

March 8, 2024

Counsel, Division of Criminal Justice Services
80 South Swan Street
Albany, New York 12210

VIA EMAIL TO: [REDACTED]

RE: FOIL Appeal, Criminal Cases Case-level Data

Dear Counsel,

This letter constitutes an administrative appeal pursuant to the New York Freedom of Information Law (“FOIL”), POL §89(4)(a). Scrutinize, through its counsel, appeals the sufficiency of the Division of Criminal Justice Services’ (“DCJS”) response to Scrutinize’s request for Criminal Cases Case-level Data dated January 25, 2024 (“the Request”).

Background

On January 25, 2024, Scrutinize, through its counsel, filed the Request¹ with DCJS seeking the following records:

1. Any databases created or maintained by DCJS pursuant to the agency’s statutory obligations under N.Y. Judiciary Law § 216(5)/N.Y. Exec. Law § 837-U.
2. The dataset provided by DCJS to researchers in connection with the research paper titled “[Equal Protection Under Algorithms: A New Statistical and Legal Framework.](#)”
3. Any databases or datasets created, maintained, or otherwise possessed by DCJS that contain case-level data from criminal cases arraigned or disposed in criminal courts across New York State anytime between January 1, 2008, and January 25, 2024, and that include at least all of the following variables/fields:
 - a. The name of the judge who presided over the arraignment or the unique identification value for that judge;
 - b. The defendant’s non-identifying demographic information;
 - c. The top criminal charge on which the defendant was arraigned;
 - d. The defendant’s criminal history or lack thereof;
 - e. The outcome of arraignment, including but not limited to whether the defendant was released and, if so, the conditions of release, and the amount of any bail set.

¹ See Attachment A.

4. For any database responsive to requests (1) and (2) that only maintains a unique identification code for the presiding judge rather than the judge's name, please separately provide the name of the judge that corresponds with the unique identification code in the database.
5. Any lookup tables, codebooks, data extract information, data dictionaries, database schemas, or other explanation files that accompany databases responsive to requests (1), (2), and (3).

On February 8, 2024, DCJS responded to the Request.² With regard to item (2) of the Request, DCJS stated that “[t]he data files have been destroyed and are no longer available.” With regard to all other items, DCJS stated that “the available data requested can be found online” and provided two public links. DCJS further asserted that “the division does not have pretrial release information for earlier years [prior to 2019].” DCJS did not provide any information about the scope of its search for responsive records.

Basis For Appeal

Scrutinize appeals DCJS's response as to items (1), (3), (4), and (5) of the Request on two grounds.³ First, DCJS did not certify, for each element of the Request, that it conducted a diligent search for responsive records. Second, the response DCJS did offer, which directed Scrutinize to the Office of Court Administration (“OCA”) website, is insufficient to satisfy its FOIL obligations.

“Upon receipt of a FOIL request, an agency is ‘duty bound to conduct a diligent search of the records in its possession responsive to the request’”⁴ After conducting a diligent search, the agency must respond in one of three ways: “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.”⁵ If access to the record is denied for either of the latter two reasons, the agency must provide an explanation in writing.⁶

Here, DCJS's response does none of the above. DCJS did not produce any records, claim any specific exemption to disclosure or certify that it conducted a diligent search for responsive records. To the contrary, DCJS's response does not suggest that it looked for responsive records at all. In *Baez v. Brown*, a requester sought several records related to a

² See Attachment B.

³ With regard to item (2) of the Request, DCJS represents that “the data files have been destroyed and are no longer available.” Scrutinize does not appeal this portion of DCJS's response.

⁴ *Moody's Corp. v. New York State Dep't of Tax'n & Fin.*, 141 A.D.3d 997, 999 (2016) (citing *Matter of West Harlem Bus. Group v. Empire State Dev. Corp.*, 13 N.Y.3d 882, 884 (2009)).

⁵ *Beechwood Restorative Care Ctr. v. Signor*, 5 N.Y.3d 435, 440–41, 842 N.E.2d 466, 469 (2005).

⁶ See *W. Harlem Bus. Grp. v. Empire State Dev. Corp.*, 13 N.Y.3d 882, 884 (2009).

specific case from a District Attorney's Office.⁷ The agency responded that it searched the case file and found nothing matching the description of the requested records.⁸ The Appellate Division held this to be inadequate certification that the agency had conducted a diligent search.⁹ Here, DCJS has done even less – it has not indicated that it looked for responsive records at all.

Instead, DCJS has attempted to avoid its duty to conduct a diligent search by pointing Scrutinize to the OCA website, which contains some data on criminal case disposition. The Appellate Division recently rejected a similar contention in *Goldstein v. Mamaroneck*.¹⁰ In that case, the defendant argued that “maintaining a public website . . . containing much of the information sought by the petitioner” was sufficient to discharge its duty under the FOIL.¹¹ The court rejected this narrow construction of the FOIL, explaining that “posting information online is something an agency does independent of its FOIL obligations.”¹²

Here, as in *Goldstein*, the publicly available data is incomplete. For example, the state requires DCJS and OCA to “collect” and “report” certain data including, inter alia, “whether the prosecutor requested that the court fix bail, the amounts and forms of bail requested by the prosecutor.”¹³ However, the publicly available data—aka the data reported by DCJS pursuant to this new law—does not include this information. Additionally, the DCJS supplemental dataset for 2019¹⁴ lacks critical information, such as the names of judges and failures to appear extending beyond five years. Similarly, the OCA data for 2020 to 2023¹⁵ does not include failures to appear for the prior 2-year and 5-year periods, even though these fields are available in the 2019 data and, as indicated by DCJS's own data dictionary, DCJS is the source of this data.

Finally, the information in the public data dictionaries indicate that DCJS likely possesses responsive records beyond the data published on either the DCJS or the OCA website. The Request sought all databases “created, maintained, or otherwise possessed” by DCJS

⁷ *Baez v. Brown*, 124 A.D.3d 882 (2015) (conducting individualized analysis of adequacy of response for each “branch” of a multi-part FOIL request).

⁸ *Id.* at 884.

⁹ *Id.*

¹⁰ See *Goldstein v. Inc. Vill. of Mamaroneck*, 221 A.D.3d 111 (2023).

¹¹ *Id.* at 123.

¹² *Id.* at 125; see also *id.* at 127 (“Holding that an agency satisfies a FOIL request for reproduction of records merely by referring the requestor to a public website does not adequately safeguard the public right of all of this State's citizens.”).

¹³ See N.Y. Judiciary Law § 216(5)/N.Y. Exec. Law § 837-U.

¹⁴ See *Criminal Justice Statistics, Pretrial Release*, DIVISION OF CRIMINAL JUSTICE SERVICES, available at <https://www.criminaljustice.ny.gov/crimnet/ojsa/stats.htm#prd>.

¹⁵ See Division of Technology & Court Research, *Pretrial Release Data*, NEW YORK STATE UNIFIED COURT SYSTEM, available at <https://ww2.nycourts.gov/pretrial-release-data-33136>.

that contain specific fields. The Request was not, however, limited to those specific fields—it sought the complete contents of the databases, as well as supporting information such as schema files. Moreover, many fields in the public data (such as the variable ‘larg_rel_decision,’ representing the lower court's release decision at arraignment) list two sources: DCJS and OCA. This further suggests that DCJS maintains records of pretrial decisions separately from OCA. Accordingly, there is strong evidence that (1) data exists beyond what is publicly available on the DCJS and OCA websites and (2) DCJS possesses some or all of that data.

Conclusion

For the reasons stated above, Scrutinize appeals the denial of items (1), (3), (4), and (5) of the Request. Scrutinize asks that your office order DCJS to conduct a diligent search for all responsive records—not just those that are already published—and respond by either producing the records, identifying a specific basis for withholding, or certifying that the records could not be found.

If you have any questions about this appeal, please contact counsel for Scrutinize:

- Veronica Salama, [REDACTED], [REDACTED]
- Mason Kortz, [REDACTED], [REDACTED]

Thank you for your prompt attention to this matter.

Sincerely,

/s/ Oded Oren

Oded Oren

Scrutinize

By their Counsel

/s/ Mason Kortz

Mason Kortz

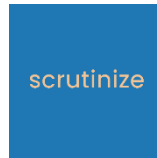
Harvard Law School Cyberlaw Clinic

/s/ Veronica R. Salama

Veronica R. Salama

New York Civil Liberties Union Foundation

Attachment A



January 25, 2024

VIA Electronic Mail

Records Access Officer
NYS Division of Criminal Justice Services
C/o [REDACTED]
Alfred E. Smith Building
80 South Swan Street
Albany, New York 12210

Re: Request under the Freedom of Information Law, Criminal Cases Case-level Data

Dear Records Access Officer:

Scrutinize, through its undersigned counsel, submits this request for records pursuant to the New York Freedom of Information Law, N.Y. Pub. Off. Law § 85, et seq. for access to and electronic copies of records collected or maintained by the New York State Division of Criminal Justice Services (“DCJS”) as described below:

- 1) Any databases¹ created or maintained by DCJS pursuant to the agency’s statutory obligations under N.Y. Judiciary Law § 216(5)/N.Y. Exec. Law § 837-U.
- 2) The dataset² provided by DCJS to researchers in connection with the research paper titled [“Equal Protection Under Algorithms: A New Statistical and Legal Framework”](#)
- 3) Any databases or datasets created, maintained, or otherwise possessed by DCJS that contain case-level data from criminal cases arraigned or disposed in criminal courts³ across New York State anytime between January 1, 2008, and January 25, 2024, and that include at least all of the following variables/fields:
 - a. The name of the judge who presided over the arraignment or the unique identification value for that judge;
 - b. The defendant’s non-identifying demographic information;
 - c. The top criminal charge on which the defendant was arraigned;
 - d. The defendant’s criminal history or lack thereof;

¹ For purposes of clarification, a “database” refers to any tabulated, electronic records.

² A “dataset” refers to a collection of tabulated, electronic records in DCJS’ possession or control. The terms “database” and “data set” are used interchangeably in this request.

³ For purposes of clarification, “criminal courts” refer to any trial-level courts that handle criminal cases, as described in OCA’s Criminal Courts flow chart, available at <https://www.nycourts.gov/courthelp/pdfs/NYSCriminalCourts.pdf>.

- e. The outcome of arraignment, including but not limited to whether the defendant was released and, if so, the conditions of release, and the amount of any bail set.
- 4) For any database responsive to requests (1) and (2) that only maintains a unique identification code for the presiding judge rather than the judge's name, please separately provide the name of the judge that corresponds with the unique identification code in the database.
- 5) Any lookup tables, codebooks, data extract information, data dictionaries, database schemas, or other explanation files that accompany databases responsive to requests (1), (2), and (3).

The variables in each responsive database or dataset should be produced in the same way they are maintained as part of the related file. For example, if a criminal case's docket number is maintained in a pseudonymized, hashed, or otherwise "scrambled" format in a responsive database, then it should be produced in the same manner. For clarity, this request does not seek confidential information from any applicable database or dataset. Confidential information that is used as a primary key or otherwise uniquely identifies a database entry should be pseudonymized through a one-way hash or similar cryptographic function.⁴

To the extent that the electronic records are available in electronic spreadsheet or comma-separated format (Excel or CSV), we request that they be provided in that format.

The requested documents will be made available to the public, and this request is not being made for commercial purposes. If all or part of this request is denied, please cite each specific applicable FOIL exemption. To the extent that you determine that certain portions of a record cannot be disclosed, please redact only that information that you consider to be protected, identify the applicable exemption, state the justification for each redaction, and provide us with the remaining information. As you are aware, pursuant to Public Officers Law 84-90(9), "when records maintained electronically include items of information that would be available under this article, as well as items of information that may be withheld, an agency in designing its information retrieval methods, whenever practicable and reasonable, shall do so in a manner that permits the segregation and retrieval of available items in order to provide maximum public access."

If any records are unavailable within five business days of receipt of the request, and responsive records exist, we seek a description of such records and a timeline of when access to the records will be provided. If you determine that certain parts of this request may be more easily produced than others, we are happy to discuss a production schedule for records that will require additional time for review/redaction/production. We request to be notified of any fees over \$100.00.

⁴ See *Am. C.L. Union Immigrants' Rts. Project v. United States Immigr. & Customs Enf't*, 58 F.4th 643 (2d Cir. 2023) (responding agency was required to replace exempt identifying numbers for non-U.S. citizens with anonymized unique identifiers in its response to FOIA request).

Please send all responsive records by email to:

- Veronica Salama, [REDACTED]; and
- Mason Kortz, [REDACTED].

Or by mail to:

New York Civil Liberties Union
Attn: Veronica Salama
[REDACTED]

If you have any questions about this request, please do not hesitate to contact us at:

- Veronica Salama, [REDACTED], [REDACTED], ext. 377;
- Mason Kortz, [REDACTED], [REDACTED].

Thank you for your prompt attention to this matter.

Sincerely,

/s/ Oded Oren
Oded Oren
Scrutinize

By their Counsel

/s/ Veronica R. Salama
Veronica R. Salama
New York Civil Liberties Union Foundation

/s/ Mason Kortz
Mason Kortz
Harvard Law School Cyberlaw Clinic

Attachment B

From: dcjs.sm.legal.foil <[REDACTED]>

Sent: Thursday, February 8, 2024 11:24 AM

To: Veronica Salama <[REDACTED]>

Subject: FW: Scrutinize Request to DCJS under the Freedom of Information Law: Criminal Cases Case-level Data

Dear Veronica Salama:

This is in response to your Freedom of Information Law (FOIL) request to the Division of Criminal Justice Services (Division) seeking "1) Any databases created or maintained by DCJS pursuant to the agency's statutory obligations under N.Y. Judiciary Law § 216(5)/N.Y. Exec. Law § 837-U. 2) The dataset provided by DCJS to researchers in connection with the research paper titled "Equal Protection Under Algorithms: A New Statistical and Legal Framework" 3) Any databases or datasets created, maintained, or otherwise possessed by DCJS that contain case-level data from criminal cases arraigned or disposed in criminal courts across New York State anytime between January 1, 2008, and January 25, 2024, and that include at least all of the following variables/fields: a. The name of the judge who presided over the arraignment or the unique identification value for that judge; b. The defendant's non-identifying demographic information; c. The top criminal charge on which the defendant was arraigned; d. The defendant's criminal history or lack thereof; e. The outcome of arraignment, including but not limited to whether the defendant was released and, if so, the conditions of release, and the amount of any bail set. 4) For any database responsive to requests (1) and (2) that only maintains a unique identification code for the presiding judge rather than the judge's name, please separately provide the name of the judge that corresponds with the unique identification code in the database. 5) Any lookup tables, codebooks, data extract information, data dictionaries, database schemas, or other explanation files that accompany databases responsive to requests (1), (2), and (3)."

Please be advised that the available data requested can be found online. Data available pursuant to Judiciary Law 216(5) and Executive Law 837-U are posted publicly every six months, as required by law, on the Office of Court Administration (OCA) website: <https://ww2.nycourts.gov/pretrial-release-data-33136> The data files include judge name, defendant demographics, top arraignment charge, prior convictions, release outcomes and, where applicable, release conditions and bail amounts ordered. As required by law, the data include arraignments from Jan 1, 2020. The most recent data available is through June 30, 2023. The Division also posts a supplemental research file on the Agency's website: <https://www.criminaljustice.ny.gov/crimnet/ojsa/stats.htm#prd> The research file includes arraignments from 2019 through the end of 2022. The Division does not have pretrial release information for earlier years. Data dictionaries and data notes are posted on the Division website for the supplemental file, and on OCA's website for the statutorily required file.

Please note that the "dataset provided by DCJS to researchers in connection with the research paper titled "Equal Protection Under Algorithms: A New Statistical and Legal Framework" was provided through a one-time legal agreement between the researchers, the Division, and the OCA. The data files have been destroyed and are no longer available.

Pursuant to POL §89(4)(a), you may appeal this determination within 30 days to the Counsel, Division of Criminal Justice Services, 80 South Swan St., Albany, NY 12210 or by email at [REDACTED]

Very truly yours,

Brian Garvey, Esq.
Records Access Officer

From: Veronica Salama [REDACTED]
Sent: Thursday, January 25, 2024 3:28 PM
To: dcjs.sm.legal.foi <[REDACTED]>
Cc: Kortz, Mason <[REDACTED]>
Subject: Scrutinize Request to DCJS under the Freedom of Information Law: Criminal Cases Case-level Data

You don't often get email from vsalama@nyclu.org. [Learn why this is important](#)

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Dear Records Access Officer:

Scrutinize, through its undersigned counsel, the New York Civil Liberties Union ("NYCLU") and the Harvard Law School Cyberlaw Clinic, submits this request for records pursuant to the New York Freedom of Information Law, N.Y. Pub. Off. Law § 85, et seq. for access to and electronic copies of records collected or maintained by the New York State Division of Criminal Justice Services ("DCJS") as described in the attached PDF.

If all or part of this request is denied, please cite each specific applicable FOIL exemption. To the extent that you determine that certain portions of a record cannot be disclosed, please redact only that information that you consider to be protected, identify the applicable exemption, state the justification for each redaction, and provide us with the remaining information. As you are aware, pursuant to Public Officers Law 84-90(9), "when records maintained electronically include items of information that would be available under this article, as well as items of information that may be withheld, an agency in designing its information retrieval methods, whenever practicable and reasonable, shall do so in a manner that permits the segregation and retrieval of available items in order to provide maximum public access."

If any records are unavailable within five business days of receipt of the request, and responsive records exist, we seek a description of such records and a timeline of when access to the records will be provided. If you determine that certain parts of this request may be more easily produced than others, we are happy to discuss a production schedule for records that will require additional time for review/redaction/production. We request to be notified of any fees over \$100.00.

Please send all responsive records to us by email at [REDACTED] and [REDACTED], or by mail to:

New York Civil Liberties Union
Attn: Veronica Salama
[REDACTED]

If you have any questions about this request, please do not hesitate to contact us at:

- Veronica Salama, [REDACTED]
- Mason Kortz, [REDACTED]

Thank you for your prompt attention to this matter.

Respectfully,

Veronica Salama (NYCLU) and Mason Kortz (Harvard Law School Cyberlaw Clinic)

Veronica R Salama

Staff Attorney

Pronouns: she, her, hers

New York Civil Liberties Union

125 Broad St., New York, NY 10004

[REDACTED], ext. 377 | [REDACTED]

NYCLU

ACLU of New York