

**Matter of Legal Aid Socy. v New York State Dept. of
Corr. & Community Supervision**

2021 NY Slip Op 33219(U)

October 12, 2021

Supreme Court, Albany County

Docket Number: Index No. 902827-21

Judge: Richard M. Platkin

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STATE OF NEW YORK
SUPREME COURT

ALBANY COUNTY

In the Matter of the Application of

THE LEGAL AID SOCIETY, a nonprofit
corporation,

Petitioner,

DECISION & ORDER

-against-

NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY
SUPERVISION,

Respondent.

For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules.

Index No.: 902827-21

(Judge Richard M. Platkin, Presiding)

APPEARANCES:

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Hon. Richard M. Platkin, A.J.S.C.

Petitioner Legal Aid Society brings this CPLR article 78 proceeding challenging the denial of its January 21, 2021 request for records pursuant to the Freedom of Information Law (*see* Public Officers Law art 6 [“FOIL”]). Petitioner seeks an order compelling respondent New York State Department of Corrections and Community Supervision (“DOCCS”) to comply with its request for “all records reflecting the number of DOCCS employees, by facility, tested for COVID-19, and the number of DOCCS employees who tested positive for COVID-19, by facility, from October 1, 2020 to the date of DOCCS’ final determination denying access, March 5, 2021” (NYSCEF Doc No. 16 [“Amended Petition”], ¶ 1 [emphasis omitted]; *see also id.*, Whereas Clause).

The Cardozo Civil Rights Clinic moves for permission to file a brief as *amicus curiae* in support of the Amended Petition.

In lieu of answering, DOCCS moves to dismiss the Amended Petition as moot based on its August 4, 2021 production of records. Petitioner opposes DOCCS’s motion.

BACKGROUND

On January 21, 2021, petitioner requested the disclosure of “all records reflecting the number of DOCCS employees, by facility and by hub, tested for COVID-19, and the number of DOCCS employees who tested positive for COVID-19, by facility and by hub, from October 1, 2020 until the date that DOCCS renders a final determination as to this FOIL request” (NYSCEF Doc No. 17 [emphasis omitted]). Petitioner’s request “includes but is in no way limited to records produced or published on a[n] hourly, daily, weekly, monthly, or other periodic basis that

reflect the aggregate number of tests performed and positive tests returned during a given time period” (*id.*).

On February 19, 2021, DOCCS partially granted the FOIL request by disclosing hub-level data, but it denied the request for facility-level data based on Public Officers Law § 87 (2) (f), which exempts the “release of records [that] could jeopardize the life or safety of any individual” (NYSCEF Doc No. 20).

Petitioner took an administrative appeal (*see* NYSCEF Doc No. 21), which was denied on March 5, 2021 for the following reasons:

With regard to your request for facility-specific data, be advised DOCCS does not maintain comprehensive COVID-19 testing data for employees, as such testing would be administered by outside agencies not affiliated with DOCCS or employees’ personal health care providers. Additionally, this portion of your request is exempt from disclosure pursuant to Public Officers Law § 87 (2) (f), where release could endanger the life or safety of staff and incarcerated individuals, as well as institutional security within the correctional facility. The requested data consists of sensitive information related to staffing levels at each facility which, if disclosed, could be utilized to assist incarcerated individuals in an effort to circumvent security protocols. Facility-level information, due to the degree of detail, could also be used by incarcerated individuals to target perceived vulnerabilities of a particular staff members or area(s) of a correctional facility (NYSCEF Doc No. 22).

Petitioner commenced this proceeding on March 31, 2021 (*see* NYSCEF Doc No. 1) and then filed an Amended Petition on April 14, 2021 (*see* NYSCEF Doc Nos. 15-16, 28). The Amended Petition ultimately was made returnable on August 13, 2021 (*see* NYSCEF Doc No. 35).

By notice of motion dated August 6, 2021, DOCCS moves to dismiss the proceeding as moot on the ground that it provided petitioner “with a fully adequate response to its request

during the pendency of this [proceeding]” (NYSCEF Doc No. 37 [“Ranieri Aff.”], ¶¶ 8-9; *see* NYSCEF Doc No. 39 [“MOL”], pp. 2-3). DOCCS also argues that, because it had a reasonable basis for withholding the records, petitioner is not entitled to counsel fees (*see* MOL, p. 3-4).

Petitioner opposes the motion, arguing that DOCCS failed to fully comply with its FOIL request (*see* NYSCEF Doc No. 44 [“Quackenbush Aff.”], ¶¶ 4-23) and that it is entitled to an award of counsel fees and costs under Public Officers Law § 89 (4) (c) (ii) (*see id.*, ¶¶ 24-31).

DISCUSSION

“Where a petitioner receives an adequate response to a FOIL request during the pendency of [its] CPLR article 78 proceeding, the proceeding should be dismissed as moot because a determination will not affect the rights of the parties” (*Matter of DeFreitas v New York State Police Crime Lab*, 141 AD3d 1043, 1044 [3d Dept 2016] [citations omitted]; *see Matter of Associated Gen. Contrs. of N.Y. State, LLC v Dormitory Auth. of the State of N.Y.*, 173 AD3d 1523, 1525 [3d Dept 2019], *lv denied* 34 NY3d 906 [2019]).

DOCCS supports its motion with the affirmation of Michael Ranieri, an assistant counsel assigned to the agency’s FOIL unit. Ranieri avers and submits proof that “[o]n August 4, 2021, the requested information, including all records reflecting the number of DOCCS employees who tested positive for COVID-19 by facility from October 2020 through January 31, 2021 (the closest data point available to date of Petitioner’s request), was provided electronically to Petitioner” (Ranieri Aff., ¶ 8; *see* NYSCEF Doc No. 38).

Petitioner does not dispute that “DOCCS produced cumulative facility-level confirmed positives data broken down *by month*” (Quackenbush Aff., ¶ 6), but it argues that “DOCCS did

not produce any daily or weekly confirmed staff positives data” and has “not certified that [such] data could not be found after a diligent search” (*id.*, ¶ 7).

As petitioner acknowledges, however, its FOIL request “sought facility-level confirmed staff positives data, including data ‘produced or published on a daily, weekly, monthly, *or* other periodic basis that reflect the aggregate number of . . . positive tests returned during a given time period’” (*id.*, ¶ 5, quoting Amended Petition, ¶¶ 13-14 [emphasis added]; *see* NYSCEF Doc Nos. 2, 17). Thus, as correctly observed by DOCCS, “[t]he production of hourly, daily, weekly *and* monthly facility level data was not required because Petitioner’s FOIL request was for ‘records produced or published on a[n] hourly, daily, weekly, monthly *or* other periodic basis’” (NYSCEF Doc No. 46, quoting NYSCEF Doc No. 2).

Accordingly, the branch of the Amended Petition alleging the denial of access to records reflecting the number of DOCCS employees “who tested positive for COVID-19” by facility (NYSCEF Doc Nos. 2, 17) must be dismissed as moot.

This is not the end of the inquiry, however, as petitioner further alleges that “DOCCS has neither produced any *total testing data broken down by week or month*, nor certified that it conducted a diligent search for those records without success” (Quackenbush Aff., ¶ 18 [emphasis added]).

Besides seeking facility-based records as to the number of DOCCS employees who tested positive for COVID-19, petitioner’s FOIL request also seeks access to “all records reflecting the number of DOCCS employees, by facility . . . , *tested for COVID-19*” (NYSCEF Doc Nos. 2, 17 [emphasis added]; *see* Amended Petition, ¶ 49 [“Petitioner requested records showing not only how many DOCCS staff tested positive for COVID-19 at each facility, but also records showing

the number of DOCCS employees tested for COVID-19, regardless of the test results.”)].

Petitioner explains that records showing the number of DOCCS employees tested for COVID-19 will allow it to calculate the “positivity rate” (Quackenbush Aff., ¶ 21).

DOCCS provided petitioner with “all records reflecting the number of DOCCS employees *who tested positive for COVID-19* by facility from October 2020 through January 2021” (NYSCEF Doc No. 38 [emphasis added]), but it has neither produced “total testing data broken down by week or month, nor certified that it conducted a diligent search for those records without success” (Quackenbush Aff., ¶ 18; *see* Amended Petition, ¶ 49; *see also* Ranieri Aff., ¶ 8). Indeed, respondent’s reply papers do not address the issue of access to total testing data.

The Court recognizes that the denial of petitioner’s FOIL appeal states that “DOCCS does not maintain comprehensive COVID-19 testing data for employees, as such testing would be administered by outside agencies not affiliated with DOCCS or employees’ personal health care providers” (NYSCEF Doc No. 22). However, even assuming that this response satisfied the certification requirement of Public Officers Law § 89 (3) (*cf. Matter of Wright v Woodard*, 158 AD3d 958, 958-959 [3d Dept 2018]), “the person requesting the documents may nevertheless be entitled to a hearing on the issue where [it] can ‘articulate a demonstrable factual basis to support [the] contention that the requested documents existed and were within the [entity’s] control’” (*Matter of Oddone v Suffolk County Police Dept.*, 96 AD3d 758, 761 [2d Dept 2012], quoting *Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 279 [1996]; *accord Matter of Jackson v Albany County Dist. Attorney’s Off.*, 176 AD3d 1420, 1421-1422 [3d Dept 2019]).

Here, petitioner avers that even if DOCCS properly had certified to the absence of records concerning total testing data, “there would be reason to doubt such an assertion: Bryan

Hilton, DOCCS' Associate Commissioner for Mental Health and DOCCS' Health Services COVID Coordinator, has indicated that such data exists" (Quackenbush Aff., ¶ 19). To this end, petitioner refers to the federal litigation in *Harper v Cuomo*, No. 9:21-CV-00019, which concerned COVID-19-related conditions at a particular DOCCS facility (*see* Amended Petition, ¶ 51).¹ Hilton submitted a declaration in that litigation attesting that "DOCCS *itself* arranged and facilitated COVID-19 testing of facility staff on the premises of its correctional facilities and that the testing is sometimes *even conducted by DOCCS' own facility medical staff*" (*id.*). The declaration, which is annexed to the Amended Petition, states that testing of DOCCS employees was offered in "each of the correctional facilities" on "a bi-weekly basis" with the participation of "a DOCCS nurse" (NYSCEF Doc No. 23, ¶¶ 23-25).²

Accordingly, petitioner has provided a sufficient factual basis to support its contention that total COVID-19 employee testing data exists and is within DOCCS' control (*see Oddone*, 96 AD3d at 761; *cf. Jackson*, 176 AD3d at 1422). Thus, the proceeding has not been proven to be moot to this limited extent.³

Finally, the Cardozo Civil Rights Clinic moves for permission to file a brief as *amicus curiae* (*see* NYSCEF Doc Nos. 31-33). As courts favor participation of *amicus curiae* and given the lack of opposition from DOCCS, the motion for permission to file a brief as *amicus curiae*

¹ While petitioner states that this litigation is still pending, the federal docket indicates that the case was dismissed by stipulation on June 25, 2021.

² Of course, if the limited testing data that may be within DOCCS's possession or control does not encompass all of the testing that gave rise to the reported positive results, computation of a meaningful positivity rate will not be possible.

³ In view of this determination, the Court will reserve decision regarding petitioner's claimed entitlement to an award of counsel fees.

should be granted (*see generally Matter of American Motors Sales Corp. v Brown*, 152 AD2d 343, 346 [2d Dept 1989], *lv denied* 75 NY2d 709 [1990]).

CONCLUSION

Based on the foregoing, it is

ORDERED that respondent's motion to dismiss the proceeding as moot is granted to the extent of dismissing that part of the Amended Petition which seeks disclosure of all records reflecting "the number of DOCCS employees who tested positive for COVID-19, by facility"; and the motion is denied to the extent that petitioner seeks disclosure of "all records reflecting the number of DOCCS employees, by facility, tested for COVID-19"; and it is further


ORDERED that respondent shall serve an answer to the Amended Petition, as limited by the preceding decretal paragraph, within **thirty (30) days** of being served with a copy of this Decision & Order with notice of entry; and it is further

ORDERED that the motion of the Cardozo Civil Rights Clinic for permission to file a brief as *amicus curiae* is granted and the proposed brief is accepted as filed; and finally it is

ORDERED that, upon the filing of respondent's answer, petitioner shall re-notice the Amended Petition for hearing.

This constitutes the Decision & Order of the Court, the original of which is being uploaded to NYSCEF for electronic entry by the Albany County Clerk. Upon such entry, counsel for petitioner shall promptly serve notice of entry on all parties entitled thereto.

Dated: Albany, New York
October 12, 2021


RICHARD M. PLATKIN
A.J.S.C.

