

**Matter of New York Civ. Liberties Union v New York  
City Police Dept.**

2011 NY Slip Op 30380(U)

February 14, 2011

Supreme Court, New York County

Docket Number: 115928/09

Judge: Emily Jane Goodman

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

PRESENT: **EMILY JANE GOODMAN**

PART 17

Index Number : 115928/2009  
NEW YORK CIVIL LIBERTIES  
vs  
NYC POLICE DEPT.  
Sequence Number : 001  
ARTICLE 78

EX NO. \_\_\_\_\_  
FILING DATE \_\_\_\_\_  
SECTION NO. \_\_\_\_\_  
SECTION CAL. NO. \_\_\_\_\_  
Motion for/for \_\_\_\_\_

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

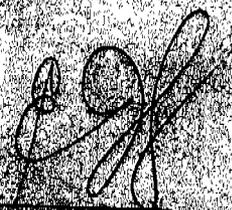
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Cross Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *partially*  
*denied as to the remainder*

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

Dated: 2/14/11



Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 17

-----X

In the Matter of NEW YORK CIVIL LIBERTIES UNION,

INDEX NO.  
115928/09

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

EMILY JANE GOODMAN, J.:

In this article 78 proceeding, petitioner, the 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, NYPD), to produce individual copies of shooting incident reports prepared within 24 hours of a shooting incident (hereinafter referred to as the 24-hour firearms discharge incident reports) and individual copies of shooting incident reports prepared 90 days after a shooting incident (hereinafter referred to as the 90-day firearms discharge incident reports), made since January 1997, with appropriate redaction, pursuant to request under the state's

**UNFILED JUDGMENT**  
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Freedom of Information Law ("FOIL") (Public Officer's Law, art 6, §§ 84-90). It also seeks an order directing the NYPD to produce any documents describing or analyzing the role of race in NYPD shootings since 1990. The respondents oppose the petition as lacking merit. For the reasons set forth below, the petition is granted in part.

### **Background**

The petitioner alleges that on October 22, 2007, as part of a concerted effort to gain access to information about the "NYPD's use of deadly force against civilians" (Affirmation in Support of Verified Petition of Christopher Dunn dated November 10, 2009 at ¶ 9), the NYCLU made a FOIL request for copies of "documents identifying the race of all persons shot by police officers either in 'gunfights' or 'other shooting incidents' (as those terms are used in the Firearms discharge Report for the last ten years (since January 1, 1997)" (Letter to Raymond Kelly from Christopher Dunn and Donna Lieberman [October 22, 2007] (Exhibit C to Dunn Aff) which request was denied. After the commencement of an Article 78 proceeding, the NYPD agreed to provide disclosure limited to providing "tables listing" information regarding the race of persons only "actually struck" "compiled from the individual firearms discharge reports" (see, *New York Civil Liberties Union v New York Police Department*, Index Number 110557/08 (December 15, 2009 J. Madden). There,

Justice Madden determined that the NYCLU was also entitled to "data compiled from the firearms incident reports about the race of persons shot and not struck" since, by agreeing to provide the information regarding civilians shot and struck, the NYPD "waived their right to claim a FOIL exemption" with respect to the other information contained in the identical reports and, in any event, have not demonstrated that the information sought is statutorily exempt ((*New York Civil Liberties Union v New York Police Department*, Index Number 110557/08 (December 15, 2009 J. Madden)).

Justice Madden's decision was unanimously affirmed on appeal (*New York Civil Liberties Union v New York City Police Department*, 74 AD3d 632 [1<sup>st</sup> Dept 2010]), wherein the Court stated in pertinent part that:

[b]y already having voluntarily and deliberately disclosed one category of information relating to a person shot, respondents affirmatively waived their right to claim FOIL exemptions in the requested data (citation omitted). Even were we to find that there was no waiver, **the record nonetheless demonstrates that the reports can be redacted to adequately protect their confidential nature** (citations omitted) [emphasis added].

In 2008 the RAND corporation prepared an evaluation and analysis of the NYPD firearms training and firearms review process at the NYPD's request (RAND Report) and in the course of RAND's investigation, the NYPD provided RAND with copies of various NYPD shooting reports prepared between 2004 and 2006, including the 24-hour firearms discharge incident reports and the

90-day firearms discharge incident reports (RAND Report at 43, Ex F to Dunn Aff). The RAND Report noted that the NYPD has no procedure for identifying lessons learned in the review process, so that it may improve training or introduce new, safer and more effective practices (*id.* at 46).

In January 2009 the City Council voted unanimously to require the NYPD to begin yearly reporting of detailed statistics about the NYPD shootings, including race, gender and age (Local law No. 1 [2009]).

On January 27, 2009, in an effort to obtain a more detailed analysis of the facts of specific shooting incidents, NYCLU submitted the instant FOIL request at issue herein to the NYPD (see letter to Raymond Kelly from Christopher Dunn and Donna Lieberman (Ex K to Dunn Aff) which sought:

- (1) For each incident since January 1, 1997 in which a police 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 herein as FOIL paragraph one)
- (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 "49" prepared immediately after the incident (referred to herein as FOIL paragraph two)
- (3) [c]opies of all NYPD documents describing summarizing, addressing, or analyzing the role of race in NYPD shooting incidents at anytime since January 1, 1990.

The FOIL request specifically excluded any "private

information exempt from disclosure" which they "assume[d]" would be "redact[ed]" .

On May 27, 2009 the NYPD denied the instant FOIL request for four stated reasons:

(1) "to the extent" the request sought "NYPD forms denominated Firearms Discharge/Assault Report (PD424-151)" which are forms completed by the officer involved in an intentional shooting incident, the request is denied because the reports are exempt from disclosure pursuant to (1) Public Officers Law § 87 (2) (a), New York Civil Rights Law 50-a(1); (2) Public Officers Law §§ 87 (2) (b) and 89 (2); § 87 (2) (e) (i-iv) ; Public Officers Law § 87 (2) (f) and Public Officers Law § 87 (2) (g);

(2) the request is "duplicative" of the October 22, 2007 FOIL request which was the subject of J Madden's decision

(3) the documents sought are exempt from disclosure pursuant to (1) Public Officers Law § 87 (2) (a), New York Civil Rights Law 50-a(1); (2) Public Officers Law §§ 87 (2) (b) and 89 (2); § 87 (2) (e) (i-iv) ; Public Officers Law § 87 (2) (f) and Public Officers Law § 87 (2) (g); and

(4) the NYPD is not sure of how to locate "responsive records" to the request for "any" documents "describing or analyzing the role of race in NYPD shootings" (see May 27, 2009 Letter to Christopher Dunn from Sergeant James Russo, Ex M to Dunn Affirmation dated November 10, 2009).

The NYCLU's subsequent administrative appeal of this decision was denied for the same reasons expressed in the earlier denial, despite the NYCLU's specific request that all exempt information be redacted (see July 14, 2009 Letter to Christopher Dunn from NYPD Record Access Appeals Officer Jonathan David).

Thereafter, this Article 78 proceeding ensued to appeal the complete denial of the documents sought. The 24-hour and 90-day firearms discharge incident reports are form documents created to "assess the propriety of firearms discharges and gauge the need for adjustments in weapons training for officers" (see, NYPD Firearms Discharge Investigation Manual at 2 [Exhibit B to Dunn Affirmation]). Petitioner alleges that within 24 hours after a shooting incident, an investigating officer is required to record information about the encounter in a form (UF 49) including predominantly factual details about the date, time of incident, type of firearms used and a narrative of the incident. Also included in the form is "identifying information" about the officers involved, about the officers involved (including name, rank, shield, tax #, command, tour, assignment) information about the civilians (including name, address and phone number ) and the names and statements of witnesses ("identifying information") (2007 Annual Firearms Discharge Report at vi[discussing 24-hour report under heading "The Shooting Incident Report"], Ex A to Affirmation of Christopher Dunn dated November 10, 2009; NYPD

Firearms Discharge Manual at 4-9b[identifying contents of 24-hour report], Ex B to Dunn Aff).

Petitioner alleges that the officer involved in the shooting incident is also required to immediately, personally fill out a form referred to as an "FDAR", but that report is not sought.

Within 90 days of the shooting incident, a commanding officer is required to use the same form to give a more detailed investigative account including detective bureau case files, results of ballistics and other forensic results, the date the officer last attended the shooting range, the medical examiner's report that was not available immediately after the incident (see, 2007 Firearms Discharge Report at vi [discussing 90-day report under heading "The Final Report"], Ex A to Dunn Aff; Bernard D Rostker et al., Evaluation of the NYPD Firearm Training and Firearm Discharge Review Process [RAND Report] at 46 [2008]. Also included at the end of the form, is a recommendation section concerning whether the shooting was justified or whether a less lethal option was available ("recommendations") [id.].

The NYCLU alleges that they have not sought certain NYPD reports made months after a shooting incident, which specifically evaluate the incident to assess the imposition discipline (see, 2007 Firearms Discharge Report at vii).

The respondent filed a verified answer and memorandum of law in opposition to the petition based upon the arguments that the

petition seeks documents:

- (1) not initially sought in the FOIL request served on NYPD;
- (2) were the subject of the October 22, 2007 FOIL request and were denied in Justice Madden's decision;
- (3) are completely exempt from disclosure because the confidential information contained therein is too intertwined with non-confidential information; and
- (4) that the request "for documents describing or analyzing the role of race" is too broad a records request to research.

Respondent later filed an Affidavit of Helen Mcaleer, Commanding Officer of Investigation Review for NYPD dated August 23, 2010, in further support of the above arguments.

#### **Discussion**

Respondent's reliance on the doctrine of exhaustion of remedies is misplaced. Clearly, the instant FOIL request seeks both the 24-hour (see FOIL paragraph two) and 90-day firearms discharge incident reports (see FOIL paragraph one). While the NYPD is correct that the NYCLU did not specifically "identify" and designate (NYPD FOIL Appeal Denial at 2) the 90-day firearms discharge incident report, by seeking a "copy of the individual firearms discharge report prepared" when "an NYPD officer intentionally fire[s] at a civilian" the NYCLU sufficiently "reasonably describe[d]" the documents it sought (*Konigsberg v Coughlin*, 68 NY2d 245 [1986]), thereby enabling the agency to

identify and locate responsive records (*id.* at 250; *Farbman & Sons v New York City Health & Hospitals Corp.*, 62 NY2d 75, 81 [1984]). In fact, NYPD expressly acknowledged its understanding that the NYCLU sought other shooting reports, by denying the FOIL "to the extent" it sought "FDARs" and later again in its subsequent appeal denial (see Letter from Sgt James Russo to Christopher Dunn [May 27, 2009] (Ex M to Aff of Christopher Dunn [November 10, 2009]); Letter from Jonathan David to Christopher Dunn (July 14, 2009) (Ex O to Dunn Aff)).

Nor is petitioner barred from bringing the petition based upon the principle of *res judicata*. The issue before Justice Madden was limited to information sought about "the race of persons shot by police officers" for the "last ten years" and she already determined that the instant FOIL request was "separate and subsequent" request (which was made during the pendency of the proceeding before her) as it was "not limited to information about race, but seeks copies of the 24-hour and 90-day firearms incident reports" (*New York Civil Liberties Union v New York Police Department*, *supra*). The FOIL request here also seeks "[c]opies of all NYPD documents describing summarizing, addressing, or analyzing the role of race in NYPD shooting incidents at anytime since January 1, 1990" but the Court need not address whether that request would be barred by *res judicata* because the petition is denied as to that request (discussed

infra). The case cited by the NYPD, *Matter of Mays v New York Police Department*, 48 AD3d 372 [1st Dept 2008]), does not compel a different result. In that case, the Court found that petitioner made a FOIL request to the NYPD "essentially seeking all documents related to the same indictment" whereas here, Justice Madden has already decided that the requests are "separate." Moreover, contrary to the NYPD's argument, Justice Madden did not determine "that the original request encompassed the request at issue here, and decreed that Respondents would have to provide the information on race or heavily redact the very documents that Petitioner seeks here" (Respondents' Memorandum of Law at 27). She, in fact, determined the opposite--that the requests were "separate" and this finding, even if not the subject of the appeal, is controlling as law of the case. Further, as *Matter of Mays* notes, the principle that "claims that could have been raised in the prior litigation" should not be raised in a subsequent litigation, stems from the concept that "a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again (*Matter of Mays* at 373 [internal citations omitted]). As Justice Madden declined to address the FOIL request before this Court, because this proceeding had already been commenced, the NYPD has not demonstrated that (1) any claims which could have been raised, were not raised, and (2) that the parties had a full and fair

opportunity to litigate the issues.

Regarding the substance of NYPD's arguments, whether the NYPD's complete refusal to disclose the 24-hour and 90-day firearms discharge incident reports was arbitrary and capricious, must be viewed in light of the fact that the burden of proving that the requested material is exempt from disclosure falls on the agency seeking to withhold that material (*see, Matter of Capital Newspapers Div. v Burns*, 67 NY2d 562 [1986]).

All government documents, including police records, are presumptively available for "public inspection and copying," and an agency, here NYPD, carries the burden of demonstrating that an exemption applies to a FOIL request (*Matter of Data Tree LLC v Romaine*, 9 NY3d 454 [2007]; *Matter of Gould v New York City Police Dept.*, 89NY2d 267, 274 [1996], citing Public Officers Law § 84 [legislative declaration]; *New York Civil Liberties Union v New York City Police Dept.*, *supra*, 74 AD3d 632). In order to deny disclosure, the NYPD must show that the requested information "falls squarely within a FOIL exemption" by articulating a "particularized and specific justification" for denying access (*Matter of Capital Newspapers Div. Of Hearst Corp. v City of Albany*, 15 NY3d 759 [2010]; POL § 87[2]; *Matter of Data Tree*, 9 NY3d at 462). If the agency fails to prove that an exemption applies, an agency "shall" release records (Public Officers Law §87[2]), in order to promote "open government" and "public

accountability" (*Matter of Gould*, 89 NY2d at 274-275). Even if the NYPD is able to establish that some material in the requested records is exempt, it does not follow that the document is entirely exempt from disclosure. The NYPD may limit its disclosure to its records or "portions thereof." (Public Officers Law §87[2]); *New York Civil Liberties Union v New York City Police Dept*, supra, 74 AD3d 632.

Because the purpose of FOIL is to ensure that the public has "maximum access to government documents," "[b]lanket exemptions" are considered "inimical to FOIL's policy of open government" (*Matter of Gould*, 89 NY2d at 275). If it is not clear whether the information sought to be withheld falls squarely within a statutory exemption, the court can conduct an in camera inspection of the representative documents if necessary, and order the disclosure of all non-exempt material appropriately redacted (*id.*).

The NYPD seeks to invoke a variety of statutory exemptions to withhold disclosure of the 24-hour and 90-day individual firearms discharge incident reports in their entirety, arguing that complete denial is warranted [1] under sections 87(2)(b) and 89(2) of the privacy exemption, because "disclosure" [of personal and confidential information in the reports] "would constitute an unwarranted invasion of privacy" (Respondent's Memorandum at 19); [2] under section 87(2)(e) the law enforcement exemption because

"disclosure of records compiled for law enforcement purposes would reveal non-routine criminal investigative techniques and procedures" or "deprive parties of the right to a just adjudication" or "interfere with judicial proceedings and law enforcement investigations" (*id.* at 19-20); [3] under section 87 (2) (f) the public safety exemption because "civilian witnesses would be discouraged from future cooperation" and witnesses will be afraid to make statements that could contradict the prevailing view of the incident, and could face humiliation; [4] under 87(g) the intra-agency exemption because any factual data in the shooting reports is "too closely intertwined with assessments, evaluations, and recommendations so as to be susceptible to disclosure in redacted form" (*id.* at 21-22) and [5] under Civil Rights Law 50-a because the reports contain confidential "information about officers' prior firearms discharges, if any, and disciplinary record, descriptions of disciplinary actions taken or proposed to be taken; [and] initial assessments of whether any New York State laws have been broken ... " and thus, have a "realistic and substantial potential to be used in an abusive manner" (Respondents Memorandum at 17).

The issue is whether the 24-hour and 90-day firearms discharge incident reports are categorically exempt from disclosure under FOIL. After a careful review of the NYPD Firearms Discharge Manual containing the 28 section form for the

24-hour and 90-day firearms discharge incident report, the Court finds that these reports are not categorically exempt.

What is apparent from the NYPD's arguments, is its failure to meet its burden to "narrowly construe" the exemptions, and establish that the documents fall "squarely within the ambit of one of the exemptions" (*Matter of Gould*, 89 NY2d at 275), since blanket exemptions for particular types of documents are "inimical to Foil's policy of open government" (*id.*). Especially where, as here, the documents undisputedly contain both confidential and non-confidential information, the agency, consistent with its obligation under FOIL, must consider the possibility of turning over the documents with a redaction of certain confidential information (*Data Tree LLC v Romaine*, 9 NY3d 454, 464 [2007]; *Matter of Gould*, 89 NY2d at 275, ordering disclosure of NYPD complaint follow-up reports with opinions and analysis subject to the intra-agency exemption redacted); *Matter of Daily Gazette Co. v City of Schenectady*, 93 NY2d 145, 159 [1999], explaining that, for officer disciplinary reports, "disclosure for uses that would not undermine the protective legislative objectives [of personnel records exemption] could be attained ... through redaction by the agency having custody of the records"; *Johnson v New York City Police Dep't*, 257 AD2d 343,349 [1st Dept 1999]), holding that disclosure of unredacted follow up reports could pose a threat to safety, but rejecting

the NYPD's claim of a blanket exemption and instead ordering disclosure of the records with names and identifying information redacted; *New York Times Co v City of New York Fire Dept*, 4 NY3d 477, 486, [2005], directing the release of call tapes and transcripts of 911 calls from September 11, 2001 with portions revealing intimate moments of terror redacted to avoid violation of privacy under section 87(2)(b); *Fink v Lefkowitz*, 47 NY2d at 567, 572 [1979], ordering disclosure of a manual created to instruct investigators regarding nursing home fraud, with specialized techniques subject to law enforcement exemption redacted).

The NYPD argues that the reports were properly withheld under the intra-agency exemption, which provides that an "agency may deny access to records or portions thereof that: ... are inter-agency or inter-agency materials which are not: i. Statistical or factual tabulations or data; ii. instructions to staff that affect the public; iii. final agency policy or determinations; or iv. external audits" (Public Officers Law § 87 [2] [g]).

Petitioner correctly contends that because the firearms discharge incident reports contain primarily "factual data", and the exemption does not "justify" complete non-disclosure. "Factual data ... simply means objective information, in contrast to opinions, ideas or advice exchanged as part of the consultative or deliberative process of government decision

making" (*Gould supra*, at 277) (internal citations omitted). The Court finds that the 24-hour and 90-day firearms discharge incident reports contain substantial "factual data" (27 out of 28 sections are factual) such as : (section one) the time, date, location, command, who was injured, extent of injuries, perpetrator; (section two) the person(s) who investigated the incident; (section three) other persons involved including rank and shield ;(section four) a narrative account of the accident; (section five) detectives involved; (section six) borough investigations team members; (section seven) if district attorney was notified; (section eight) indicate if statements were taken from subject; (section nine) indicate that statement was taken from police witnesses; (section ten) indicate civilian subjects interviewed and whether statements are supportive, and if not, provide a summary of the statement(s); (section eleven) indicate civilian witnesses interviewed and whether statements are supportive, and if not, provide a summary of the statement(s); (section twelve) the identity and criminal history of perpetrator; (section thirteen) describe officer-e.g., whether bullet proof vest worn, plain clothes etc.,; (section fourteen) police officer firearm information; (section fifteen) police officer historical data-awards, disciplinary records; (section sixteen) crime scene unit that responded information; (section seventeen) emergency unit that responded information; (section

eighteen) ballistics; (section nineteen) trauma unit involvement; (section twenty) if police officer was directed to a borough assignment; (section twenty one) indicate if community affairs survey taken; (section twenty two) list types of reports prepared; (section twenty three) list extent of injuries and other medical information; (twenty four) radio dispatch recorded; (twenty five) miscellaneous; (twenty six) who was present; (twenty seven) who was notified; (twenty eight) recommendation-not factual (see 2007 Firearms Discharge Report at vi, [discussing 24-hour report under heading "The Shooting Incident Report"], Ex A to Affirmation of Christopher Dunn dated November 10, 2009; NYPD Firearms Discharge Manual at 4-9b[identifying contents of 24-hour report), Ex B to Dunn Aff).

The NYPD's reliance upon *Matter of Newsday, Inc v NYPD*, 133 AD2d 4 [1<sup>st</sup> Dept 1987], decided nine years before *Gould*, for the proposition that the recommendation section is "too closely intertwined with the facts to be susceptible to disclosure in redacted form" (Respondent's Memorandum at 19-22), is misplaced since the recommendation section twenty eight, is separable from facts (see, NYPD Firearms Discharge Investigation Manual at 40), and can be easily identified and isolated (*Gould v New York City Police Dept*, 89 NY2d at 275), and thus, redaction presents no practical difficulty.

Also, to the extent disclosure of private information

implicates a "privacy interest" pursuant to NY Pub Off Law § 87 (2) (b) and 89(2) [c] [I], because the documents requested contain certain personal identifying information, petitioner has no objection to the use of limited redaction of identifying personal information, including the home address, home and other numbers, social security number, date of birth, which could "adequately protect the individual officers", civilians and witnesses (*Matter of Data Tree*, 9 NY3d at 464 ); *Matter of New York Times Co., v City New York Fire Dept*, 4 NY3d at 486, directing release of call tapes and transcripts of 911 calls from September 11, 2001 with portions revealing intimate moments of terror redacted to avoid violation of privacy under section 87[2] [b]).

Similarly, to the extent "civilian witnesses would be discouraged from future cooperation" with the police, creating a threat to witness safety, implicating the public safety exemption, pursuant to section 87(2) (f), (see Respondent's Memorandum at 20), the proper remedy is to disclose the records and redact the exempt witness identifying information (*Matter of Johnson v New York City Police Dept*, 257 AD2d 343 [1<sup>st</sup> Dept 1999]), the NYPD's attempt to apply the exemption to all information imparted by all witnesses is "overly broad" (*id.*).

Also, Civil Rights Law § 50-a provides that, personnel records of a police officer "used to evaluate performance toward continued employment or promotion" are "considered confidential

and not subject to inspection or review without the express written consent of such police officer ... except as may be mandated by lawful court order". To the extent that the "recommendation section" and identifying information sections contain "personal, employment-related information" about an officer (*Matter of Prisoners' Legal Servs of New York v New York State Dept of Correctional Servs.*, 73 NY2d 26, 31 [1998]), that could be "used to evaluate [his] performance" (Civil Rights Law 50-a), implicating the personnel exemption, the 24-hour and 90-day firearms discharge incident reports could still be released with appropriate redaction, narrowly "tailored ... so as to preclude use in personal attacks against an officer" in the context of a litigation (*Matter of Daily Gazette Co. v City of Schenectady*, 93 NY2d 145, 159 [1999]); cf *Matter of Capital Newspapers Div of Hearst Corp. v Albany*, 15 NY3d 759, *supra*, finding that gun tags were not exempt "personnel records" and were subject to disclosure without redaction.

NYPD failed to meet its burden of demonstrating that the "reports are compiled for law enforcement purposes" implicating section 87(2)(e) law enforcement exemption (see Petitioner's Memorandum at 19-20) since the NYPD did not establish that disclosure "would reveal non-routine criminal investigative techniques or procedures" that would "deprive parties of the right to a just adjudication", (see generally, *Matter of*

*Washington Post Co. v New York State Ins. Dep't*, 61 NY2d 557), and, in any event, are in conflict with the record that demonstrates that the purpose of the reports is not law enforcement but to facilitate administrative review to "assess the propriety of firearms discharges and gauge the need for adjustments in weapons training for officers" (NYPD Firearms Discharge Investigation Manual at 2, Ex B to Dunn Aff).

Furthermore, NYPD has failed to meet its burden to explain why NYCLU should be denied access to the same information that has already been shared with the RAND Corporation.

In conclusion, with proper redaction of the above-mentioned identifying personal information concerning officers who shot civilians, individuals shot, and witnesses involved and the section concerning recommendations, the firearms discharge incident reports are clearly subject to FOIL disclosure.

Finally, by stating that the NYCLU's request for all NYPD documents "describing, summarizing, addressing or analyzing the role of race in NYPD shooting incidents since January 1, 1990" was too general "to define or suggest a path that RAO can follow in seeking to identify responsive records" in that the search would require a random search of every bureau and precinct (see, NYPD FOIL Appeal Denial at 2), the NYPD met its burden in establishing that the request is insufficient and requires a clarification (Cf, *Konigsberg v Coughlin*, 68 NY 2d 245, 249

[1986], finding insufficient the Department of Corrections' "naked allegation that the request would require review of thousands of records"); *Farbman & Sons v New York City Health & Hospitals Corp.*, 62 NY2d 75 [1984].

NYCLU's request for attorneys fees and costs pursuant to Pub Off Law § 89 (4) is severed and held in abeyance pending further briefs regarding whether NYCLU has "substantially prevailed" in this proceeding, which should be submitted to the Court within 60 days.

Accordingly, it is

ADJUDGED that the petition is hereby granted to the extent that, within 60 days of service of a copy of this order with notice of entry, the NYPD shall furnish NYCLU with a copy of the requested 24-hour and 90-day firearms discharge incident reports, with redaction of identifying information and recommendations; it if further

ADJUDGED that the petition is denied to the extent that NYCLU seeks documents describing summarizing, addressing, or analyzing the role of race in NYPD shooting incidents at anytime since January 1, 1990, with leave to serve a FOIL request which clarify this request; it is further

ORDERED that portion of the request seeking attorney fees is hereby severed and held in abeyance pending further briefs regarding whether NYCLU has "substantially prevailed" in this

proceeding, which should be submitted to the Court within 60 days.

This constitutes the Decision, Order and Judgment of the Court.

Dated: February 14, 2011

ENTER:

  
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JSC

**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).