C141C02>; *Briefing Paper of the Governmental Affairs Division*, NYC Council (Sept. 25, 2015), <https://legistar.council.nyc.gov/View.ashx?M=F&ID=4046964&GUID=0BDD882F-B726-4C93-91F1-46AA32949441>; City of New York, *NYPD School Safety Data*, <https://www1.nyc.gov/site/nypd/stats/reports-analysis/school-safety.page> (only including data starting in 2016).

the DOE via the NYPD's OpenRecords platform (petition exhibit A). Specifically, the NYCLU requested:

1. All records regarding metal detectors in schools collected since September 2015 pursuant to the NYPD's reporting requirements under § 14-152 (e) of the New York City Administrative Code.
2. All records regarding the deployment of School Safety Agents collected since 2005 pursuant to the NYPD's reporting requirements under § 14-150 (a) (3) of the New York City Administrative Code.

On January 7, 2020, the NYCLU received an email from the OpenRecords platform stating, "You can expect a response on or about Tuesday, May 19, 2020" (petition exhibit B).

On February 4, 2020, the NYCLU appealed this response via email as a constructive denial of the FOIL request because the timeframe articulated was not reasonable given the circumstances of the Request (petition exhibit C). The following day, February 5, 2020, the NYCLU received a letter via email from the Records Access Officer ("RAO") stating that the "appeal is premature because, as of the date of your appeal, the [ ] RAO had not yet issued a determination on your request, and therefore, your appeal lacked the predicate denial of access" (petition exhibit D).

On February 14, 2020, the NYCLU received an email through the OpenRecords platform granting access to some records partially responsive to Request 1 and denying access to records responsive to Request 2 on the basis of the "public safety exemption" and claiming that "such information, if disclosed, would reveal non-routine techniques and procedures" (petition exhibit E). The NYPD provided a chart labeled "dangerous instruments," including totals from what appeared to be school years starting in July 2014<sup>9</sup> (petition exhibit F). The chart did not disaggregate the data on confiscated items by school building, as required under the Administrative Code, nor did it indicate the type of "contraband," as is also required. The chart also did not define

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<sup>9</sup> The exact time periods listed are from 7/1/14 to 6/30/15, 07/01/2015 to 06/30/2016, 7/1/16 to 6/30/17, 7/1/2017 to 6/30/18, 7/1/18 to 6/30/19, 07/01/2019 to 12/15/2019.

the term “dangerous instruments” or indicate whether any of the required categories, including firearms, knives, box cutters and laser pointers, were included within this definition. The NYPD also produced a second chart containing what appeared to be the total number of metal-detector scanning sites across the DOE, including full-time and random scanning, from various months starting in 2017<sup>10</sup> (petition exhibit F). This aggregate data did not reflect a list of school buildings, as required by the Administrative Code. In its response, the NYPD did not certify that it conducted a diligent search for the requested information.

On March 13, 2020, the NYCLU submitted a second appeal to Sgt. Jordan Mazur via email alleging that the NYPD’s responses were incomplete and inappropriate (petition exhibit G). On March 26, 2020, Sgt. Mazur acknowledged the appeal via email and asked for an extension of the time in which to respond to the appeal given the COVID-19 pandemic (petition exhibit H). The NYCLU consented to this extension via email that same day (petition exhibit I).

On April 27, 2020, the NYPD denied the appeal via email based on the “public safety exemption” under FOIL (Pub. Off. Law § 87 [2] [f]) and a provision within the Administrative Code itself (§ 14-150 [c]) (“information, data and reports ... shall be provided to the council except where disclosure of such material could compromise the safety of the public or police officers”) (petition exhibit J). Despite denying the appeal, in response to Request 1, the NYPD directed the NYCLU to a website<sup>11</sup> containing data that can be used to identify schools where full-time or random scanning has taken place or whether certain contraband items were confiscated if there was an NYPD “incident” at the school. However, because the data is incident-related, it is unclear

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<sup>10</sup> The exact months listed are September 2017, December 2017, June 2018, September 2018, June 2019, August 2019, and “September-January 2019/2020.”

<sup>11</sup> City of New York, *School Safety Data*, <https://www1.nyc.gov/site/nypd/stats/reports-analysis/school-safety.page>.

whether it captures each school building that was subjected to permanent or random scanning or all items confiscated, as required under the Administrative Code. The website does not contain data related to requests to remove metal detectors, all contraband confiscated, or details about the deployment of school safety officers. The NYPD again did not certify that it had conducted a diligent search for the requested information.

Having exhausted its administrative remedies, the NYCLU files this Article 78 proceeding seeking immediate production of responsive documents, certification of a diligent search, and attorneys' fees and costs.

## ARGUMENT

### I. THE NYPD IS IMPERMISSIBLY CLAIMING THE "PUBLIC SAFETY" EXEMPTION TO AVOID ITS BASIC DUTIES UNDER FOIL.

In response to each part of the NYCLU's request, FOIL requires that the NYPD "either disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document and that it could not be located after a diligent search" (*Legal Aid Soc. v New York State Dept. of Corr. & Cmty. Supervision*, 105 AD3d 1120, 1121 [3d Dept 2013], quoting *Matter of Beechwood Restorative Care Ctr. v Signor*, 5 NY3d 435, 440-441 [2005]; Public Officers Law § 89 [3] [a]). Where a request has multiple elements, agencies must respond to each separately (*Baez v Brown*, 124 AD3d 881 [2d Dept 2015] [finding that that District Attorney's responses were inadequate for failing to search and certify for each branch of the request]).<sup>12</sup> The NYPD cannot simply reply to some elements and ignore others.

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<sup>12</sup> The Appellate Division Second Department's decision in *Baez v. Brown*, 124 AD3d 881 [2d Dept 2015], is instructive on this point. There, the court separately analyzed the Queens District Attorney's responses to each "branch" of the petitioner's request. For example, the Court held that "since the respondent failed to proffer more than conclusory" invocations of a statutory exemption to justify redacting and withholding records, it failed to meet its "burden of demonstrating that the redactions and denial of the request . . . fell within this statutory exemption" (*Id.* at 883). As to another branch of the request, the respondent violated FOIL by failing to provide an adequate certification that it had conducted a diligent search for the material sought (*Id.* at 884).



FOIL also establishes a high bar for the NYPD to deny a request for information. As the New York Court of Appeals has explained, “All government records are . . . presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87 (2)” (*Gould v New York City Police Dept.*, 89 NY2d 274 [1996] [requiring the New York City Police Department to demonstrate that requested material qualified for an exemption in order for the records to be withheld]). Furthermore, “[e]xemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access” (*Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562 [1986]; *see also Baez*, 124 AD3d at 883 [requiring “the entity resisting disclosure to ‘articulate a ‘particularized and specific justification for denying access’”] [citations omitted]; *Gannett Satellite Info. Network, Inc. v Cty. of Putnam*, 142 AD3d 1012 [2d Dept 2016] [finding that the agency “failed to sustain their burden of demonstrating the applicability of the asserted exemptions”]). The requirement for particularized and specific justifications means that the NYPD cannot claim blanket exemptions: “blanket invocation of . . . statutory exemptions . . . without offering a specific basis for any of the claims of exemption” violates FOIL (*City of Newark v Law Dept. of City of New York*, 305 AD2d 28, 34 [1st Dept 2003]; *see West Harlem Business Group v Empire State Development Corp.*, 13 NY3d 882 [2009] [an agency must “fully explain in writing . . . the reasons for [the] denial” and “conclusory characterizations” of the documents is not enough]; *see also Buffalo Broad. Co. Inc. v New York State Dept. of Corr. Servs.*, 174 AD2d 212, 216 [3d Dept 1992] [“The burden of establishing a blanket exemption covering all of the records requested is especially heavy”]).



Instead, the NYPD must provide “specific, persuasive evidence” and “cannot merely rest on a speculative conclusion that disclosure might potentially cause harm” (*Markowitz v Serio*, 11 NY3d 43, 50-51 [2008]). Thus, to comply with FOIL, the NYPD must show that each category of information sought by the NYCLU falls within a FOIL exemption by articulating a specific, non-speculative, non-conclusory, and factual justification for the denial. If the NYPD cannot provide such a basis for the claimed exemption, then it must be discarded, and the NYPD must fulfill the request or certify that such information is unavailable following a diligent search (*Loevy & Loevy v New York City Police Dept.*, 38 Misc. 3d 950, 955 [Sup Ct, NY County 2013] [“A ‘[f]ailure to establish the factual existence of [a] claimed exemption ... renders [the] claim for exemption unavailing’”] [internal citations omitted]).

**A. The NYPD’s blanket denial of Request 1 is inappropriate and it should be compelled to produce outstanding documents to the NYCLU.**

In Request 1, the NYCLU sought five categories of information that the NYPD was required to produce to the City Council regarding the NYPD’s metal detector program in NYC public schools under Section 14-152 (e) of the NYC Administrative Code:

- i. “a list of school buildings with permanent metal detectors”;
- ii. “a list of school buildings subjected to random scanning”;
- iii. “a list of schools that have requested the removal of metal detectors”;
- iv. “a list of schools for which a requested removal of metal detectors has been honored”; and
- v. “the amounts and types of contraband seized as a result of metal detector scanning, disaggregated by school building,” including, but not limited to, “firearms, knives, box cutters and laser pointers.”

In response to the NYCLU’s appeal, the NYPD inappropriately claimed a blanket exemption that the information requested in these five categories could be withheld due to the

“public safety exemption,” Public Officers Law § 87 (2) (f), which allows an agency to deny access to records if disclosure “could endanger the life or safety of any person.”<sup>13</sup> The NYPD asserted that “the disclosure of those schools that are equipped with magnetometers, are subject to random scanning, have requested the removal of magnetometers, and which have been granted those requests for removal, would provide a list of those schools which would be vulnerable to the possession of weapons that would otherwise be prevented by magnetometers.” The NYPD’s conclusory and speculative statement about the application of this exemption to four of the five categories of information in the Request is not particularized and does not contain “specific, persuasive evidence” and therefore violates FOIL (*Markowitz v Serio*, 11 NY3d 43, 50-51 [2008]; *Carnevale v City of Albany*, 68 AD3d 1290 [3d Dept 2009]; *Pennington v Calabrese*, 2002 WL 31885409 [Sup Ct, Erie County, Nov. 25, 2002], *aff’d in part*, 4 AD3d 778 [2004] [“the public-safety exemption must be based on more than mere speculation”]).

In fact, in its response, the NYPD failed to even mention the fifth category of records—items confiscated from metal detectors—and therefore cannot be said to have provided any justification, let alone a particularized and specific one, for failing to produce responsive documents. For this reason alone, the claimed exemption should be discarded.

But even if the court finds that the blanket exemption is particularized and specific, it cannot survive, as it is not factual and fails basic reason (*Loevy & Loevy*, 38 Misc. 3d at 955). It strains credulity for the NYPD to claim that providing a list of school buildings with magnetometers would pose a threat to life and safety, while simultaneously directing the NYCLU

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<sup>13</sup> After first producing incomplete records responsive to Request 1, the NYPD then invoked the “public safety exemption” in its appeal response. Having previously disclosed responsive documents, the NYPD cannot now claim the documents are exempt from disclosure (*see* Committee on Open Gov’t Op. FOIL AO-17668 [June 10, 2009], <https://docs.dos.ny.gov/coog/ftext/fl7668.html>, [“if a disclosure was not inadvertent, but rather purposeful... we believe that the ability to deny access to that record would have been waived”]).

to a website containing data that can be used to identify at least a subset of DOE schools that have permanent or random screening. The NYPD's response undermines its exemption claim and raises the specter that the entire blanket exemption is disingenuous at best.

Likewise, the NYCLU is not aware of instances where prior public disclosure of this type of information has resulted in threats to public safety. During a 2017 City Council hearing, the Commanding Officer of the NYPD's School Safety Division testified that 91 school buildings had either full-time or random scanning.<sup>14</sup> The NYPD also revealed during a 2017 press conference the number of contraband items seized from students, with a breakdown by firearms, knives, boxcutters, razors, BB guns, stun guns, and other "dangerous objects."<sup>15</sup> In 2016, the principal of Park Slope Collegiate indicated to ProPublica that she "[was] trying to get the scanners removed from her building"<sup>16</sup> and in 2019, the Principal of Tottenville High School in Staten Island notified parents that the school would be subject to random scanning.<sup>17</sup> In 2016, the NYPD School Safety Division itself tweeted the exact location of a metal detector, an item that was confiscated, and the name of the agent that seized it on its public Twitter feed.<sup>18</sup> And, in 2015, WNYC published the results of a study they conducted regarding the demographics of students who attend schools with metal detectors.<sup>19</sup> In addition, many federal and state law enforcement agencies routinely share

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<sup>14</sup> *Statement of Assistant Chief Brian Conroy, Commanding Officer, School Safety Division, NYPD* (Nov. 21, 2017).

<sup>15</sup> Susan Edelman, *New stats reveal rise in gun & blade seizures at city schools*, The New York Post (Sept. 30, 2017), <https://nypost.com/2017/09/30/new-stats-reveal-rise-in-gun-blade-seizures-at-city-schools/>.

<sup>16</sup> Cecilia Reyes, *100,00 NYC School Children Face Airport-Style Security Screening Every Day*, ProPublica (Jan. 12, 2016), <https://www.propublica.org/article/nyc-school-children-face-airport-style-security-screening-every-day>.

<sup>17</sup> Annalis Knudson, *Metal detectors to be used regularly at Tottenville High School*, SILive.com (Sept. 19, 2019), <https://www.silive.com/news/2019/09/metal-detectors-to-be-used-regularly-at-tottenville-high-school.html>.

<sup>18</sup> *NYPD School Safety*, @NYPDSchools, Twitter (Oct. 8, 2016), <https://twitter.com/NYPDSchools/status/784523315352313856?s=20>.

<sup>19</sup> Kat Aaron, Jenny Ye, The WNYC Data News Team, *More Than 90,000 New York City Students Are Searched Before School*, WNYC News (Sept. 15, 2015), <https://www.wnyc.org/story/school-metal-detectors/>.

similar information without issue.<sup>20</sup> The NYCLU is unaware of any instances of violence or material threats to public safety that resulted from this information being disclosed, and the NYPD certainly did not provide a factual or particularized basis for concluding otherwise. In fact, the public availability of this data directly challenges the argument that its disclosure will cause an unsafe situation at the school buildings and completely invalidates the NYPD's claim of the "public safety exemption" (*Grabell v New York City Police Dept.*, 139 AD3d 477, 479 [1st Dept 2016] [holding that "information about the safety risks of backscatter technology is already widely available to the public. Thus, release of NYPD's records containing health information about the vans would neither reveal nonroutine investigatory techniques or procedures, nor endanger public safety"]; *see also N.Y. Civil Liberties Union v New York City Police Dept.*, 20 Misc 3d 1108, \*2-3 [Sup Ct, NY County 2008] [denying application of the "public safety exemption" when the same information has already been provided to two outside organizations]).

In addition, the "public safety exemption" is particularly inapplicable to backwards-looking data, such as records detailing the items confiscated from the metal detectors or random screening (*see Lancman v New York City Police Dept.*, Index No. 154329 [Sup Ct, NY County, Sept. 23, 2019] [holding that retrospective data on fare evasion enforcement could not be withheld pursuant to the "public safety exemption"]) (Coyle aff exhibit 4). It is difficult to imagine how a record of items that were collected from scanning, such as laser pointers, headphones, or cell phones, would endanger the life or safety of any person. This data would also be from a previous year, making its utility to a potential wrongdoer even more miniscule. In fact, the NYPD did not

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<sup>20</sup> *See, e.g.*, United States Border Patrol, <https://www.cbp.gov/sites/default/files/assets/documents/2019-May/Sector%20Profile%20FY18.pdf> (detailing the confiscation of firearms, ammunition, drugs, and currency); Leslie Josephs, *TSA: July air travel down 75% from 2019, but gun confiscation rates triple*, CNBC, (Aug. 10, 2020), <https://www.cnbc.com/2020/08/10/tsa-july-air-travel-down-75percent-from-2019-but-gun-confiscation-rates-triple.html>; Tina Moore and Chris Perez, *Here's some of the 15,000 guns the NYPD seized since 2013*, The NY Post (Oct. 26, 2016), <https://nypost.com/2016/10/26/this-is-how-many-guns-the-nypd-has-seized-so-far-this-year/>.

even claim that this data would cause the same “dangers” as data on the locations of metal detectors or requests to remove them (petition exhibit J).

Furthermore, the “public safety exemption” does not even apply because many of the requested records could be attained through simple public inspection. While it would take considerable time and effort, the NYCLU could gather information about the location of metal detectors by calling or visiting every DOE school across the city.<sup>21</sup> In a recent FOIL case against the NYPD filed by New York City Councilmember Rory Lancman regarding its failure to produce subway enforcement data, this court rejected the NYPD’s “public safety exemption” claim for a similar reason (*Lancman*, Index No. 154329 [Sup. Ct, NY County, Sept. 23, 2019]). There, this court held that “the data being sought [on subway fare evasion arrests and summonses] could be obtained by simple public inspection, albeit at great time and/or expense to petitioners.” Because of this, the NYPD was ordered to produce the data and this court rejected its claim of the “public safety exemption” (*see also Buffalo Broad. Co. Inc. v New York State Dept. of Corr. Servs.*, 174 AD2d 212 [3d Dept 1992] [holding that the “public safety exemption” did not apply to “matters... which would have been readily observable”]; *accord Mack v Howard*, 91 AD3d 1315 [4th Dept 2012]).

Here, any records regarding the placement of metal detectors could be obtained by public inspection. Metal detectors typically result in long lines of students queuing outside school buildings—a conspicuous indicator of metal detectors, which will be made especially apparent now as students may be expected to wait in socially distanced lines to enter the school buildings. Further, metal detector equipment is large and can often be seen from outside the building. The

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<sup>21</sup> In 2014, prior to the passage of the Student Safety Act, the NYCLU did exactly that. Alan Singer, *Students Tell Mayor de Blasio, Turn Off the Metal Detectors!*, The Huffington Post (April 25, 2015), <https://www.huffpost.com/entry/students-tell-mayor-de-bl b 6735290>.

availability of this information based solely on observation negates the NYPD's claim that releasing the request information "could endanger the life or safety of any person."<sup>22</sup>

Thus, having failed to meet the heavy burden of claiming a blanket exemption, the NYPD should be compelled to produce the information the NYCLU sought about each of the five categories under Request 1 or certify that no additional information is available.

While the NYPD may have, in its appeal denial, partially responded to the first two categories of Request 1 through the data available on the public website, it is unclear whether this data captures each school building that was subjected to permanent or random scanning because it is linked to schools where an NYPD "incident" took place (petition exhibit J). If a school did not have an "incident", any use of metal detectors would not be reflected. In addition, the NYPD produced a chart on February 14, 2020 containing what appeared to be the total number of metal-detector scanning sites across the DOE, including full-time and random scanning, from various months starting in 2017 (petition exhibit F). Yet, this chart was also incomplete as it did not reflect a list of school buildings, as required by the Administrative Code, and as requested by the NYCLU. Thus, the NYPD should either provide the requested lists or certify that this data represents all records responsive to the first two categories.

For the third and fourth categories of the Request, the NYPD did not produce any records at all concerning schools' requests to remove a metal detector or whether those requests had been honored. Therefore, it must provide this data or certify that such data does not exist, which seems unlikely.

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<sup>22</sup> Also, the students who attend school in each of the buildings are obviously aware as to whether their own school building has metal detectors – either permanent or random. The information that they do not have access to is which days the random scanners will be utilized or whether their building will be subjected to unannounced scanning. The NYCLU did not request this information.

Finally, with regard to the fifth category of requested information, the chart produced on February 14, 2020, labeled “dangerous instruments,” does not fulfill the Request as it does not disaggregate the data on confiscated items by school building, as is required, nor did it indicate the type of “contraband,” as is also required. The chart also did not define the term “dangerous instruments” or indicate whether any of the required categories, including firearms, knives, box cutters and laser pointers, were included within this definition (petition exhibit F). Further, the data on the public website produced in response to the appeal denial also does not completely respond to the NYCLU’s request because it is unclear whether it reflects all contraband items seized from students through scanning and is linked to “incidents” (petition exhibit J). Thus, again, the NYPD must produce all documents responsive to the fifth branch of the request or certify that the information that it has already produced represents all of the records responsive to this request.

**B. The NYPD cannot rely on the “public safety exemption” to withhold records responsive to Request 2.**

In Request 2, the NYCLU sought “[a]ll records regarding the deployment of School Safety Agents collected since 2005 pursuant to the NYPD’s reporting requirements” under § 14-150 (a) (3) of the NYC Administrative Code (petition exhibit A). Section 14-150 (a) (3) requires the NYPD to produce a report on the “number of uniformed personnel and civilian personnel” including the number of school safety agents assigned to each school on average for each quarter. Just to reiterate, this section and the NYCLU’s request simply sought the average number of school safety agents at each school for the previous quarter.

The NYPD has inappropriately claimed a blanket exemption to producing this information to the NYCLU under FOIL. The NYPD’s February 14, 2020 response denied access “based on Public Officers Law Section 87(2)(f) as such records/information would endanger the life or safety of any person, and Public Officers Law Section 87(2)(e)(iv) as such information, if disclosed,



would reveal non-routine techniques and procedures”<sup>23</sup> (petition exhibit E). The NYPD again claimed the “public safety exemption,” Pub. Off. Law § 87 (2) (f), to deny access to the records in its April 27, 2020 appeal denial. It stated that “access is denied in that the disclosure of these records would reveal the total number of the officers assigned to each specific borough – information which could then be used to produce a reasonable estimate of the number of agents assigned to each of the schools within that borough, and, consequently, the scope of coverage maintained by the Department. This information would, consequently, compromise the NYPD’s ability to secure the schools and the safety of both the members of service and the students and teachers at certain schools” (petition exhibit J).

This claim again fails to meet the required bar for FOIL, as it is highly speculative and unsupported by the facts. Public statements by the NYPD directly contradict the assertion that this data would endanger life and safety. For example, the NYPD School Safety Division’s verified Twitter account routinely publishes—almost daily—the names and photos of school safety agents and the schools at which they are deployed.<sup>24</sup> With nearly 5,500 followers, the NYPD’s School Safety Division does not seem concerned about the threat to life and safety from the availability of this data that it has made public. If the NYPD willingly shares very detailed information about its school safety agents, then surely it can also share aggregated data by school or by borough.

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<sup>23</sup> The NYPD failed to raise its claim of exemption under Pub. Off. Law § 87 (2) (e) (iv) in its administrative appeal denial and has thus waived it (*Madeiras v New York State Educ. Dept.*, 30 NY3d 67, 74 [2017]). Because the NYPD “did not make any contemporaneous claim that the requested materials” were exempt under Section 87 (2) (e) (iv), it cannot rely on that exemption now (*Id.*).

<sup>24</sup> See, e.g., NYPD School Safety, @NYPDSchools, Twitter (March 30, 2018) @nypdschools, <https://twitter.com/NYPDSchools/status/979543464017842176> (identifying School Safety Officer Tamara Jenkins with a photo and disclosing that she is assigned to PS 241); @NYPDSchools (Mar. 11, 2020), <https://twitter.com/NYPDSchools/status/1237702845010452481> (identifying five school safety agents with names, photos, their job titles, and identifying that they are deployed at Jane Addams High School); @NYPDSchools (Feb. 13, 2020), <https://twitter.com/NYPDSchools/status/1228002715638345730> (identifying School Safety Agents Osorio and Melendez with photos and their deployment at Springfield Gardens High School); @NYPDSchools (Feb. 7, 2020), <https://twitter.com/NYPDSchools/status/1225834603476389890> (identifying School Safety Agents Davis and Daniel with photos and their assignment to Lehman HS). These pictures also feature students, thus negating the NYPD’s claim that this information will endanger students.



Furthermore, the NYCLU is unable to ascertain the nature of NYPD's exemption claim. The NYCLU requested records regarding the deployment of school safety agents. The NYPD claimed that it could not produce "the total number of the officers assigned to each specific borough," phraseology that appears to refer to police officers and is not specific to school safety agents (petition exhibit J). The NYPD's claim is therefore not responsive to the NYCLU's request and, thus not particularized or specific to justify a "public safety" exemption.

For the reasons above, the NYPD's claim of the "public safety exemption" as to Request 2 should fail and the NYPD should be ordered to produce responsive records.

## **II. THE NYPD CANNOT USE THE NYC ADMINISTRATIVE CODE AS A SHIELD TO BLOCK RESPONSIVE RECORDS FROM DISCLOSURE.**

In addition to its "public safety exemption" claims under FOIL, the NYPD also incorrectly claimed that it does not have to produce documents responsive to the Request because of a provision within the Administrative Code of the City of New York. The NYPD argued<sup>25</sup> that § 14-150 (c) allowed the NYPD to withhold information on the basis that the "material could compromise the safety of the public or police officers" (Administrative Code § 14-150). This is an error under FOIL.

First, Section 14-150 (c) only narrows what the NYPD must produce to the City Council and has no bearing on the NYPD's independent obligations under FOIL. Moreover, while public

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<sup>25</sup> In its appeal response, the NYPD stated:

the information specifically pertaining to magnetometers *may be withheld pursuant to §14-152(h)*, which provides that 'information, data, and reports required by this section shall be subject to the disclosure limitations of section 14-150 of this chapter.' Section 14-150(c), in turn, provides that 'information, data and reports . . . shall be provided to the council *except where disclosure of such material could compromise the safety of the public or police officers.*' The NYPD's position has always been, and remains, that the disclosure of this information could compromise the safety of the students.

(petition exhibit J) (emphasis added).

agencies may deny access to records that “are specifically exempted from disclosure by state or federal statute” (Pub. Off. Law § 87 [2] [a]),<sup>26</sup> the Administrative Code is not a proper basis on which to deny access to records because the Administrative Code is not a state or federal statute under the meaning of FOIL (*Brownstone Publishers, Inc. v NYC Dept. of Finance*, 150 AD2d 185 [1st Dept 1989] [the “secrecy” provision within the Administrative Code “did not constitute an exemption from FOIL disclosure because it was not a state or federal statute, as required for these purposes by Public Officers Law § 87 (2) (a)”] [citing *Matter of Morris v Martin*, 55 NY2d 1026 [1982]]). Therefore, the NYPD should be barred from using the NYC Administrative Code as a basis for denial and ordered to immediately produce responsive documents.

**III. THE NYPD COULD HAVE PRODUCED PORTIONS OF RESPONSIVE RECORDS INSTEAD OF WITHHOLDING RECORDS IN THEIR ENTIRETY.**

Finally, even if some responsive documents contained content that was exempt, which is not the case, that would not allow the NYPD to withhold the records in their entirety. FOIL requires that agencies produce “records or *portions thereof*” unless they fall under one of the statutory exemptions (Pub. Off. Law § 87 [2] [*emphasis added*]), and an agency “cannot refuse to produce the whole record simply because some of it may be exempt from disclosure” (*Matter of Schenectady County Society for the Prevention of Cruelty to Animals v Mills*, 18 NY3d 42, 46 [2011]). Here, the NYPD did not even attempt to redact any information but rather inappropriately produced incomplete information and claimed blanket exemptions to block the rest of the records from disclosure. The NYPD should be ordered to produce all responsive documents to the Request

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<sup>26</sup> It should be noted that the NYPD did not specifically invoke the § 87 (2) (a) exemption in its administrative denial. Thus, the NYCLU would also argue that the NYPD has waived its claim under § 87 (2) (a). When an agency “fail[s] to invoke [a] particular exemption” in its administrative denial, it cannot then do so at a later date (*Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 74 [2017] [“Because the Department did not rely on subparagraph (iv) in its administrative denial, to allow it to do so now would be contrary to our precedent, as well as to the spirit and purpose of FOIL”]).

and redact any portions of the records that are exempt from disclosure, instead of withholding documents in their entirety.

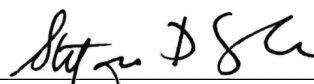
#### IV. THE NYCLU IS ENTITLED TO ATTORNEYS' FEES.

Petitioner respectfully requests an award of reasonable attorneys' fees and litigation costs. Courts are required to assess reasonable attorneys' fees and costs when a party has "substantially prevailed" and the agency had "no reasonable basis for denying access" to the records in dispute (Pub. Off. Law § 89 [4] [c]). If this Court orders the NYPD to disclose additional documents in response to this Petition, the NYCLU will have "substantially prevailed." (*Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 79 [2017] [finding that the petitioner "substantially prevailed" when the respondent produced documents in response to the petition]). For all of the reasons discussed above, the NYPD had no reasonable basis for denying the NYCLU access to the range of records that were responsive to its Request and the NYCLU is entitled to attorneys' fees.

## CONCLUSION

For the foregoing reasons, Petitioner the NYCLU respectfully requests that this Court order the New York City Police Department to abide by Article 6 of the New York Public Officers Law and disclose the records Petitioner requested in its January 3, 2020 FOIL request.

NEW YORK CIVIL LIBERTIES UNION  
FOUNDATION, by



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Stefanie D Coyle  
Christopher Dunn  
New York Civil Liberties Union Foundation  
125 Broad Street, 19<sup>th</sup> Floor  
New York, New York 10004  
Telephone: (212) 607-3300  
Facsimile: (212) 607-3329  
scoble@nyclu.org

*Counsel for Petitioner*

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New York, N.Y.