

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

In re Application for a Judgment Pursuant to
Article 78 of the Civil Practice Law and Rules by

NAACP LEGAL DEFENSE & EDUCATIONAL
FUND, INC., and CENTER FOR
CONSTITUTIONAL RIGHTS,

Petitioners,

-against-

NEW YORK CITY POLICE DEPARTMENT, and
JAMES P. O’NEILL, in his official capacity as
Commissioner of the New York City Police
Department,

Respondents.

Index No. _____

VERIFIED PETITION

PRELIMINARY STATEMENT

1. This Article 78 Proceeding asserts the right of Petitioners, the NAACP Legal Defense & Educational Fund, Inc. (“LDF”) and the Center for Constitutional Rights (“CCR”), to access public records relating to the New York City Police Department’s (“NYPD” or “the Department”) classification of individuals as members of local gangs or crews. The NYPD claims that after conducting a “diligent search” it cannot locate records about the criteria used to decide which individuals it enters into its gang database (“Criminal Group Database”), and similarly cannot find records on the process by which the Department reviews and modifies its gang database for accuracy. This assertion stands in direct contrast to the NYPD Chief of Detective’s sworn testimony about the criteria for entry in the gang database and the “avenues to exit” the database.

2. It is a matter of public record that the NYPD maintains a Criminal Group Database to track and surveil alleged members of gangs or crews.

3. In New York, as in the nation as a whole, individuals identified in gang databases—almost always boys and young men of color—face extraordinary consequences. They risk heightened police surveillance, elevated aggression during police encounters, enhanced bail recommendations, elevated charges, enhanced sentencing recommendations, and, for some, loss of housing and the threat of deportation.

4. New York State's Freedom of Information Law ("FOIL") expresses the State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies. N.Y. Pub. Off. Law § 84. FOIL presumes that the public has a vested right to know certain information, and that secrecy is antithetical to our government. *Id.* Thus, under FOIL, all government records are presumptively open for public inspection and copying. *Id.* When the public agency that is the subject of a FOIL Request, here, the NYPD, claims that requested records cannot be found after a diligent search, Petitioners are entitled to a hearing on the agency's possession of the documents if they can articulate a factual basis to support the contention that the documents exist and are within the agency's control. *Gould v. NYPD*, 89 N.Y.2d 267, 279 (1996).

5. Petitioners submitted a FOIL Request to the NYPD in December 2017 for five discrete categories of public records on the Department's policies and practices for identifying and tracking gang or crew members. In February 2018, Petitioners submitted a second FOIL Request to the NYPD for six discrete categories of public records concerning the due process implications for individuals who the NYPD has designated as members of local gangs or crews.

6. On May 1, 2018, the NYPD sent Petitioners, by email, Determination Letters in response to each of Petitioners' FOIL Requests. The Department disclosed eight NYPD Patrol Guide Procedures and two PowerPoint presentations subject to redactions and withholdings under FOIL. The Letters broadly cite several FOIL exemptions to withhold most of the records requested.

7. On May 31, 2018, Petitioners timely administratively appealed each of the Determination Letters.

8. On June 13, 2018, NYPD Chief of Detectives, Dermot Shea, testified publicly that the NYPD established policies and procedures in 2014 about the criteria for the entry and removal of individuals in its Criminal Group Database. Detective Shea admitted that the Department shares information about individuals' gang affiliations with local District Attorneys' Offices and the New York City Department of Correction. The Chief of Detectives also testified that the NYPD does not notify individuals of their inclusion in the database and there is no mechanism for individuals to challenge their gang designations.

9. Detective Shea's sworn testimony included the specific criteria for entering individuals in its Criminal Group Database and discussed the "avenues to exit" the database.

10. On June 20, 2018, the NYPD issued its Appeal Determination in response to Petitioners' appeal of the agency's determination. The Department claimed that after conducting a "diligent search," the NYPD could not locate records about the criteria for entering individuals in its gang database. The NYPD Records Access Appeals Officer also claimed that he could not locate records memorializing the process by which the Department reviews and modifies its database for accuracy.

11. Detective Shea's sworn testimony to the New York City Council undermines the reliability of the NYPD's Appeal Determination to the extent that the Department now claims to be unable to locate certain requested records about its gang database.

12. The face of the NYPD's Appeal Determination did not address the redactions and withholdings made to the eight NYPD Patrol Guide Procedures and two PowerPoint presentations originally provided in response to the Requests, which Petitioners raised on appeal. In a subsequent email, the Records Access Appeals Officer maintained that these records are exempt from disclosure, citing, without explanation, six distinct FOIL exemptions.

13. This Article 78 petition seeks to compel the NYPD to comply with its statutory mandate under FOIL. The NYPD failed to provide a particularized and specific justification for withholding certain records as required by law. Further, Petitioners have reason to believe that the NYPD maintains records that it claims could not be located. Petitioners therefore contest the thoroughness of the NYPD's search for records and respectfully ask this Court to direct the NYPD to provide Petitioners with the requested records in response to their FOIL requests.

PARTIES

14. Petitioner LDF is the nation's first civil rights law organization. Through litigation, advocacy, public education, organizing and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that prevent African Americans and other people of color from realizing their full civil and human rights. Since its inception, LDF has sought to eliminate the arbitrary role of race in the administration of the criminal justice system by challenging laws, policies, and practices that disproportionately affect African Americans and other communities of color.

15. Petitioner CCR is a national non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution, federal civil rights law, and the Universal Declaration of Human Rights. Since its founding in 1966, CCR has engaged in litigation, advocacy, and public education campaigns challenging racially discriminatory and unconstitutional policies and practices within the American criminal justice system.

16. Respondent NYPD is an agency administered under the New York City Administrative Code, Title 14 that is responsible for law enforcement in the City of New York. The NYPD is subject to FOIL requirements. *See* N.Y. Pub. Off. Law § 84, *et seq.*

17. Mr. James P. O'Neill is a public officer who is named in his official capacity as Commissioner of the NYPD.

FACTS

18. On December 20, 2017, Petitioners served the NYPD with a FOIL Request seeking public records for five separate categories of information: (1) criteria used to designate individuals as gang/crew members; (2) criteria used to identify groups of people as gangs/crews; (3) de-identified demographic information for individuals labeled as gang/crew members; (4) a copy of the NYPD's Gang/Group Incident Report (PD377-158); and (5) documents about the use of the Domain Awareness System to monitor and identify individuals as members of gangs or crews.

19. On February 22, 2018, Petitioners served a second Request seeking additional public records about (1) the NYPD's definition of the terms "crew" and "gang"; (2) how, if at all, the NYPD notifies individuals of their entry into its gang database; (3) how, if at all, an individual in the database may challenge her designation as a gang/crew member; (4) information, if it exists, about individuals' challenges to their designation as gang/crew members; (5) how, if at all, the

NYPD reviews, audits, or modifies its gang database; and (6) a list of companies/agencies with which the NYPD has shared its gang database.

20. The Department responded to each Request and promised to issue a final determination on the requested documents within 90 business days of the date of the acknowledgement letters.

21. Between February 2018 and April 2018, the undersigned LDF counsel spoke with Detective Steven Halk, the detective assigned to the two FOIL Requests, four times over the phone. Detective Halk conveyed that he was actively looking into Petitioners' Requests. On March 15, 2018, Detective Halk represented that he was "hoping" but "cannot guarantee" that he would have a response to both Requests "within the next week or two."

22. On May 1, 2018, the NYPD sent a Determination Letter for each Request. Enclosed with each letter were eight NYPD Patrol Guide Procedures and two PowerPoint presentations that the Department redacted or withheld portions of, citing FOIL exemptions to justify the redactions and withholdings.

23. The NYPD withheld the remainder of the requested records, citing, without explanation, the following exemptions to disclosure under New York Public Officers Law: § 87(2)(b) (unwarranted invasion of personal privacy); 87(2)(g) (inter-agency or intra-agency materials); 87(2)(i) (information technology assets); 87(2)(e)(iii) (confidential source or confidential information); 87(2)(e)(iv) (non-routine techniques and procedures); 87(2)(f) (endanger the life or safety of any person); and 87(2)(g)(iii) (not a final agency determination); or "the records are not maintained in the manner you described."

24. On May 31, 2018, Petitioners administratively appealed each of the NYPD's Determination Letters. Petitioners argued 1) the Department's recitation of FOIL subsections was

inadequate to meet its burden of providing a “particularized and specific” justification for both the redacted or partially withheld documents provided and the nondisclosure of the remainder of the requested records, and 2) the NYPD improperly invoked or incorrectly applied several FOIL exemptions to deny records for the enumerated categories in each Request.

25. On June 13, 2018, NYPD Chief of Detectives Dermot Shea appeared at a New York City Council Committee on Public Safety hearing entitled, “NYPD Gang Takedown Efforts.” There, the Chief testified about the criteria the Department uses to designate individuals as members of gangs and provided statistics revealing that ninety-nine percent of the individuals in the NYPD’s Criminal Group Database are people of color.

26. Detective Shea also testified that the NYPD does not notify individuals of their entry in the database, nor is there a process for individuals to challenge their inclusion in the database.

27. On June 20, 2018, the NYPD responded to Petitioners’ Appeals. The Appeals were granted in part and denied in part.

28. In response to Petitioners’ Appeals, the Department provided three Microsoft Excel spreadsheets with statistics on the individuals entered in the gang database. The NYPD also disclosed a copy of the NYPD’s now-retired Gang/Group Incident Report (PD377-158), along with a copy of the Interim Order revoking the Incident Report. Finally, the Department provided an already-public copy of the June 13, 2018 written testimony that Chief of Detectives Dermot Shea gave to the New York City Council Committee on Public Safety.

29. In its Appeal Determination, the NYPD stated that “a diligent search was conducted” and “no records were located” on (1) the criteria for an individual’s entry into the Criminal Group Database; (2) the criteria used to determine what groups of individuals constitute

a gang or crew; (3) the process for reviewing/auditing/modifying the database; (4) the process for notifying individuals of their inclusion in the database; (5) the process for individuals to challenge their inclusion in the database; (6) individual challenges to inclusion in the database; and (7) companies/agencies with which the NYPD shares its database.

30. After receiving the Appeal Determination, counsel at LDF spoke with Sergeant Jordan Mazur, the Records Access Appeals Officer. Sergeant Mazur confirmed that his search encompassed the search conducted at the pre-appeal level.

31. LDF counsel spoke with Sergeant Mazur about the December 2017 request for records regarding the relationship between the NYPD's Domain Awareness System and gang or crew identification. Over the phone, Sergeant Mazur conceded that Petitioners' written request did provide sufficient detail to allow the NYPD to search for the requested records. He stated, however, that such records do not exist.

32. The face of the Appeal Determination did not address the records that the Department originally disclosed but redacted and partially withheld, which Petitioners had raised on appeal. By email, Sergeant Mazur clarified that the information that had been redacted and withheld initially is exempt from disclosure under the same subsections of Public Officers Law cited in the NYPD's May 1, 2018 Determination Letters. However, he did not explain why those exemptions applied to the redacted and withheld information.

VENUE AND JURISDICTION

33. Pursuant to Civil Practice Law and Rules Sections 7804(b) and 506(b), venue in this proceeding lies in New York County, the judicial district in which both Petitioners' and Respondents' principal offices are located.

34. Article 78 of the Civil Practice Law and Rules, Section 7804(b), confers jurisdiction over this matter upon the Court.

35. This Court has jurisdiction over the matter because the NYPD's response to Petitioners' appeals cannot be further "reviewed by appeal to a court or to some other body or officer." N.Y. C.P.L.R. § 7801(1).

CAUSE OF ACTION:

ARTICLE 78 REVIEW OF WRONGFUL DENIAL OF FOIL REQUESTS

36. Petitioners repeat and reallege every allegation in the preceding paragraphs as if fully set forth herein.

37. Article 78 is the appropriate method of review of final agency determinations concerning FOIL Requests.

38. Petitioners have a legal right under FOIL to access the public records requested in each of Petitioners' FOIL Requests.

39. FOIL recognizes the public's right to access and review government documents. Agency records are presumed to be public and subject to disclosure under FOIL.

40. Respondents have not produced all the records sought by Petitioners and have failed to properly invoke exemptions to disclosure under FOIL.

41. Respondents did not meet their burden to provide specific and particularized justification for withheld and redacted records requested under FOIL.

42. Petitioners have exhausted their administrative remedies and have no other remedy at law.

43. Petitioners have not made a prior application for the relief requested herein.

44. Because the NYPD had no reasonable basis for its categorical denial of Petitioners' FOIL Requests and subsequent administrative appeals, Petitioners are entitled to attorney's fees under Public Officers Law Section 89(4)(c).

CLAIM FOR RELIEF

Petitioners respectfully request that this Court enter judgment, pursuant to Civil Practice Law and Rules Section 7806, on their behalf:

- a. Directing the New York City Police Department and Commissioner O'Neill to comply with their duty under FOIL to provide Petitioners with the requested records and documents responsive to Petitioners' FOIL requests that are not subject to any exemption and to specifically identify and describe any documents allegedly exempt from disclosure;
- b. Ordering, in the alternative, a hearing to determine whether the requested documents exist and are in the control of the New York City Police Department, and, if they are not, for the NYPD to make a judicially binding admission to that effect;
- c. Awarding Petitioners reasonable attorney's fees pursuant to New York Public Officers Law Section 89(4)(c); and,

- d. Granting Petitioner such other and further relief as the Court deems necessary and equitable.

Respectfully Submitted,

Dated: August 8, 2018
New York, NY

/s/ Marne L. Lenox

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VERIFICATION

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

Marne Lenox, being duly sworn, deposes and says: I am an Assistant Counsel at the NAACP Legal Defense and Educational Fund, Inc., counsel to one of the Petitioners in this proceeding. I make this verification pursuant to Civil Practice Law and Rules Section 3020(d)(3). I have read the foregoing petition and know the contents thereof. The same are true to my knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters I believe them to be true.



Marne L. Lenox

Sworn to before me on this 8th
day of August, 2018.

Dianne Elaine Simmons

DIANNE SIMMONS
Notary Public, State of New York
No. 01SI6232777
Qualified in New York County
Commission Expires December 13, 2018