

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

-----X  
In the Matter of the Application of  
KEEGAN STEPHAN,

Petitioner-Plaintiff,

For Judgment and Order Pursuant to Article 78 and Section  
3001 of the Civil Practice Law and Rules

-against-

THE NEW YORK CITY POLICE DEPARTMENT, and  
WILLIAM BRATTON, NYPD COMMISSIONER,  
in his official capacity,

Respondents-Defendants.  
-----X

Index No. 101285/2016  
IAS Part 13  
(Mendez, J.)

**STIPULATION AND  
ORDER OF  
SETTLEMENT AND  
DISCONTINUANCE**

**COPY**

**WHEREAS**, Petitioner-Plaintiff Keegan Stephan commenced this action and proceeding on or about August 11, 2016, seeking to obtain certain records from Respondents-Defendants pursuant to the Freedom of Information Law ("FOIL"), Public Officers Law §84 *et seq.*, attorney's fees under the FOIL, and relief requiring Respondent-Defendant New York City Police Department ("NYPD") to comply with Public Officers Law §87(5)(a) and §89(3)(b); and

**WHEREAS**, no party herein is an infant, incompetent person for whom a committee has been appointed, or conservatee;

**WHEREAS**, Respondents-Defendants deny any and all liability or wrongdoing arising from the allegations set forth in the Verified Petition and Complaint, and nothing in this Stipulation and Order of Settlement and Discontinuance shall be deemed an admission of any fault or liability by Respondents-Defendants; and

**WHEREAS**, the parties now desire to resolve this litigation, without further proceedings and without admitting any fault or liability;

**COPY**

**NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED**, by and between the undersigned, as follows:

1. Upon execution of this Stipulation and Order of Settlement and Discontinuance, the above-captioned action and proceeding is hereby dismissed, with prejudice, and without attorneys' fees, costs, and expenses except as specified in paragraph 15 below.

2. NYPD agrees that it will produce items numbered 1 through 6 described in the list annexed hereto as Exhibit A to Petitioner-Plaintiff within 30 days of the date this Stipulation and Order of Settlement and Discontinuance is entered by the Clerk of the Court, item numbered 7 within 45 days of that date, and items 8 through 9 within 60 days of that date.

3. The production described in paragraph 2 above coupled with the certifications included in paragraph 4 below shall be deemed as full satisfaction of the requests set forth in Petitioner-Plaintiff's FOIL request dated December 12, 2014, and annexed hereto as Exhibit B (the "Request").

4. NYPD certifies that NYPD conducted diligent searches for records responsive to the Request and that it has preserved all documents located. With respect to the documents to be produced consistent with Exhibit A:

- i. **Regarding (a) of the Request**, Petitioner-Plaintiff narrowed the scope to include only copies of recorded police communications transmitted over NYPD Citywide One and Two Channels between 6:00pm on December 4, 2014 and 3:00am on December 5, 2014 that reflect LRAD use, as well as communications reflecting NYPD response to the December 5, 2014 protest between 12:31 am and 1:31 a.m. that led to the Request. In response to this

narrowed request, NYPD agrees to produce communications that occurred 30 minutes before and after a request was made for use of an LRAD at around 10:00 p.m., and is accordingly producing communications that occurred between 9:31 p.m. and 10:31 p.m. on December 4, 2014, as well as NYPD communications that occurred on December 5, 2014 between 12:31 a.m. and 1:31 a.m. reflecting NYPD response to the December 5, 2014 protest. Those entire hours will be produced except for portions that NYPD claims are exempt from disclosure pursuant to Public Officers Law § 87(2)(e)(iv), which permits an agency to withhold records or portions thereof that are compiled for law enforcement purposes and which, if disclosed, would reveal non-routine techniques and procedures, or that NYPD may otherwise claim are exempt from disclosure, consistent with paragraph 4(iii) below.

- ii. **Regarding (b), (f), (g), and (k) of the Request**, NYPD has created the records described in item numbers 5 and 8 in Exhibit A describing dates and times that LRADs were deployed, may have been deployed, or were requested to be deployed from September 1, 2011 through December 12, 2014 (the "Relevant Period") based on diligent searches for and review of NYPD records including Detail Requests and available 204s (which are forms prepared by NYPD that provide information about officer assignments and resources, such as LRADs, that will be deployed during planned

**COPY**



events). After conducting a diligent search, NYPD did not locate any After-Action Reports or Unusual Occurrence Reports/U.F. 49 Reports regarding LRAD use for the period September 1, 2011 through December 12, 2014. There is no definitive record of every time an LRAD was in fact used during Relevant Period. NYPD will conduct a diligent search for After-Action Reports or Unusual Occurrence Reports/U.F. 49 Reports related to the December 4-5, 2014 protest that led to the Request, and will either (i) produce the records it identifies, or (ii) certify that it has located no responsive records, by e-mail to counsel for Petitioner-Plaintiff, within 45 days of the execution of this Stipulation and Order.

- iii. If Respondents-Defendants redact or withhold any portions of the recorded police communications described in paragraph 4(i) or the After-Action Reports or Unusual Occurrence Reports/U.F. 49 Reports related to the December 4-5, 2014 protest described in paragraph 4(ii), at the same time Respondents-Defendants produce responsive records, NYPD will provide written explanations of and justifications for withholding or redacting the same to Petitioner-Plaintiff's counsel by e-mail. If Petitioner-Plaintiff disagrees with the withholding or redactions, Petitioner-Plaintiff will first attempt in good-faith to resolve the issue by communicating his challenges to the production to counsel for NYPD. If the parties are unable to resolve the challenges within 30 days from the date Petitioner-

**COPY**

Plaintiff communicates his objections to counsel for NYPD, Petitioner-Plaintiff may, in accordance with paragraph 20 of this Stipulation and Order, restore this matter to the calendar for the purpose of enforcing the provisions of this Stipulation and Order (including challenging any withholding or redactions), on at least 14 days' written notice to Respondents-Defendants.

- iv. **Regarding (c) of the Request**, NYPD located at least 3,300 e-mails created during the Relevant Period that contain the keyword "LRAD." The records described in item 9 of Exhibit A include all e-mails responsive to the Request, except e-mails that NYPD claims are exempt from disclosure under FOIL's intra- and inter-agency exemption set forth in Public Officers Law § 87(2)(g).
- v. **Regarding (d) of the Request**, the record described in items 4 and 6 in Exhibit A includes responsive information identifying by Model Number the LRADs the NYPD had as of 2014 as well as information from the manufacturer.
- vi. **Regarding (e) of the Request**, the records described in item numbers 1 through 4 in Exhibit A are complete responses.
- vii. **Regarding (h) of the Request**, all responsive records were disclosed in response to the Request prior to this litigation.
- viii. **Regarding (i) of the Request**, no responsive records exist specifically regarding LRAD uses as uses of force.

**COPY**

ix. **Regarding (j) of the Request**, Petitioner-Plaintiff withdrew that portion of the Request.

5. NYPD will accept FOIL requests sent to the designated e-mail address, which is currently FOIL@NYPD.ORG. NYPD will also accept any follow-up correspondence regarding pending FOIL requests by e-mail if it is identified by the FOIL Unit file number.

6. NYPD will respond to FOIL requests by e-mail, if possible.

7. NYPD will provide requested records in an electronic format, when requested, if possible. If records requested in an electronic format cannot be e-mailed because the e-mail is rejected by NYPD's server(s) or destination server(s) as undeliverable due to the size of the electronic file(s) or because some other reason renders sending the records in electronic format by e-mail not reasonable, NYPD will copy the requested records onto a compact disc (or other electronic medium) and mail the compact disc (or other electronic medium) to the requestor's designated mailing address.

8. NYPD will include the contact information for its Records Access Appeals Officer ("Appeals Officer"), including the Appeals Officer's designated e-mail address for appeals, in determinations issued by its Records Access Officer in response to FOIL requests.

9. The Appeals Officer will accept appeals of NYPD's determinations regarding FOIL requests by e-mail to the designated e-mail address for appeals and will respond to those appeals by e-mail, when requested, if possible. If the requestor has requested records be provided in an electronic format, and records NYPD provides in response to an appeal cannot be e-mailed because the e-mail is rejected by NYPD's server(s) or destination server(s) as undeliverable due to the size of the electronic file(s) or because some other reason renders sending the records in electronic format by e-mail not reasonable, NYPD will copy the requested

**COPY**



records onto a compact disc (or other electronic medium) and mail the compact disc (or other electronic medium) to the requestor's designated mailing address.

10. NYPD will determine the actual cost of reproducing a record requested under FOIL in accordance with Public Officers Law § 87(1)(b), § 87(1)(c), and 21 New York Code of Rules and Regulations ("NYCRR") §1401.8.

11. NYPD will set forth procedures for receiving and responding to FOIL requests and appeals by e-mail and providing electronic versions of responsive records when requested, if possible, consistent with paragraphs 5 through 10 above in a NYPD memorandum to be finalized within 90 days of the date this Stipulation and Order of Settlement and Discontinuance is entered by the Clerk of the Court. Within 14 days thereafter, counsel for NYPD will send a copy of the finalized memorandum to Petitioner-Plaintiff's counsel by e-mail.

12. NYPD will revise its FOIL website to reflect the substance of those procedures for receiving and responding to electronic FOIL requests and appeals, within 90 days of the date this Stipulation and Order of Settlement and Discontinuance is entered by the Clerk of the Court. In addition to reflecting the substance of those procedures, the revised website shall state the e-mail and mailing addresses of the Records Access Officer and the Appeals Officer.

13. Also within 90 days of the date this Stipulation and Order of Settlement and Discontinuance is entered by the Clerk of the Court, NYPD will revise its website to include a list of records maintained by the NYPD as required under Public Officers Law §87(3)(c) and links to the Committee on Open Government website and relevant provisions of the Public Officers Law.

14. The parties note that the NYPD's method of receiving and responding to electronic FOIL requests, as well as the information available on its website regarding FOIL, will

change once the NYPD becomes part of the NYC Open Records program, which is currently available only in a beta form. Any such changes to NYPD's method of receiving and responding to electronic FOIL requests, or to the information available on its website regarding FOIL, will be consistent with Public Officers Law §§87(4)(c), §87(5)(a), and §89(3)(b); 21 NYCRR §1401.2(a) and 21 NYCRR §1401.6(d); and any other provisions of the FOIL or 21 NYCRR 1401 governing NYPD's method of receiving and responding to electronic FOIL requests, or to the information available on its website. Once NYPD becomes part of the NYC Open Records program, it will, within 30 days, update the memorandum described in paragraph 11, and within 90 days update its website, to reflect the new method of submitting FOIL requests. NYPD will further provide a link to the Open Records program, which website will contain instructions for its use.

15. The City of New York ("City") agrees to pay the sum of \$24,000 (hereinafter the "Settlement Amount") by check payable to Gideon Orion Oliver, Esq. in partial satisfaction of all claims that were or could have been raised in this action and proceeding and for attorneys' fees, costs, and expenses that were incurred in connection with this matter from December 2014 through December 11, 2016. Petitioner-Respondent may be entitled to additional attorneys' fees, costs, and expenses for work counsel performed through the date of this Stipulation and Order of Settlement and the parties shall engage in good faith negotiations to settle Petitioner-Respondent's request for such fees, costs and expenses within 30 days from the date counsel for Respondents-Defendants receive additional timesheets for the period December 2014 through December 11, 2016 as well as timesheets for the period between March 21, 2017 and the present from Petitioner-Plaintiff's counsel. If the parties are unable to resolve the remaining claims for attorneys' fees, costs, and expenses, Petitioner-Plaintiff shall have the right

**COPY**



to restore this matter to the calendar for the purpose of petitioning this Court to fix an amount of attorney's fees that the Court deems reasonable under the circumstances, on at least 14 days' written notice to Respondents-Defendants.

16. In consideration of the foregoing, Petitioner-Plaintiff agrees to the dismissal of all the claims against Respondents-Defendants and to release Respondents-Defendants, their successors and assigns, and all present or former officials, employees, representatives or agents of the City and NYPD from any and all liability, claims, and/or rights of action arising from the allegations set forth in the Verified Petition and Complaint, including claims for costs, expenses and attorneys' fees.

17. Nothing contained herein shall be deemed to be an admission by the City or NYPD that they have (or that either of them has) in any manner or way violated the provisions of Public Officers Law §84, *et seq.*, Plaintiff-Petitioner's rights, or the rights of any other person or entity, as defined in the constitutions, statutes, ordinances, rules, or regulations of the United States, the State of New York, the City of New York, or any other rules, regulations, or bylaws of any department or subdivision of the City of New York or NYPD.

18. With the exception of the procedures described in paragraph 11 above, nothing contained herein shall be deemed to constitute a policy or practice of the NYPD or the City of New York.

19. Facsimile signatures on this Stipulation and Order of Settlement and Discontinuance shall have the same effect as original signatures.

20. This Stipulation and Order of Settlement and Discontinuance shall not be admissible in, nor is it related to, any other litigation or settlement negotiations, except any arising from enforcement of the provisions contained herein, except that this Stipulation and

COPY

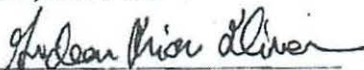
COPY

Order of Settlement and Discontinuance is relevant to and may be admissible in *Malcolm v. NYPD*, Index No. 100466/2017 (Sup. Ct., N.Y. Co.), and/or *Edrei, et al. v. City of New York, et al.*, 16-CV-1652 (S.D.N.Y.).

21. This Stipulation and Order of Settlement and Discontinuance contains all the terms and conditions agreed upon by the parties hereto, and no oral agreement entered into at any time nor any written agreement entered into prior to the execution of this Stipulation and Order of Settlement and Discontinuance regarding the subject matter of the instant action and proceeding shall be deemed to exist, or to bind the parties hereto, or to vary the terms and conditions contained herein.

Dated: New York, NY  
June 27, 2017

GIDEON ORION OLIVER  
*Attorney for Petitioner-Plaintiff*  
277 Broadway, Suite 1501  
New York, NY 10007  
(646) 263-3495

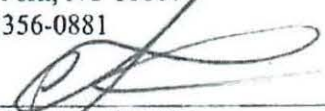
  
GIDEON ORION OLIVER

ELENA L. COHEN  
*Attorney for Petitioner-Plaintiff*  
365 Fifth Avenue, Room 5202  
New York, NY 10016

  
ELENA L. COHEN

DATED: June \_\_ 2017

ZACHARY W. CARTER  
Corporation Counsel of New York City  
*Attorney for Respondents-Defendants*  
100 Church Street  
New York, NY 10007  
(212) 356-0881

By:   
AGNETHA E. JACOB  
Assistant Corporation Counsel

SO ORDERED:

  
HONORABLE MANUEL J. MENDEZ, J.S.C.

MANUEL J. MENDEZ  
J.S.C.

**Additional Records to be Produced in Response to December 12, 2014 FOIL Request**

1. Instructor Guide regarding LRADs dated February 14, 2014
2. Lesson plan regarding LRAD dated February 14, 2014
3. Training document titled "Disorder Control Unit (DCU) – Long Range Acoustic Device" (LRAD) and dated December 2014
4. PowerPoint Presentation regarding LRADs dated January 16, 2015
5. Chart listing instances of LRAD use during November 2014 and December 2014 protests regarding Michael Brown and Eric Garner
6. Pamphlet from manufacturer regarding LRAD specifications
7. Citywide Two communications recorded between 9:31 p.m. and 10:31 p.m. on December 4, 2014 and between 12:31 am and 1:31am on December 5, 2014 reflecting NYPD response to the December 5, 2014 protest, subject to the redactions described in paragraph 4(i) in the Stipulation and Order of Settlement and Discontinuance
8. Chart listing dates and times that LRADs were deployed, may have been deployed, or were requested to be deployed from September 1, 2011 through December 12, 2014
9. 17 e-mail communications regarding LRADs that are responsive and as to which Respondents claim no exemption under FOIL, that were sent or received between September 1, 2011 and December 12, 2014



**EXHIBIT B**

# Gideon Orion Oliver

Attorney at Law

277 Broadway, Suite 1501  
New York, New York 10007

(646) 263-3495 (phone)  
(646) 349-2914 (fax)\*

Gideon@GideonLaw.com\*  
\*Not for service

December 12, 2014

**BY HAND AND EMAIL TO RICHARD.MANTELLINO@NYPD.ORG**

Records Access Officer  
NYPD FOIL Unit  
1 Police Plaza, Room 110 C  
New York, New York 10038

Re: *Freedom of Information Law Request –  
NYPD Long Range Acoustic Devices (LRADs)*

Dear Records Access Officer:

I make this request pursuant to the New York State Freedom of Information Law ("FOIL"), Sections 84-90 of the Public Officers Law, and its implementing regulations, 21 NYCRR Part 1401, as well as the Uniform Rules and Regulations for All City Agencies Pertaining to the Administration of the Freedom of Information Law, Title 43, Rules of the City of New York Chapter 11.

I hereby request disclosure of all records in the NYPD's possession regarding the deployment, use, management and operation of Long Range Acoustical Devices (LRADs). For purposes of this request, an LRAD is any device that uses sound waves, sound pressure, generated noise, or focused sound as a means of crowd control or as a means of communicating official instructions during demonstrations, rallies, protests or similar events.

Specifically, I request disclosure of the following records:

- a. Copies of recorded police communications from December 4 and December 5, 2014 reflecting NYPD responses to protest activities (including, but not limited to, copies of NYPD Citywide One or other radio channels used in connection with policing protests or other incidents on those dates).
- b. All records that indicate the dates and times at which the NYPD has stationed, positioned, and/or operated one or more LRADs between September 1, 2011 and December 21, 2011, including records that explain how and why such devices were utilized.

- c. Records, including memoranda, emails and other correspondence, both internal to the NYPD and external (e.g., with other police departments, state police and/or security agencies, federal police and/or security agencies) pertaining to the use of LRADs.
- d. All records describing any LRADs in the NYPD's possession, including manufacturer's instructions or manuals; records identifying the manufacturer, trade name, make and/or model number, identifying characteristics, and physical dimensions; and acoustic specifications, including decibel levels (dBA) across the full range of frequencies (Hz) and over a range of distances.
- e. All records, including training materials, directives, policies, manuals, and/or memoranda, created or adopted by the NYPD pertaining to the operation of LRADs, including any descriptions of who is qualified to operate LRADs, the circumstances under which LRADs are to be operated, and the chain of command through which authority to station, position and operate LRADs is granted.
- f. All records reflecting instances in which LRADs have been deployed (whether or not they were used).
- g. All records reflecting instances in which LRADs were used, including, but not limited to, any unusual occurrence reports or after-action reports reflecting the date, time, location, and any other facts or circumstances surrounding an LRAD use.
- h. All records regarding LRAD testing.
- i. All records, including training materials, directives, policies, manuals, and/or memoranda, created or adopted by the NYPD pertaining to the use of force, force escalation, and use of force reporting requirements and practices, including any such records regarding LRAD uses as uses of force.
- j. All records, including training materials, directives, policies, manuals, and/or memoranda, created or adopted by the NYPD pertaining to crowd control in connection with First Amendment assemblies, special events, or other, similar incidents, including, but not limited to, any such documents reflecting the circumstances under which a perceived group may be treated as a group for crowd control or mass arrest purposes.
- k. Any and all documents or memoranda, including requests for detail, requesting the deployment of an LRAD.

Please respond to this request by e-mail in the first instance.

Please provide electronic versions of responsive documents/records where possible.

Please notify me in advance if the fees for providing these records are expected to exceed \$100.



Should you deny any portion of this request based on a determination that you are legally exempt from the disclosure requirement with respect to a particular document, please provide me with a written explanation specifically citing the Public Officers Law §87(2) category into which you allege that each document allegedly exempt from disclosure falls. As I am sure you are aware, these exemptions are to be narrowly construed, and the burden to demonstrate that the requested material indeed qualifies for exemption is yours. *Gould v. NYPD*, 87 NY2d 267 (1996). Moreover, you may only withhold disclosure where the material requested falls squarely within the ambit of one of those statutory exemptions. *Id.* Accordingly, please articulate particularized and specific justifications for your withholding in each case.

Please treat this request as severable. If you deny any portion(s) of it based on an alleged exemption from disclosure, please continue the process of providing me with copies of those records you agree you are required to disclose without delaying that process based on your partial denial of the overall request. In other words, please turn over what you agree I am entitled to as soon as possible, even if you claim exemption from disclosing some of the records requested herein.

Please also provide me with the name, email address, mailing address, and facsimile number of the person or body to whom I should direct an administrative appeal of any such potential denial.

I look forward to your first response within five business days.

Thank you kindly for your time and prompt attention to this matter.

Very truly yours,

/S/

Gideon Orion Oliver

cc: Robert J. Freeman  
Executive Director  
Committee on Open Government  
New York State Department of State  
41 State Street  
Albany, New York 12231