

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

2021 NY Slip Op 31012(U)

April 1, 2021

Supreme Court, New York County

Docket Number: 156799/2020

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

-----X

NEW YORK CIVIL LIBERTIES UNION

Plaintiff,

- v -

NEW YORK CITY POLICE DEPARTMENT,

Defendant.

-----X

INDEX NO. 156799/2020

MOTION DATE 08/26/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of the petitioner New York Civil Liberties Union (motion sequence number 001) is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of the respondent New York City Police Department (motion sequence number 001), is granted, and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent shall serve a copy of this order on all parties along with notice of entry within twenty (20) days.

In this Article 78 proceeding, the petitioner New York Civil Liberties Union (NYCLU) seeks to compel the records access officer (RAO) of the respondent New York City Police Department (NYPD) to comply with a Freedom of Information Law (FOIL) request, and the NYPD cross-moves to dismiss the petition (together, motion sequence number 001). For the following reasons, the petition is denied, the cross motion is granted, and this proceeding is dismissed.

FACTS

On January 3, 2020, the NYCLU served a FOIL request on the NYPD for:

- “1. All records regarding metal detectors in schools collected since September 2015 pursuant to the NYPD’s reporting requirements under §14-152 (e) of the New York City Administrative Code. [NYC Admin Code; and]
2. All records regarding the deployment of School Safety Agents collected since 2005 pursuant to the NYPD’s reporting requirements under §14-150 (3) of the New York City Administrative Code.”

See verified petition, ¶ 18; exhibit A. On February 14, 2020, the NYPD’s RAO issued a decision that made a partial document disclosure in response to item one of the NYCLU’s request, but denied petitioner’s request with respect to item two (the RAO’s order). *Id.*, ¶ 23; exhibit E. the NYCLU thereafter submitted an administrative appeal of the RAO’s order to the NYPD on March 13, 2020. *Id.*, ¶ 27; exhibit G. On April 27, 2020, an NYPD records access appeals officer (RAAO) issued a decision that denied the NYCLU’s administrative appeal (the RAAO’s order). *Id.*, ¶ 30; exhibit J. The RAAO’s order specifically found as follows:

“As it pertains to Item No. 1 of your request for records related to the NYPD’s reporting requirement under Administrative Code §14-152 (e); first, please note that the reporting pursuant to §14-152 is published online at the following web address:

<https://www1.nyc.gov/site/nypd/stats/reports-analysis/school-safety.page>

“As it pertains specifically to §14-152 (e), however, the appeal is denied because the information specifically pertaining to magnetometers may be withheld pursuant to §14-152 (h), which provides that “information, data, and reports required by this section shall be subject to the disclosure limitations of section 14-150 of this chapter.” Section 14-150 (c), in turn, provides that “information, data and reports . . . shall be provided to the council except where disclosure of such material could compromise the safety of the

public or police officers.” The NYPD’s position has always been, and remains, that the disclosure of this information could compromise the safety of the students.

“Accordingly, the appeal is denied to the extent that disclosure could endanger the life or safety of certain individuals [§ 87 (2) (f)]. ‘Public Officers Law § 87 (2) (f) permits an agency to deny access to records, that, if disclosed, could endanger the life or safety of any person. The agency in question need only demonstrate a possibility of endanger[ment]’ in order to invoke this exemption’ *Matter of Bellamy v New York City Police Dept.*, 87 AD3d 874, 875 (1st Dept 2011), quoting *Matter of Connolly v New York Guard*, 175 AD2d 372, 373 (3d Dept 1991)] affd 20 NY3d 1028); see *Matter of Ruberti v New York Div. of State Police*, 218 AD2d 494, 499 (3d Dept 1996).

“There is no requirement that this agency demonstrate the existence of a specific threat or intimidation; rather a showing must be made of a ‘possibility of endanger[ment]’ to invoke this exemption. *Matter of Exoneration Initiative v New York City Police Dept.*, 114 AD3d 436, 438 (1st Dept 2014); see *Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 277-278 (1996). It is this agency’s position that the disclosure of those schools that are equipped with magnetometers, are subject to random scanning, have requested the removal of magnetometers, and which have been granted those requests for removal, would provide a list of those schools which would be vulnerable to the possession of weapons that would otherwise be prevented by magnetometers.

“The information requested here falls squarely within FOIL’s statutory exemption designed to protect public safety. The life and safety exemption excludes these records from disclosure to ensure public safety, and so as not to assist malefactors in committing crimes. As the Court of Appeals warned, FOIL ‘was not enacted to furnish the safecracker with the combination to the safe.’ See *Fink*, 47 NY2d at 573.

“As it pertains to Item No. 2 of your request for records related to the NYPD’s reporting requirement under Administrative Code § 14-150 (3) regarding the number of uniformed personnel and civilian personnel assigned to each and every patrol borough and operational bureau . . . ‘for each school operated by the department of education to which school safety agents are assigned, the number of school safety agents, averaged for the quarter, assigned to each of those schools,’ the appeal is denied to the extent that disclosure of the data could endanger the life or safety of certain individuals [§ 87 (2) (f)]. For the same reasons described above, access is denied in that the disclosure of these records would reveal the total number of the officers assigned to each specific borough - information which could then be used to produce a reasonable estimate of the number of agents assigned to each of the schools within that borough, and, consequently, the scope of coverage maintained by the Department. This information would, consequently, compromise the NYPD’s ability to secure the schools and the safety of both the members of service and the students and teachers at certain schools.”

Id., exhibit J. Dissatisfied, the NYCLU commenced this Article 78 proceeding pro se on August 28, 2020. See verified petition. Rather than file an answer, the NYPD submitted a cross motion to dismiss it on October 16, 2020. See cross motion. The matter is now fully submitted (motion sequence number 001).

DISCUSSION

The Appellate Division, First Department, recently reiterated the rules that govern document requests submitted pursuant to the FOIL (Public Officers Law §§ 84-90) as follows:

“All government records are presumptively open for public inspection unless specifically exempted from disclosure as provided in the Public Officers Law.’ An agency may withhold records sought pursuant to FOIL only if it ‘articulate[s] particularized and specific justification for not disclosing requested documents.’ . . . In an article 78 proceeding, judicial review of an agency’s determination of a FOIL request is limited to whether it ‘was affected by an error of law.’”

Matter of Jewish Press, Inc. v New York City Police Dept., 190 AD3d 490, 490 (1st Dept 2021)

(internal citations omitted). Here, the NYCLU argues that the RAAO’s order violated the FOIL with respect to both items in its January 3, 2020 document request.

Before reaching the NYCLU’s arguments, the court notes that Steven Drennen (Drennen), counsel to the NYPD Commissioner, certifies that his office performed a “diligent search” for all of the magnetometer-related information in the subject FOIL request, and subsequently compiled 58 pages of responsive material that consists of: 1) operational reports dated 2015 that contained a “list of school buildings with permanent metal detectors . . . as well as a list of schools which have requested the removal of metal detectors;” 2) “an annual list showing types of weapons seized citywide as a result of metal detector scanning and hand wands;” and 3) “lists of the number of school safety agents assigned to each borough, as well as each school, on a twice a year basis since 2018,” but not from before 2018, and not including deployment statistics. *See* notice of cross motion, Drennan affirmation, ¶¶ 16-17. Drennen further attests that these 58 pages, along with the magnetometer-related information contained on the NYPD’s public website, are the only documents responsive to the NYCLU’s FOIL request, and that the NYPD does not possess any additional documents. *Id.*, ¶¶ 18-19.

Public Officers Law § 89 (3) permits the NYPD to respond to a FOIL request by “certify[ing] that it does not have possession of [a requested] record or that such record cannot be found after diligent search.” The First Department consistently holds that doing so moots the FOIL request and discharges the NYPD’s disclosure obligation, since the statute does not require the NYPD to provide records that it does not already possess or maintain. *See e.g., Matter of Stengel v Vance*, __ AD3d __, 2021 NY Slip Op. 01734, * 1 (1st Dept 2021), citing *Matter of Rattley v New York City Police Dept.*, 96 NY2d 873, 875 (2001); *see also Matter of Abdur-Rashid v New York City Police Dept.*, 31 NY3d 217 (2018); *Matter of Tarantino v New York City Police Dept.*, 136 AD3d 598 (1st Dept 2016); *Matter of Yonamine v New York City Police Dept.*, 121 AD3d 598 (1st Dept 2014). Here, Drennen has provided the statutory certification. *See* notice of cross motion, Drennan affirmation, ¶¶ 16-19. As a result, the court accepts the NYPD’s assertion that it possesses no documents responsive to the instant FOIL request apart from the information on its public website and the 58 pages of withheld documents. The issue is therefore whether the NYPD properly withheld those documents pursuant to the “public safety” exemption set forth in Public Officers Law § 87 (2) (f). The NYCLU raises four arguments that it was improper for the NYPD to do so.

The NYCLU’s first asserts that the NYPD improperly invoked the public safety exemption in a “blanket” manner to justify its refusal to disclose any of the five categories of magnetometer-related information that it is required to report by NYC Admin Code §14-152 (e).¹

¹ NYC Admin Code §14-152 (e) requires the NYPD to submit quarterly reports to the City Council that set forth four categories of information regarding school metal detectors, including: “(i) a list of school buildings with permanent metal detectors; (ii) a list of school buildings subjected to random scanning; (iii) a list of schools that have requested the removal of metal detectors; and (iv) a list of schools for which a requested removal of metal detectors has been honored.” NYC Admin Code §14-152 (e). The regulation also requires the NYPD to submit an annual report to the City Council which lists “the amounts and types of contraband seized as a

See petitioner’s mem of law at 9-12. However, this argument fails in light of the NYPD’s certification that it only possesses a limited amount of such information. As the NYPD’s cross motion makes clear, it withheld the subject 58 pages of documents on the ground that releasing the specific information contained in them would pose a danger to “public safety.” The fact that the NYPD addressed its argument to the subject documents with particularity gainsays the NYCLU’s characterization of that argument as a “blanket” rationale. Further, the NYCLU itself admits that the NYPD made a partial response regarding the first and second categories of information described in NYC Admin Code §14-152 (e), since that information is set forth in the NYPD’s public website. *See* petitioner’s mem of law at 16. Therefore, the court rejects the NYCLU’s first argument.

Next, the NYCLU argues that it “is not aware of instances where prior public disclosure of this type of information has resulted in threats to public safety.” *See* petitioner’s mem of law at 13. The NYPD responds that Public Officers Law § 87 (2) (f) only requires it to demonstrate “a possibility of endangerment” to invoke the public safety exemption from FOIL disclosure. *See* notice of cross motion, Drennan affirmation, ¶¶ 20-27. It also asserts that the 58 pages of magnetometer-related documents that it withheld contains information about the “operational capabilities of the NYPD [with respect to] . . . the size and structure of school safety operations” which “would be of enormous operational value to someone seeking to harm [a] school, its students, teachers and support staff or the residents and visitors to the City.” *Id.* The NYPD presents an affidavit from Pamela Lightsey (Lightsey), an Associate Supervisor of School Security in the NYPD’s School Safety Division, who explains that the NYPD limits public

result of metal detector scanning, disaggregated by school building . . . [which] shall include but not be limited to firearms, knives, boxcutters and laser pointers.” *Id.*

availability of a wide variety of school safety information pursuant to a “tactical principle of uncertainty” which posits that lack of ready access to such information complicates, and therefore deters, the ability of certain types of criminals to attack NYC schools; including, e.g., kidnappers, thieves, sexual predators, gangs, school shooters and/or terrorists. *Id.*; Lightsey aff., ¶¶ 1-23. Lightsey cites statistical data showing decreases in various school safety-related incidents in NYC schools as evidence that the “tactical principle of uncertainty” is an effective deterrent. *Id.* The NYCLU replies that “the NYPD fails to provide specific, persuasive evidence and relies on hypothetical “bad actors” to justify withholding responsive documents.” *See* petitioner’s reply mem at 3-6. The NYPD’s reliance on a “tactical principle of uncertainty” plainly entails some degree of speculation. Nevertheless, after reviewing the applicable case law, the court finds in the NYPD’s favor.

Last year in *Matter of Empire Ctr. for Pub. Policy v New York City Off. of Payroll Admin.* (187 AD3d 435 [1st Dept 2020]), the First Department held that the public safety exemption recognized in Public Officers Law § 87 (2) (f) justified the denial of petitioner’s FOIL request for “information . . . as to the salaries of undercover police officers, whether aggregated or individualized,” on the ground that the release of such information could “allow members of the public to estimate the increases or decreases in the overall number of undercover officers, which could ‘undermine their deterrent effect, hamper NYPD's counterterrorism operations, and increase the likelihood of another terrorist attack.’” 187 AD3d at 435-436, quoting *Matter of Grabell v New York City Police Dept.*, 139 AD3d 477, 478 (1st Dept 2016). The First Department ruled that the “possibility of endangerment” standard applied to invoke the exemption, and found that the affidavit of the NYPD’s Undercover Coordinator which opined as to how the subject information could be misused by bad actors was a sufficient evidentiary basis

to invoke the exemption. 139 AD3d at 435; *see also Matter of Asian Am. Legal Defense & Educ. Fund v New York City Police Dept.*, 125 AD3d 531 (1st Dept 2015). Here, the NYPD seeks to assert the exemption to protect the security of school safety operations, which it plainly regards as co-equal with its various undercover criminal operations, since it has created separate NYPD divisions that are entirely devoted to each of these specialized functions. The court acknowledges the seriousness that the NYPD accords to its school safety operations and is disinclined to undermine the Department's mission by granting the instant FOIL request, even if only a "possibility of endangerment" has been demonstrated today. As the Court of Appeals recently reiterated, "FOIL was not designed to assist wrongdoers in evading detection or, put another way, 'to furnish the safecracker with the combination to the safe.'" *Matter of Abdur-Rashid v New York City Police Dept.*, 31 NY3d at 226, quoting *Matter of Fink v Lefkowitz*, 47 NY2d 567, 573 (1979). Against this rationale, the NYCLU cites a portion of an unpublished 2010 decision by the Supreme Court, Albany County, which upheld a FOIL request for information about researchers engaged in certain animal experimentation over the objection that PETA-like animal rights terrorist groups might use such information to retaliate against the researchers. *Matter of Physicians Comm. for Responsible Medicine v Hogan*, 29 Misc 3d 1220 (A), 2010 NY Slip Op 51908(U) (Sup Ct, Albany County 2010). The court (Platkin, J.) based its decision on the respondent's failure to provide "a non-speculative basis for withholding" the subject information, and declined to apply the public safety exemption to FOIL disclosure solely because "because the passions of unknown terrorists or criminals might be inflamed." *Id.*, at *6. Here, in contrast, the NYPD has presented Lightsey's affidavit, which does provide a "non-speculative basis" for invoking the exemption. Therefore, the court finds that the NYCLU's cited precedent is inapposite, and rejects its "speculation" argument. Instead, the court finds that

the NYPD has demonstrated “a possibility of endangerment” to its school safety operations, which justifies its invocation of the public safety exemption set forth in Public Officers Law § 87 (2) (f). As a result, the court finds that the decision in the NYPD’s RAAO’s order to deny petitioner’s FOIL request should be upheld with respect to item one of that request.

The NYCLU’s remaining arguments relating to item one are unavailing. It argues that “the ‘public safety exemption’ is particularly inapplicable to backwards looking data, such as records detailing the items confiscated from the metal detectors or random screening.” *See* petitioner’s mem of law at 14-15. The NYCLU cites the unpublished 2019 decision by this court (Engoron, J.) in *Matter of Lancman v New York City Police Dept.* (Index No. 154329/19) which granted a FOIL request for information about subway fare-beating data, and denied the NYPD’s invocation of the public safety exemption. *See* verified petition, Coyle affirmation, exhibit 4. However, the court’s research has disclosed the more recent decision by the Supreme Court, Suffolk County (Berland, J.) that partially upheld the Suffolk County Police Department’s challenge to an NYCLU FOIL request for information about undercover operations involving suspected gang members. *See New York Civ. Liberties Union v Suffolk County Police Dept.*, 67 Misc 3d 1222(A), 2020 NY Slip Op 50608(U) (Sup Ct, Suffolk County 2020). The court specifically acknowledged that a “possibility of endangerment” to public safety could arise if criminals were able to aggregate information about past police operations in order to further their ongoing criminal activities. *Id.*, *19. The fact that the Suffolk County Police Department did not specifically invoke the “public safety” exemption to the NYCLU’s FOIL request is not dispositive. Instead, this court finds that Justice Berland’s analysis is persuasive because information about ongoing school safety operations is more similar to information about ongoing undercover anti-gang operations than it is to information about fare-beating statistics. Therefore,

the court rejects the NYCLU's argument about "backward looking data" in the context of this case.

The NYCLU also argues that "the 'public safety exemption' does not even apply because many of the requested records could be attained through simple public inspection." See petitioner's mem of law at 15-16. The NYCLU cites *Matter of Physicians Comm. for Responsible Medicine v Hogan* for the general proposition that "public availability of the information sought refutes the argument that its disclosure will cause harm." See petitioner's reply mem at 6-9; see also 29 Misc 3d 1220 (A), 2010 NY Slip Op 5190(U), *5. However, the NYCLU's assertion ignores that Justice Platkin based his decision in that case primarily on the fact that the respondent had failed to present evidence of a "a non-speculative basis for withholding" the requested information. Here, as observed, the NYPD has presented Lightsey's affirmation to provide that "non-speculative basis." Justice Platkin addressed the public availability of information about the subject animal researchers and their experiments as a secondary matter rather than as a dispositive factor, as the NYCLU appears to suggest. In this case, the fact that the NYCLU is capable of obtaining certain of the magnetometer-related information that it seeks through its own efforts is similarly not dispositive. That fact is simply insufficient to overcome the NYPD's evidence of a "possibility of endangerment" sufficient to invoke the public safety exemption set forth in Public Officers Law § 87 (2) (f). Therefore, the court rejects the NYCLU's "public availability" argument.

As a result of the foregoing, the court concludes that the portion of the RAAO's order that upheld the denial of the NYCLU's FOIL request with respect to item one in that request was not "affected by an error of law." *Matter of Jewish Press, Inc. v New York City Police Dept.*, 190 AD3d at 490. Accordingly, the court finds that so much of the NYCLU's petition as sought

to overturn said portion of the RAAO's order should be denied, and that so much of the NYPD's cross motion as sought to dismiss that part of the NYCLU's petition should be granted.

The next portion of the NYCLU's petition concerns item two in the January 3, 2020 FOIL request, which sought "[a]ll records regarding the deployment of School Safety Agents collected since 2005 pursuant to the NYPD's reporting requirements under [NYC Admin Code] §14-150 (3)." *See* verified petition, exhibit A. The NYCLU argues that the NYPD's reliance on the "public safety" exemption to deny this request is improper because item two "simply sought the average number of school safety agents at each school for the previous quarter." *See* petitioner's mem of law at 17-18. The NYCLU repeats its assertions that the NYPD imposed the public safety exemption in a "blanket" fashion to justify its denial of this request, and that its assertion that releasing the material could cause a possibility of endangerment was "speculative." *Id.* However, the court has already rejected these assertions for the reasons discussed above; i.e., that the NYPD tailored its denial to the magnetometer-related material that it discovered during its "diligent search," and that Lightsey's affirmation constitutes sufficient evidence to defeat the allegation of "speculation" and to justify the NYPD's invocation of the public safety exemption. The court has also adopted Justice Berland's finding in *New York Civ. Liberties Union v Suffolk County Police Dept.* that permitting criminals to aggregate older statistical data about certain types of police operations can give rise to a "possibility of endangerment," which the FOIL may not be used to excuse. 67 Misc 3d 1222(A), 2020 NY Slip Op 50608(U), *16-17. Therefore, the court rejects the NYCLU's arguments regarding item two in the subject FOIL request.

As a result of the foregoing, the court concludes that the portion of the RAAO's order that upheld the denial of the NYCLU's FOIL request with respect to item two in that request was not "affected by an error of law." *Matter of Jewish Press, Inc. v New York City Police Dept.*,

190 AD3d at 490. Accordingly, the court finds that so much of the NYCLU's petition as sought to overturn said portion of the RAAO's order should be denied, and that so much of the NYPD's cross motion as sought to dismiss that part of the NYCLU's petition should be granted.

The NYCLU's three remaining arguments are meritless. It first asserted that "the NYPD cannot use the NYC Administrative Code as a shield to block responsive records from disclosure." *See* petitioner's mem of law at 19-20. However, this argument is a "red herring." Although the RAAO's order mentioned Administrative Code §14-150, that decision was plainly based on Public Officers Law § 87 (2) (f), as were all of the arguments in the NYPD's cross motion. Simply put, the NYPD did not seek relief herein based on an inapplicable regulation. Therefore, the court rejects this argument.

The NYCLU also argues that "the NYPD could have produced portions of responsive records instead of withholding records in their entirety." *See* petitioner's mem of law at 20-21. However, as was previously discussed, the NYPD did provide a partial disclosure of the magnetometer-related information that is contained on its public website. Also, the NYPD did not "withhold records in their entirety," but rather only withheld those magnetometer-related documents that which it discovered during its "diligent search" which it deemed to be covered by the "public safety" exemption. Therefore, the court finds that the NYCLU's argument springs from an inaccurate characterization and rejects it.

Finally, the NYCLU argues that it is entitled to attorney's fees. *See* petitioner's mem of law at 21. However, pursuant to Public Officers Law § 89 (4) (c) (ii), attorney's fees may only be recovered when a party "substantially prevail[s]" on a FOIL request. *See e.g., Matter of Kohler-Hausmann v New York City Police Dept.*, 133 AD3d 437 (1st Dept 2015). Here, the NYCLU has not "substantially prevailed" because the court has determined that the NYPD's

decision to deny the subject FOIL request in the RAAO’s order should be upheld. therefore, the NYCLU is not entitled to attorney’s fees in this proceeding, and the court rejects its argument.

Accordingly, for the reasons discussed herein, the court concludes that the NYCLU’s Article 78 petition should be denied, and that the NYPD’s cross motion should be granted.

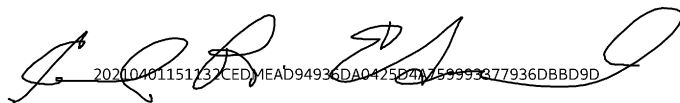
DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of the petitioner New York Civil Liberties Union (motion sequence number 001) is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of the respondent New York City Police Department (motion sequence number 001), is granted, and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent shall serve a copy of this order on all parties along with notice of entry within twenty (20) days.


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4/1/2021
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE