

SCANNED ON 12/23/2009
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JOAN A. MADDEN

PRESENT: _____ J.S.C. _____

PART 11

Index Number : 110557/2008
NY CIVIL LIBERTIES UNION
VS.
NYC POLICE DEPT.
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ *Article 78 proceeding* is determined in accordance with the annexed decision, order and judgment.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: December 15, 2009



HON. JOAN A. MADDEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
In the Matter of NEW YORK CIVIL LIBERTIES
UNION,

INDEX NO. 110557/08

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
JOAN A. MADDEN, J.:

In this Article 78 proceeding, petitioner New York Civil Liberties Union (“NYCLU”) seeks an order directing respondents New York City Police Department and Raymond Kelly, in his official capacity as Commissioner of the New York City Police Department (collectively, the “NYPD”) to respond to its October 22, 2007 Freedom of Information Law (“FOIL”) request for “documents identifying the race of all persons shot by police officers either in ‘gunfights’ or ‘other shootings vs. subjects’ (as those terms are used in the Firearms Discharge Report) for the last ten years (since January 1, 1997). It is not disputed that after the commencement of this proceeding, the NYPD agreed to provide petitioner with data as to the race of persons shot and struck by NYPD officers between 1997 and 2006, and the parties executed a stipulation to that effect on December 17, 2008. On January 16, 2009, the NYPD produced tables listing such

information, which was compiled from the individual firearms discharge reports that the NYPD prepares after individual shooting incidents. For some time thereafter, the parties were engaged in discussions as to whether the NYPD would produce information about the race of persons shot at, but not struck by NYPD officers between 1997 and 2006. When the parties could not reach an agreement as to that issue, the NYPD filed its answer to the petition, and that is the only issue remaining for this court's determination.

The policy underlying freedom of information laws is that all government agency records are presumptively available for public inspection and copying, notwithstanding the status, need, good faith or purpose of the person requesting the records, unless the agency can demonstrate that the documents in question fall squarely within one of the enumerated exemptions. See Matter of Gould v. New York City Police Department, 89 NY2d 267, 274-275 (1996); Matter of M. Farbman & Sons, Inc. v. New York City Health & Hospitals Corp., 62 NY2d 75, 79-80 (1984); Matter of City of Newark v. Law Department of the City of New York, 305 AD2d 28 (1st Dept 2003).

Here, respondent fails to provide adequate justification for not producing information as to the race of persons shot at, but not struck by NYPD officers. As noted above, petitioner requested "documents identifying the race of all persons shot by police officers in 'gunfights' or 'other shootings vs. subjects' (as those terms are used in the Firearms Discharge Report) for the last ten years (since January 1, 1997)." The "Glossary of Terms" in the Firearms Discharge Report defines "gunfight" as "[a]ny incident during which both the subject and officers fired their weapons; and exchange of gunfire," and "other shooting vs. subjects" as "[a]ny incident in which officers fired weapons in defense of themselves or others at subjects who did not return fire."

Based on these definitions, the court rejects respondents' argument that petitioner's FOIL request is limited to persons actually struck and wounded or killed by a NYPD officer. Respondents' argument that "historically" this information has applied to persons shot by the police is insufficient to warrant a different result.

Respondents' reliance on the doctrine of exhaustion of administrative remedies is misplaced. Petitioner's separate and subsequent FOIL request is not limited to information about race, but seeks copies of the 24-hour and 90-day firearms incident reports. Moreover, any issue as to whether petitioner exhausted its administrative remedies is now moot. While the instant proceeding was *sub judice*, the NYPD denied petitioner's subsequent FOIL request, and petitioner commenced a separate Article 78 proceeding in this court challenging that denial (In the Matter of New York Civil Liberties Union v. New York City Police Department, Index No. 115928/09 [Supreme Court, New York County]).

Finally, by agreeing to provide and providing petitioner with data compiled from the firearms incident reports about the race of persons shot and struck, respondents have waived their right to claim a FOIL exemption with respect to information contained in the identical reports about the race of persons shot and not struck. In any event, respondents have not met their burden of establishing that the information petitioner seeks falls within any of the statutory exemptions.

Accordingly, it is hereby

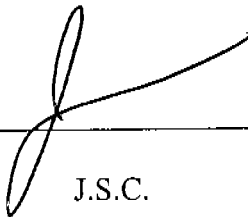
ORDERED AND ADJUDGED that the petition is granted and respondents are directed to produce information identifying the race of persons shot at and not struck by NYPD officers

between 1997 and 2006, either in the form of individual reports with all information redacted except the race of the civilian targets, or as the NYPD has already done and if it so chooses, in the form of tables.

This constitutes the decision, order and judgment of the court.

DATED: December 15, 2009

ENTER:



J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).