

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

2022 NY Slip Op 30793(U)

January 26, 2022

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:

THE LEGAL AID SOCIETY, CRIMINAL PRACTICE, PRISONERS' RIGHTS PROJECT
Attorneys for Petitioner
(Robert M. Quackenbush, of counsel)
199 Water Street, 6th Floor
New York, New York 10038

BENJAMIN N. CARDOZO SCHOOL OF LAW, CIVIL RIGHTS CLINIC
Amicus Curiae
(Betsy Ginsberg, of counsel)
55 5th Avenue
New York, New York 10003

LETITIA JAMES, ATTORNEY GENERAL
Attorney for Respondent
(Stacey Hamilton, of counsel)
The Capitol
Albany, New York 12224

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

Petitioner Legal Aid Society commenced this CPLR article 78 proceeding on March 31, 2021, 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”]).

The petition, as amended, sought an order compelling respondent New York State Department of Corrections and Community Supervision (“DOCCS”) to disclose “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).

In lieu of answering, DOCCS moved to dismiss the proceeding as moot based on its August 4, 2021 production of responsive records. By Decision & Order dated October 12, 2021, the Court partially granted the motion by dismissing the branch of the Amended Petition seeking access to records reflecting the number of DOCCS employees who tested positive for COVID-19 by facility (*see* NYSCEF Doc No. 48 [“Prior Decision”], p. 5). The motion was denied, however, as to the part of the Amended Petition that sought records reflecting the number of DOCCS employees tested for COVID-19 (*see id.*, pp. 6-8).

In lieu of answering the branch of the Amended Petition that survived the prior motion practice, DOCCS again moves for dismissal of the proceeding as moot. Petitioner opposes the motion.

DISCUSSION

Although not raised by the parties, “[t]he single motion rule prohibits parties from making successive motions to dismiss a pleading” (*Ramos v City of New York*, 51 AD3d 753,

754 [2d Dept 2008]; *see* CPLR 3211 [e]; *Bailey v Peerstate Equity Fund, L.P.*, 126 AD3d 738, 739 [2d Dept 2015]; *Nassau Roofing & Sheet Metal Co. v Celotex Corp.*, 74 AD2d 679, 680 [3d Dept 1980)].¹ Nonetheless, “mootness is a doctrine related to subject matter jurisdiction and thus must be considered by the court *sua sponte*” (*Matter of Sportsmen’s Tavern LLC v New York State Liq. Auth.*, 195 AD3d 1557, 1557 [4th Dept 2021], quoting *Matter of Grand Jury Subpoenas for Locals 17, 135, 257 & 608 of United Bhd. of Carpenters & Joiners of Am., AFL-CIO*, 72 NY2d 307, 311 [1988], *cert denied* 488 US 966 [1988]; *see Matter of National Rest. Assn. v Commissioner of Labor*, 141 AD3d 185, 189 [3d Dept 2016]). Accordingly, the Court will consider the motion.

“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 claim of mootness with the affirmation of Michael Ranieri, an assistant counsel in the agency’s FOIL unit (*see* NYSCEF Doc No. 52 [“Ranieri Aff.”]). According to Ranieri, it “remains Respondent’s position that it does not maintain comprehensive data reflecting the total number of Departmental employees that were tested for COVID-19 from October 1, 2020 to the date of Petitioner’s request, January 21, 2021” (*id.*, ¶ 11).

¹ The single-motion rule is, of course, applicable to CPLR article 78 proceedings (*see generally* CPLR 7804 [f]; *cf. Severson Hotel Assoc. v Stranges*, 262 AD2d 957, 958 [4th Dept 1999]).

Ranieri also addressed petitioner's previous reliance on "Associate Commissioner Hilton's declaration" stating that testing was offered in each correctional facility (*see* NYSCEF Doc No. 23), explaining that "this testing was offered on a purely voluntary basis designed to complement, not replace, existing opportunities for testing in the community" (Ranieri Aff., ¶ 12). "Therefore, the resulting limited data does not provide the total number of DOCCS employees who were tested for COVID-19, as [DOCCS] does not maintain data regarding the total number of employees who were tested by personal health care providers or other [outside] testing vendors" (*id.*, ¶ 13).

Finally, while claiming that it is "not responsive to Petitioner's request for the total number of DOCCS employees tested," Ranieri affirms that DOCCS has disclosed to petitioner, "as a courtesy," the "limited data" that it gathered "as a result of the voluntary testing opportunities that were offered at each correctional facility" (*id.*, ¶ 14; *see also* NYSCEF Doc Nos. 53-54).

Based on the foregoing, DOCCS maintains that it has "provided Petitioner with a fully adequate response to its request during the pendency of this proceeding, and therefore, the amended petition should be dismissed as moot" (NYSCEF Doc No. 51, p. 4).

In opposition, petitioner complains that DOCCS "did not produce any data concerning testing from January 22, 2021 to March 5, 2021" and has not certified that it "diligently searched for records covering tests" for those dates (NYSCEF Doc No. 56, p. 3). Petitioner further argues that the records that DOCCS claims to have produced "as a courtesy" were, in fact, responsive to petitioner's FOIL request, as the disclosed data "contains unique client or patient identification numbers, from which one can determine the total number of individuals actually tested – the precise data that Petitioner requested – simply by counting the unique entries" (*id.*).

In its FOIL request, petitioner sought access to records “from October 1, 2020 until the date that DOCCS renders a final determination as to this FOIL request” (NYSCEF Doc No. 17 [emphasis omitted]). Here, it was the March 5, 2021 denial of petitioner’s request by the agency’s FOIL appeals officer (*see* NYSCEF Doc No. 22) that constitutes DOCCS’ “final determination” (*Matter of Jackson v Wilcox*, 70 Misc 3d 1208[A], 2021 NY Slip Op 50012[U], *2 [Sup Ct, Albany County 2021]; *see also Matter of Alterra Healthcare Corp. v Novello*, 306 AD2d 787, 788 [3d Dept 2003]). As records reflecting the number of DOCCS employees tested for COVID-19 from January 22, 2021 through March 5, 2021 have not been produced, this proceeding has not been shown to be moot to that limited extent.²

Finally, while a motion to dismiss predicated upon mootness is not the proper vehicle for addressing the merits of this proceeding, the Court observes that petitioner’s FOIL request was not limited to “total” testing data (*see* NYSCEF Doc No. 17 [“records reflecting the number of DOCCS employees . . . tested for COVID-19” (emphasis omitted)]), and the fact that petitioner may be unable to compute a meaningful positivity rate from the data produced by DOCCS (*see* Prior Decision, p. 7 n 2; *Ranieri Aff.*, ¶ 12) is not a valid basis for denying access to agency records responsive to petitioner’s FOIL request.

CONCLUSION

Based on the foregoing, it is

ORDERED that respondent’s motion to dismiss the proceeding as moot is denied in accordance with the foregoing; and it is further

² DOCCS did not reply to petitioner’s opposition to the motion, and there is nothing in the record to indicate that the agency does not possess the same type of records for this period.

ORDERED that respondent shall serve an answer to the Amended Petition, as limited by the Prior Decision and this Decision & Order, within **thirty (30) days** of being served with a copy of this Decision & Order with notice of entry; 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
January 26, 2022


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

Papers Considered:³

NYSCEF Doc Nos. 50-56.



01/26/2022

³ The Court takes judicial notice of the prior proceedings and filings in this matter (*see Matter of Shirley v Shirley*, 101 AD3d 1391, 1394 [3d Dept 2012]; *Casson v Casson*, 107 AD2d 342, 344 [1st Dept 1985], *appeal dismissed* 65 NY2d 637 [1985]).