MICHAEL A. SIRAGUSA
ERIE COUNTY ATTORNEY

COUNTY OF ERIE

MARK C. POLONCARZ
COUNTY EXECUTIVE
DEPARTMENT OF LAW

MICHELLE M. PARKER
FIRST ASSISTANT COUNTY ATTORNEY

JEREMY C. TOTH
SECOND ASSISTANT COUNTY ATTORNEY

November 26, 2014

Ms. Karen McCarthy, Clerk
Erie County Legislature
92 Franklin Street. 4th Floor
Buffalo, New York 14202

Dear Ms. McCarthy:

In compliance with the Resolution passed by the Erie County Legislature on June 25, 1987, regarding notification of lawsuits and claims filed against the County of Erie, enclosed please find a copy of the following:

File Name:	*New York Civil Liberties Union v. Erie County Sheriff's Office - re: records related to Stingray surveillance equipment*
Document Received:	Verified Petition
Name of Petitioner:	New York Civil Liberties Union
Claimant's attorney:	John N. Lipsitz, Esq. Lipsitz & Ponterio, LLC 135 Delaware Avenue, 5th Floor Buffalo, New York 14202

Should you have any questions, please call.

Very truly yours,

MICHAEL A. SIRAGUSA
Erie County Attorney

By: Michelle Parker
Michelle Parker
First Assistant County Attorney

MMP:dld
Enc.

CHECK PAID CASH
NOV 25 2014
ERIE COUNTY CLERK'S OFFICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

In the Matter of, NEW YORK CIVIL LIBERTIES UNION, Petitioner, -against- ERIE COUNTY SHERIFF'S OFFICE, Respondent, For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.	Index No.: I2014-000206 Hon. Patrick H. NeMoyer, JSC **NOTICE OF PETITION**

FILED
ACTIONS & PROCEEDINGS
NOV 25 2014
ERIE COUNTY CLERK'S OFFICE

PLEASE TAKE NOTICE that upon the annexed Verified Petition of the New York Civil Liberties Union, Affirmation of Mariko Hirose in Support of Verified Petition, and Petitioners Memorandum of Law in Support of the Verified Petition, each dated November 13, 2014, an application will be filed in the Supreme Court of the State of New York in the County of Erie, before the **Honorable Patrick H. NeMoyer, J.S.C., 50 Delaware Avenue, Part 34, Buffalo, New York, on Wednesday, December 17, 2014 at 2:00 o'clock in the afternoon of that day,** or as soon thereafter as counsel may be heard, for a judgment pursuant to Article 78 of the Civil Practice Law and Rules ("C.P.L.R.") and the Freedom of Information Law ("FOIL"), directing Respondent to comply with its duty under FOIL to provide the information sought by Petitioners in Petitioners' June 16, 2014 request and July 22, 2014 appeal; awarding reasonable attorney's fees and costs pursuant to New York Public Officers Law § 89; and granting other relief the Court deems just and proper.

This paper received at the
Erie County Attorney's Office
from Tom Sattler on
the 20th day of Nov, 2014
at 10:55 a.m./p.m.
Assistant County Attorney

PLEASE TAKE FURTHER NOTICE that, pursuant to C.P.L.R. § 7804 answering papers, if any, shall be received by the undersigned at least five (5) days before the return date.

Dated: November 25, 2014
Buffalo, New York

Respectfully submitted,

JOHN NED LIPSITZ, ESQ.
Lipsitz & Ponterio, LLC
135 Delaware Avenue, 5th floor
Buffalo, New York 14202
Telephone: (816) 849-0701
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Cooperating Counsel

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mhirose@nyclu.org

Counsel for Petitioner

TO: ERIE COUNTY SHERIFF'S OFFICE
10 Delaware Avenue
Buffalo, New York 14202

CC: ERIE COUNTY ATTORNEY
Erie County Department of Law
95 Franklin Street, Room 1634
Buffalo, New York 14202

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

----------X

In the Matter of,

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

-against-

ERIE COUNTY SHERIFF'S OFFICE,

Respondent,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

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Index No. I 2014-000206

VERIFIED PETITION

FILED
ACTIONS & PROCEEDINGS
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ERIE COUNTY
CLERK'S OFFICE

PRELIMINARY STATEMENT

1. In May 2014, local media in Erie County reported that the Erie County Sheriff's Office has spent over $350,000 to acquire a briefcase-sized surveillance device initially developed for military use—a device now commonly known as a "Stingray." Armed with a Stingray, law enforcement can surreptitiously spy on any cell phone in the vicinity without help from or consent of cell phone carriers. Stingrays can be used to identify people gathered in a particular area; to locate a person inside of a home or a place of worship or a doctor's office; to collect information on what numbers a person has been dialing or texting; and, when adjusted to certain configurations, to eavesdrop on conversations. With a Stingray, law enforcement can build a detailed portrait of a person, including where they have gone and who they have talked to.

2. Spurred by the media revelation, the Erie County Legislature asked the County Sheriff to appear at a hearing on May 15, 2014, to describe the office's use of the equipment.

The Sheriff, however, refused to speak to the public's concerns and revealed little about his office's use of Stingrays beyond asserting that they are being employed under an unspecified form of "judicial review." According to a media report, by "judicial review" the Sheriff did not mean a warrant based on probable cause but some other order that is obtainable on a lesser showing.

3. Following the public hearing, Petitioner New York Civil Liberties Union filed a Freedom of Information Law request with the Erie County Sheriff's Office seeking eight categories of records relating to the acquisition and use of Stingrays, all of which should be accessible to the public—including purchase orders, policies and guidelines, documents showing the number of investigations in which Stingrays have been used, and applications and court orders authorizing the use of Stingrays.

4. The Sheriff's Office denied the entire request, citing conclusory and contradictory restatements of various FOIL exemptions untethered to any facts or explanation. Without any certification that it had conducted a diligent search, the Sheriff's Office gave as one reason for its denial that "[t]he agency is not in possession of item that you requested."

5. The NYCLU then filed an administrative appeal under FOIL. The Sheriff's Office did not acknowledge the appeal or respond within the statutory time frame.

6. This Article 78 proceeding seeks to vindicate the right of the public and of the Petitioner to learn about the Sheriff's acquisition and use of Stingrays. Having exhausted administrative remedies, the NYCLU now seeks judicial relief to compel the Sheriff's Office to comply with its legal obligation to produce responsive documents.

VENUE

7. Pursuant to C.P.L.R. 7804(b) and 506(b), venue in this proceeding lies in Erie County, in the judicial district in which the Respondent took the action challenged here and where the office of the Respondent is located.

PARTIES

8. Petitioner the New York Civil Liberties Union ("NYCLU") is a not-for-profit corporation that seeks to defend civil rights and civil liberties on behalf of individuals who have experienced injustice and to promote transparency in government. For over fifty years, the NYCLU has been involved in litigation and public policy advocacy on behalf of New Yorkers to demand government accountability and transparency.

9. Respondent the Erie County Sheriff's Office ("the Sheriff" or "Sheriff's Office") is a sheriff's office established under Article 17, section 650 *et seq.*, of the New York General County Law, headquartered in Buffalo, New York.

FACTS

10. "Stingray" is a commonly-used term for a portable surveillance equipment originally developed for military use. Stingrays are cell site simulators that capture information from nearby cell phones by mimicking cell phone towers and deceiving the cell phones into delivering data to them. The data captured by Stingrays can include a person's cell phone number, whereabouts, and numbers that the person has been dialing or texting. In some configurations, Stingrays can also capture contents of conversations.

11. Using information captured by Stingrays, law enforcement can build a detailed portrait of a person's life—including where the person has been and who the person has been

communicating with. Law enforcement can also use Stingrays to conduct mass surveillance on people gathered in one location, for example for a protest or a lecture or a party.

12. The acquisition and use of Stingrays by local police departments have generated public concern in the past few years through media reports and court cases revealing their capabilities. *See, e.g.*, Thor Benson, *The Briefcases That Imitate Cell Phone Towers*, The Atlantic, Sept. 24, 2014; Ryan Gallagher, *Meet the Machines that Steal Your Phone's Data*, ArsTechnica, Sept. 25, 2013; John Kelly, *Cellphone Data Spying: It's Not Just the NSA*, USA Today, June 13, 2013; Kim Zetter, *Secrets of FBI Smartphone Surveillance Tool Revealed in Court Fight*, Wired, April 9, 2013; Bob Sullivan, *Pricey "Stingray" Gadget Lets Cops Track Cellphones Without Telco Help*, NBC News, Apr. 3, 2012.

13. In May 2014, local media in Erie County reported that the Erie County Sheriff's Office had spent at least $350,000 since 2008 on acquiring a Stingray device. *See* Michael Wooten, *Erie Co. Sheriff Spent $350,000+ To Spy On Cell Phones*, WGRZ.com, May 5, 2014.

14. Given the significant privacy concerns raised by this revelation, the Erie County Legislature called for a hearing on May 15, 2014, to question the Sheriff on the office's acquisition and use of this device. The Sheriff admitted in the hearing that his office had indeed acquired a Stingray and asserted that it was using it with judicial review. The Sheriff, however, refused to answer most other questions about the office's use of the device. According to a media report, the Sheriff admitted outside of the hearing that by "judicial review" he did not mean warrants based on probable cause but lower-level court orders. *See* Michael Wooten, *Sheriff Won't Answer Lawmakers' #cellphonespying Questions*, WGRZ.com, May 15, 2014.

15. On June 16, 2014, the NYCLU filed a FOIL request to the Sheriff's Office requesting the following records related to its acquisition and use of Stingray devices:

(1) Records regarding the Sheriff's Office's acquisition of cell site simulators, including invoices, purchase orders, contracts, loan agreements, solicitation letters, correspondence with companies providing the devices, and similar documents . . . [including] records of all contracts, agreements, and communications with Harris Corporation.

(2) All requests by the Harris Corporation or any other corporation, or any state or federal agencies, to the Sheriff's Office to keep confidential any aspect of the Sheriff's Office's possession and use of cell site simulators, including any non-disclosure agreements between the Sheriff's Office and the Harris Corporation or any other corporation, or any state or federal agencies, regarding the Sheriff's Office's possession and use of cell site simulators.

(3) Policies and guidelines of the Sheriff's Office governing use of cell site simulators, including restrictions on when, where, how, and against whom they may be used, limitations on retention and use of collected data, guidance on when a warrant or other legal process must be obtained, and rules governing when the existence and use of cell site simulators may be revealed to the public, criminal defendants, or judges.

(4) Any communications or agreements between the Sheriff's Office and wireless service providers (including AT&T, T-Mobile, Verizon, Sprint Nextel, and U.S. Cellular) concerning use of cell site simulators.

(5) Any communications, licenses, or agreements between the Sheriff's Office and the Federal Communications Commission or the New York State Public Service Commission concerning use of cell site simulators.

(6) Records reflecting the number of investigations in which cell site simulators were used by the Sheriff's Office or in which cell site simulators owned by the Sheriff's Office were used, and the number of those investigations that have resulted in prosecutions.

(7) Records reflecting a list of all cases, with docket numbers if available, in which cell site simulators were used by the Sheriff's Office as part of the underlying investigation or in which cell site simulators owned by the Sheriff's Office were used as part of the underlying investigation.

(8) All applications submitted to state or federal courts for search warrants or orders authorizing use of cell site simulators by the Sheriff's Office in criminal investigations or authorizing use of cell site simulators owned by the Sheriff's Office, as well as any warrants or orders, denials of warrants or orders, and returns of warrants associated with those applications. If any responsive records are sealed, please provide documents sufficient to identify the court, date, and docket number for each sealed document.

16. The Sheriff's Office denied the request in its entirety in a one-page letter dated July 6, 2014. The denial stated:

> "Please be advised that your request under the Freedom of Information Law is hereby denied in its entirety for the following reasons: (1) If disclosed it would result in an unwarranted invasion of personal privacy. (2) Are trade secrets or are submitted to an agency by a commercial enterprise and if disclosed would cause substantial injury to the competitive position of the subject enterprise. (3) Identify a confidential source or disclose confidential information relative to a criminal investigation. (4) Reveal criminal investigative techniques. (5) Could if disclosed endanger the life and safety of a person. (6) Are inter-agency or intra-agency communications. (7) If disclosed would jeopardize the agency's capacity to guarantee the security of information technology assets. (8) The agency is not in possession of item that you requested."

17. The Sheriff's Office did not certify or confirm in any way that anyone in the office had performed a diligent search for responsive documents.

18. By letter dated July 22, 2014, the NYCLU appealed every aspect of the denial to Undersheriff Mark Wipperman, the designated appeals officer. The NYCLU stated in its appeal that "without any indication of what types of documents exist, and with the Sheriff's Office's conclusory denial, it is impossible to tell whether any of the responsive records are exempt from disclosure." The appeal also outlined several examples of responsive documents that could not be withheld under a valid FOIL exemption, including, for example, purchase contracts, policies and guidelines on the use of Stingrays, and redacted applications for court authorization.

19. The NYCLU received a certified mail return, certifying that the appeal was received by the Sheriff's Office by July 28, 2014.

20. The Sheriff's Office has not responded to the NYCLU's appeal. Under New York state law, a failure to respond within ten business days amounts to a denial. N.Y. Pub. Off. Law § 89(4)(a).

21. The NYCLU seeks relief through judicial intervention in an effort to uncover more information about the Sheriff's use of this powerful and highly invasive technology, which implicates the rights of Erie County residents whose movement and affiliations might be monitored by the Sheriff without their knowledge.

CAUSE OF ACTION UNDER ARTICLE 78

22. Article 78 is the appropriate method for review of agency determinations concerning FOIL requests.

23. The Petitioner has a clear right to the requested records.

24. The Respondent has not properly asserted any exemptions, has not certified that it conducted a diligent search, has not identified any categories of documents found that would be responsive to the Petitioner's request, and has not produced any records.

25. The Respondent's obligation under FOIL to conduct a diligent search, to produce documents, and to respond to requests with particularized, specific reasons for any denials is mandatory, not discretionary.

26. The Petitioner exhausted its administrative remedies with the Respondent when it appealed the Respondent's initial denial of the request. The Respondent's failure to respond to the appeal amounts to a denial under FOIL. The Petitioner has no other remedy at law.

27. This Petition is timely under C.P.L.R. § 217 as it is filed within four months of Respondent's denial of the administrative appeal.

REQUESTED RELIEF

WHEREFORE, the Petitioner seeks judgment:

(1) Pursuant to C.P.L.R. § 7806, directing the Respondent to comply with its duty under FOIL and search for and disclose the records sought by the Petitioner in its request dated June 16, 2014;

(2) Awarding reasonable attorneys' fees and litigation costs as allowed under New York Public Officers Law § 89; and

(3) Granting such other relief as the Court deems just and proper.

Respectfully Submitted,

Mariko Hirose
Robert Hodgson
Christopher Dunn
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JNL@lipsitzponterio.com

Cooperating Counsel

Dated: November 13, 2014
New York, NY

VERIFICATION

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Mariko Hirose, an attorney admitted to practice in the State of New York, affirms pursuant to C.P.L.R. § 2106 under the penalties of perjury:

1. I am an attorney for the Petitioner in the within proceeding. I make this Verification pursuant to C.P.L.R. § 3020(d)(3).

2. I have read the attached Verified Petition and know its contents.

3. All of the material allegations of the Verified Petition are true to my personal knowledge or upon information and belief. As to those statements that are based upon information and belief, I believe those statements to be true.

MARIKO HIROSE

Dated: November 13, 2014
New York, New York

Sworn and subscribed to me
this 13th day of November, 2014

JESSICA GRACEANN PERRY
Notary Public, State of New York
No. 01PE6279507
Qualified in New York County
Commission Expires 04/08/2017