

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

09115928

Index No.

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In the Matter of :

NEW YORK CIVIL LIBERTIES UNION, :

Petitioner, :

-against- :

NEW YORK CITY POLICE DEPARTMENT, :  
and RAYMOND KELLY, in his official capacity as :  
Commissioner of the New York City Police :  
Department, :

Respondents. :

For a Judgment Pursuant to Article 78 :  
of the Civil Practice Law and Rules :  
----- X

VERIFIED PETITION

**FILED**

NOV 12 2009

COUNTY CLERK'S OFFICE  
NEW YORK

PRELIMINARY STATEMENT

1. This Article 78 proceeding seeks to vindicate the rights of the petitioner New York Civil Liberties Union and of the public to obtain information about the New York City Police Department's use of deadly force against civilians. Since the November 2006 Sean Bell shooting incident, in which officers fired 50 shots at three unarmed men, NYPD shooting practices have been the subject of considerable scrutiny. In the aftermath of the public controversy caused by the Bell shooting, the NYPD commissioned a major assessment of its shooting practices, the New York City Council enacted legislation mandating statistical reporting about shootings, and the NYCLU forced the release of some information through FOIL requests and related litigation. Nonetheless, critically important information remains hidden from public view. This

lawsuit arises out of the NYCLU's ongoing effort to make public complete information about NYPD shooting practices.

2. Reflecting the importance of incidents in which police officers fire their weapons at civilians, the NYPD creates a series of reports about each police shooting. These reports include two detailed factual reports about each shooting incident: an initial report compiled within 24 hours of the shooting and then a more complete report to be completed within 90 days of the shooting. In addition, the department each year compiles a statistical report about shootings. At the time of the Bell shooting, none of these reports was available to the public.

3. Prompted by the Bell shooting, the NYCLU obtained through FOIL copies of the NYPD's annual statistical reports for 1996 through 2006. When the NYCLU released these reports publicly in conjunction with a May 2008 City Council hearing about NYPD shooting practices, questions arose about the ability to draw conclusions about shootings based on the annual statistical reports without detailed information about individual incidents. As a result, the NYCLU in January 2009 sought copies of the 24-hour and 90-day reports about individual shootings since 1997.

4. The NYPD has denied the NYCLU's FOIL request for the 24-hour and 90-day reports in its entirety, withholding what are likely to be thousands of pages of factual information about incidents in which police officers fire their guns at civilians. This violates the Freedom of Information Law and the strong policy of open government that underlies the law. Having exhausted its administrative remedies, the NYCLU now seeks

judicial relief to force the NYPD to comply with its legal obligations about this matter of pressing public importance.

### FACTS

5. The NYCLU's mission is to defend civil rights and civil liberties and to preserve and extend constitutionally guaranteed rights to people whose rights have historically been denied. For over fifty years, the NYCLU, which has over 45,000 members, has been involved in litigation and other advocacy in support of individual rights and government accountability.

6. Police use of force against civilians has long been of major concern to the NYCLU. This concern intensified following two separate and highly publicized incidents where police officers shot and killed unarmed civilians. In 1999, four NYPD officers killed Amadou Diallo in a hail of forty-one shots. The incident garnered international attention, and led to widespread demonstrations resulting in the arrest of over one thousand people in New York City. A similar incident rekindled public outrage in November 2006 when officers fired fifty shots and killed Sean Bell, another unarmed civilian.

7. Every time an officer discharges his or her weapon, the NYPD initiates a two-stage process which results in a series of records concerning the incident. The first stage of this process is solely investigative and involves the creation of a series of three factual reports. The first report, referred to as a "PD424-151," or "Firearms Discharge/Assault Report (FDAR)," is created by the shooting officer. The NYCLU did not seek these reports in its FOIL request, and they are not at issue in this case.

8. The second report (the 24-hour report) is created by an investigating officer within twenty-four hours of the incident. This report includes twenty-eight sections, twenty-seven of which address factual details about the shooting and those investigating it, including, for example, the location and time of the incident, identifying information about the officers and civilians involved, the type of firearm and ammunition used, the number of shots fired, names and statements of witnesses, and the criminal history of any civilians involved. The NYCLU's FOIL request seeks all 24-hour reports prepared in response to incidents involving civilian targets since 1997.

9. The third and final report in the investigative stage (the 90-day report) is to be prepared within ninety days of the incident. The 90-day report includes the factual information from the 24-hour report but also includes additional information, such as detective bureau case files, forensic results, and medical reports that was not available immediately after the incident. The NYCLU seeks all 90-day reports prepared in response to shooting incidents involving civilians since 1997.

10. The second stage of the NYPD's review process involves an evaluation of the various reports in order to assess the event from a procedural and training perspective and impose discipline if necessary. This step takes place after the facts of each incident have been investigated. The shooting incident is considered closed once the review process is complete. The NYCLU has not requested any reports from this stage of the process, and they are not at issue in this case.

11. On an annual basis, the NYPD aggregates and analyzes statistical data related to accidental, intentional, and criminal shooting incidents involving officers over the

previous year. For shootings during the year, these reports provide statistics about a wide range of facts, including the reason for firearms discharges; the dates, times, and locations of shootings; the reasons officers were involved; and the outcome and conclusion of the incident.

12. In the aftermath of Sean Bell's death in 2006, the NYCLU began a concerted effort to gain access to information about the NYPD's use of deadly force against civilians. In October 2007 the NYCLU filed a FOIL request seeking the annual statistical reports and also seeking information about the race of civilians shot at by the police.

13. In response the NYPD produced annual statistical reports from 1996 through 2006. The NYCLU's analysis of those reports revealed a high rate of incidents involving civilian targets where police officers were the only shooters, raising important questions about NYPD shootings of unarmed civilians like Diallo and Bell. Of the 572 reported shooting incidents involving civilians between 1998 and 2006, officers were the only shooters 77% of the time (441 incidents). Also troubling was the number of shots fired in these incidents. In 2006, for example, police officers fired an average of nearly five shots per incident in which civilians did not return fire. This was the highest number in eight years of reporting, and correlated with the Department's switch to semi-automatic weapons for patrol officers.

14. Analysis of the annual statistical reports also suggested significant racial disparities in police use of deadly force. During 1996 and 1997, 90.5% of civilian shooting targets were black or Latino. After the Diallo shooting, however, the NYPD removed information identifying the race of civilian shooting victims from its annual

statistical reports and thus that information thus did not appear in any report after the report covering 1997.

15. Though it produced annual statistical reports in response to the NYCLU's October 2007 FOIL request, the NYPD denied the NYCLU's request for information about the race of civilian shooting targets. In August 2008 the NYCLU filed suit over that denial, and in January 2009 the NYPD produced a partial response, but the lawsuit remains pending with respect to the balance of the request for race data.

16. In May of 2008, concerned about the NYPD's ongoing lack of transparency, the New York City Council Committee on Public Safety held a hearing on a proposed bill to mandate that the NYPD provide the Council with additional information about shooting incidents. The NYCLU testified at the hearing, providing its analysis of the annual statistical reports it had obtained under FOIL. It argued that much more information needed to be made public about NYPD shootings.

17. In June 2008 the RAND Corporation released a report commissioned by the NYPD in the aftermath of the Bell shooting to study the Department's firearms training as well as its investigation and review processes. In the course of RAND's investigation, the NYPD provided the organization with copies of shooting reports reviewed between 2004 and 2006, including the very same reports the NYPD now refuses to disclose to the NYCLU.

18. Having reviewed the shooting reports now sought by the NYCLU as part of its investigation of the NYPD's internal review process, the RAND Corporation uncovered many instances where police may have unnecessarily fired their weapons at civilians.

RAND also concluded that the NYPD fails to adequately scrutinize police shooting practices and failed to make broader assessments of the circumstances and tactics used. Moreover, the Department has no procedure for identifying lessons learned in the review process, so that it may improve training or introduce new, safer, more effective practices. Consistent with all this and with the format of the NYPD individual shooting reports, the RAND study found the 90-day reports “long on facts... and relatively short on analysis.”

19. The Sean Bell shooting and the NYCLU’s analysis of the annual statistical reports prompted considerable press attention to NYPD shooting practices and highlighted the need for more complete public disclosure about police shootings. In December 2007 the *New York Times* published a detailed examination of the high percentage of instances in which NYPD officers failed to hit their intended target. In May 2008 the *Times* ran a lengthy article highlighting the high number of incidents in which officers were the only ones firing, as set out in the NYCLU’s testimony before the City Council. And in August of 2008, a *Daily News* editorial criticized the NYCLU’s attempts to gain access to race data related to police shootings; the editorial expressed alarm that the NYCLU’s analysis might reduce police shootings to a racial issue and advocated full disclosure of all shooting data, in order to ensure a complete and accurate understanding of Department practices.

20. In January 2009 the City Council voted unanimously to require the NYPD to begin yearly reporting of detailed statistics about NYPD shootings, including the race, gender and age of civilians shot; a breakdown of shooting incidents by precinct and by borough; and the particulars of any intentional shooting, including the reasons officers fired their weapons; and the type of weapon, if any, the civilian shooting target was

carrying. The law does not address, however, any reporting about the facts of specific shooting incidents, which is the information at issue in the NYCLU FOIL request that prompted this lawsuit.

21. The information thus far released to the public paints a troubling, but vastly incomplete picture of the NYPD shootings. As the Council recognized in January of this year, public release of information about police shootings is of paramount importance. Indeed, the NYPD itself previously recognized this, as it used to make available its annual statistical reports, and in the late-1980s it released 90-day reports and other documents related to individual shootings to at least one FOIL petitioner. It has only been in recent years that the department has tried to shut off public access to information about police shootings.

22. The NYPD's complete denial of the NYCLU's request violates the Freedom of Information Law. Having exhausted its administrative appeals, the NYCLU now seeks an order from this Court, pursuant to Article 78 of the New York Civil Practice Law and Rules, directing the NYPD to produce the records the NYCLU requests. The NYCLU also seeks attorneys' fees and any additional relief the Court deems appropriate.

### **VENUE**

23. Pursuant to C.P.L.R. §§ 7804(b) and 506(b), venue in this proceeding lies in New York County, in the judicial district in which Respondents took the action challenged here and where the offices of Respondents are located.



## PARTIES

24. Petitioner New York Civil Liberties Union is a not-for-profit corporation that defends civil rights and civil liberties in New York.

25. Respondent New York City Police Department is a law-enforcement agency administered under New York Administrative Code, Title 14. The NYPD is a public agency subject to the requirements of the Freedom of Information Law, New York Public Officers Law § 84 et seq.

26. Respondent Raymond Kelly is a public officer who is named in his official capacity as the Commissioner of the NYPD.

## PROCEDURAL HISTORY

27. On January 27, 2009, the NYCLU submitted a FOIL request to the NYPD requesting the following records related to NYPD shooting incidents, redacted to exclude all information exempt from disclosure:

- 1) For each incident since January 1, 1997 in which an NYPD officer intentionally fired at a civilian (regardless of whether the civilian was struck or not), a copy of each individual firearms discharge report prepared about the incident (referred to here as 90-day reports).
- 2) For each incident since January 1, 1997 in which an NYPD officer intentionally fired at a civilian (regardless of whether the civilian was struck or not), a copy of the memorandum, which the NYPD refers to as a "49" prepared immediately after the incident (referred to here as 24-hour reports).
- 3) Copies of all NYPD documents describing, summarizing, addressing, or analyzing the role of race in NYPD shooting incidents since January 1, 1990.

28. By letter dated, January 30, 2009, the NYPD responded, stating that a search for the requested records was ongoing and that the Department expected to reach a determination by April 27, 2009.

29. By letter dated May 27, 2009, the NYPD denied the NYCLU's request in its entirety for three stated reasons: the requested records, in part, "duplicate[d] the NYCLU's FOIL request dated October 22, 2007;" the requested documents were exempt pursuant to New York Civil Rights Law § 50-a(1) and New York Public Officers' Law § 87(2)(a), (b), (e)(i)-(iv), (f), (g), and 89(2); and, the NYCLU's request for copies of documents describing, summarizing, addressing, or analyzing the role of race "fail[ed] to define or suggest a path that RAO can follow in seeking to identify responsive records."

30. On June 25, 2009, the NYCLU appealed every aspect of the NYPD's denial. In its appeal, the NYCLU noted that, "... even if some of the material may be withheld under a valid FOIL exemption, the Department cannot withhold the documents in their entirety," and suggested that any exempt information be redacted.

31. By letter dated July 14, 2009, the NYPD denied the NYCLU's appeal. The NYPD repeated the substantive bases offered in its original denial.

32. No previous application has been made for any relief sought herein.

**CAUSE OF ACTION: ARTICLE 78 REVIEW OF  
WRONGFUL DENIAL OF FOIL REQUEST**

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

34. Petitioner NYCLU's request for 24-hour and 90-day records prepared following each police shooting is not duplicative of a prior request for race information and must be given full consideration by Respondents and this Court.

35. Petitioner has a clear right to the information contained within the 24-hour and 90-day reports. The NYPD has waived any right to withhold these records because it has previously released them. Furthermore, the reports are not subject to a blanket exemption from disclosure under any FOIL exemption claimed by the NYPD. Any exempt information may be redacted before disclosure.

36. Petitioner NYCLU's request for documents describing, summarizing, addressing, or analyzing the role of race in NYPD shooting incidents was reasonably described. Respondents failed to establish that the request was insufficient to locate responsive records and failed to carry out requirements articulated by the Committee on Open Government to assist Petitioners in identifying records sought.

37. Respondents have not produced the information sought by the petitioner. Respondents' obligation under FOIL to disclose the requested documents is mandatory, not discretionary.

38. Petitioner NYCLU has exhausted its administrative remedies, and the NYPD has denied both its initial request and subsequent appeal. Petitioner has no other remedy at law.

**REQUESTED RELIEF**

WHEREFORE, Petitioner seeks judgment:

- (1) Pursuant to C.P.L.R. § 7806, directing Respondents to comply with their duty under FOIL and provide the information sought by Petitioner in its January 27, 2009 request;
- (2) Awarding attorneys' fees and reasonable litigation costs as allowed under New York Public Officers Law § 89; and
- (3) Granting such other and further relief as the Court deems just and proper.

Respectfully Submitted,



CHRISTOPHER DUNN

ALYSSA BELL\*

MINDY FRIEDMAN\*

RACHEL PRESA\*

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Foundation

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(212) 607-3300

/ Dated: New York, NY  
November 11, 2009

\*Students enrolled in the Civil Rights Clinic of the New York University School of Law and authorized to practice law under an Appellate Division Student Practice Order.

VERIFICATION

STATE OF NEW YORK    )

                                  ) ss:

COUNTY OF NEW YORK    )

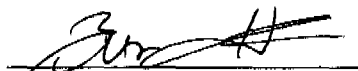
Christopher Dunn, an attorney admitted to practice in the State of New York, affirms pursuant to C.P.L.R. § 2106 under the penalties of perjury:

- (1) I am the attorney for and an employee of 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) The statements in the Verified Petition are true to my own knowledge, or upon information and belief. As to those statements that are based upon information and belief, I believe those statements to be true.

  
CHRISTOPHER DUNN

Dated:     New York, NY  
           November 11, 2009

Sworn and subscribed to me  
this 11<sup>th</sup> day of November 2009

  
NOTARY PUBLIC  
BETH HAROULES  
Notary Public, State of New York  
NO: 02HA4890292  
Qualified in New York County  
Commission Expires March 30, 2011