

Latinos in the New York City population. Before the NYPD shooting report covering 1998 was released, however, a national controversy about race and police shootings erupted when four white NYPD members fired 41 shots at and killed Amadou Diallo, an unarmed black man. At the direction of then-Commissioner Howard Safir, information about the race of persons shot and killed by NYPD officers was removed from Department reports, and since then the NYPD has never publicly reported information about the race of shooting victims.

3. The role of race in NYPD shootings re-emerged in November 2006 when Department officers fired 50 shots and killed Sean Bell, an unarmed black man. In an effort to determine whether race was playing an inappropriate role in police shootings, the NYCLU in October 2007 filed a FOIL request seeking documents with information about the race of shooting victims. In response, the NYPD has acknowledged that it has reports with the requested information but has refused to produce them to the NYCLU, arguing that the reports contain other information that is exempt from disclosure and refusing to redact that other information from the reports. Meanwhile, upon information and belief, the Department has provided unredacted versions of the exact same reports completed between 2004 and 2006 to an outside organization it hired to review its shooting practices.

4. The NYPD's refusal to produce the information sought by the NYCLU violates the Freedom of Information Law. Having exhausted its administrative appeals, the NYCLU now seeks an order from this Court, pursuant to Article 78 of the New York

Civil Practice Law and Rules, directing the NYPD to produce the information the NYCLU requests. The NYCLU also seeks attorneys' fees and any other relief the Court deems appropriate.

VENUE

5. Pursuant to C.P.L.R. §§ 7804(b) and 506(b), venue in this proceeding lies in New York County, in the judicial district in which Respondents took the action challenged here and where the offices of Respondents are located.

PARTIES

6. Petitioner New York Civil Liberties Union is a not-for-profit corporation that defends civil rights and civil liberties in New York.

7. Respondent New York City Police Department is a law-enforcement agency administered under New York Administrative Code, Title 14. The NYPD is a public agency subject to the requirements of the Freedom of Information Law, New York Public Officers Law § 84 et seq. ("FOIL").

8. Respondent Raymond Kelly is a public officer who is named in his official capacity as the Commissioner of the NYPD.

FACTS

9. The NYCLU's mission is to defend civil rights and civil liberties in New York and to preserve and extend constitutionally guaranteed rights to people whose rights have historically been denied. For over fifty years, the NYCLU has been involved in litigation

and other advocacy in support of individual rights and government accountability. The NYCLU has long been concerned about police activity that disproportionately affects members of traditionally disadvantaged communities.

10. The role of race in police shootings long has been a subject of substantial public interest. That interest was particularly intense in 1999 after four white members of the NYPD's Street Crime Unit killed an unarmed Amadou Diallo in a hail of 41 shots, an incident that garnered international attention and led to widespread demonstrations that resulted in the arrest of over 1,000 people in New York City.

11. Prior to the Diallo shooting, the NYPD reported about the race of people shot by its officers. According to annual statistical reports covering 1996 and 1997 and obtained by the NYCLU through a separate FOIL request, 58 percent of people intentionally shot by the police during those two years were black; during that same time, only 8 percent of those shot were white. By contrast, U.S. Census figures show New York City's population is approximately 27 percent black and 45 percent white.

12. Upon information and belief, the NYPD shooting report covering 1998 was released within months after the February 1999 Diallo shooting. Unlike the reports covering 1996 and 1997, the report covering 1998 dropped all information about the race of persons shot by the police. According to sworn testimony by Louis Anemone, the Chief of Department when the report for 1998 was prepared, then-Commissioner Howard Safir ordered that data about the race of those killed by the police be removed from a

version of the report specially prepared for the police commissioner. Upon information and belief, this directive also resulted in removal from the normal annual reports of information about the race of persons shot by the police. And every annual shooting report produced since then—all of which have been obtained by the NYCLU—have similarly omitted this information.

13. In November 2006 the debate about the role of race in NYPD shootings was rekindled when officers fired 50 shots and killed Sean Bell, an unarmed black man. In the aftermath of public outrage at the shooting, Commissioner Raymond Kelly hired the RAND Corporation to study the Department's firearms practices and training.

14. After each police shooting, the NYPD reviews the incident to determine whether it complies with Department guidelines. These reviews result in a written report, and included in each report is information about the race of the person shot at by the police. To assist the RAND Corporation in its post-Bell review of NYPD shooting practices and training, the NYPD provided the group with copies of the individual shooting reports produced from 2004 to 2006.

15. RAND issued its NYPD-commissioned report in June 2008. Although RAND ostensibly was to examine the Bell shooting and although RAND was provided with information about the race of shooting targets, its final report did not discuss the Bell shooting and disclosed no information about the race of the targets of NYPD shootings.

PROCEDURAL HISTORY

16. On October 22, 2007, the NYCLU submitted a FOIL request to the NYPD requesting information about the race of persons intentionally shot by members of the NYPD. Specifically, the request sought “documents identifying the race of all persons shot by police officers either in ‘gunfights’ or ‘other shootings v. subjects’ (as those terms are used in the Firearms Discharge Report) for the last ten years (since January 1, 1997).” (“Gunfights” and “other shootings vs. subjects” are the two reporting categories the NYPD uses to encompass intentional shootings of people; separate categories cover accidental shootings and the shooting of dogs.)

17. The NYPD responded on December 5, 2007, stating that a search for documents identifying all persons shot since January 1, 1997 by police officers was ongoing and that the Department expected to reach a determination by December 28, 2007.

18. On several occasions after December 28, 2007, the NYPD assured the NYCLU that it was working on preparing its response. On April 2, 2008, however, the NYCLU had not received any response and therefore filed an administrative appeal. The NYPD then formally denied the NYCLU’s request in a letter dated April 10, 2008. In doing so, the Department did not claim that the factual information sought by the NYCLU was exempt from FOIL disclosure but instead asserted the information was contained in shooting reports that were categorically exempt from disclosure:

Your request for documents that describe the race or color of the individuals who were shot by police officers is denied. The information you seek is generally contained in the report prepared about each firearms

discharge incident. However, these reports are exempt from disclosure pursuant to N.Y. Public Officers Law sections 87(2)(a), (b), (e)(i)–(iv), (f), and (g) as well as N.Y. Civil Rights Law section 50-a(1).

19. On April 23, 2008, the NYCLU administratively appealed the April 10 denial of its FOIL request. That letter stated: “In considering our appeal, we urge you to consider the extent to which the information we seek is available in other documents that are not subject to FOIL exemptions. Alternatively, we urge you to consider the extent to which redaction will remedy the Department’s concerns.”

20. On May 14, 2008 the NYPD denied the NYCLU’s April 23 appeal. In doing so, the Department did not contend that the race data sought by the NYPD was exempt from disclosure under FOIL. Rather, it repeated its earlier assertion that the information was included in individual firearm review reports that contained other exempt information and therefore that the Department was free to withhold the documents in their entirety:

The Firearms Discharge Reports contain preliminary assessments whether the shooting was within lawful guidelines. This assessment, together with other information contained in the reports, is used to evaluate the subject police officer’s performance and is exempt from disclosure pursuant to Civil Rights Law §50-a(1). Therefore, these records are exempt from disclosure under Public Officers Law (POL) §87(2)(a), which exempts from disclosure records exempted from disclosure pursuant to other statutes.

These reports are prepared at the initial stage of a complex investigative process. They contain opinions, recommendations, data, and information which are preliminary in nature, and are subject to further review. Therefore, disclosure is also denied because these reports are intra-agency records exempt from disclosure under Public Officers Law Section 87(2)(g).

In addition, the reports contain witness statements, the disclosure of which is barred by POL §87(2)(e)(iii) and POL §87(2)(f) because

disclosure could compromise a confidential source or endanger a person's life or safety. Also, disclosure of this information would constitute an unwarranted invasion of privacy, and is therefore exempt from disclosure under POL §87(2)(b).

Moreover, some of the Firearms Discharge Reports are exempt from disclosure under POL §87(2)(e)(i) because they were prepared as part of an ongoing law enforcement investigation, and their disclosure would interfere with investigations and judicial proceedings. The reports are also exempt from disclosure pursuant to POL §87(2)(e)(ii), because their disclosure would deprive a person of an impartial adjudication. Some of the information contained in these reports is confidential information relating to a criminal investigation, and its disclosure is proscribed by POL §87(2)(e)(iii). Also, the reports describe non-routine investigations and techniques and their disclosure is therefore barred by POL §87(2)(d)(iv).

Other exemptions under FOIL also may apply.

21. No previous application has been made for any relief sought herein.

**CAUSE OF ACTION: ARTICLE 78 REVIEW OF WRONGFUL
DENIAL OF FOIL REQUEST**

22. Article 78 is the appropriate method for review of agency determinations concerning FOIL requests.

23. Petitioner NYCLU has a clear right to the race data. Under FOIL, the respondents may redact portions of a document exempt from FOIL's disclosure obligations but must disclose the remaining portions of the document.

24. Respondent's have not produced the information sought by the petitioner NYCLU. Respondents' obligation under FOIL to disclose the race data is mandatory, not discretionary.

25. Petitioner NYCLU has exhausted its administrative remedies with the NYPD when it requested and appealed its denied request for the race data and received a denial of appeal. Petitioner has no other remedy at law.

REQUESTED RELIEF

WHEREFORE, Petitioner seeks judgment:

(1) Pursuant to C.P.L.R. § 7806, directing Respondents to comply with their duty under FOIL and provide the information sought by Petitioner in its October 22, 2007 request;

(2) Awarding attorneys' fees and reasonable litigation costs as allowed under New York Public Officers Law § 89; and

(3) Granting such other and further relief as the Court deems just and proper.

Respectfully Submitted,

NEW YORK CIVIL LIBERTIES UNION
FOUNDATION, by

CHRISTOPHER DUNN
ARTHUR EISENBERG
New York Civil Liberties Union
125 Broad Street, 19th Floor
New York, NY 10004
(212) 607-3300

On the petition: Michael Page

Dated: New York, NY
Aug. 4, 2008

VERIFICATION

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Christopher Dunn, an attorney admitted to practice in the State of New York,
affirms pursuant to C.P.L.R. § 2106 under the penalties of perjury:

1. I am the attorney for and an employee of the Petitioner in the within proceeding.

I make this Verification pursuant to C.P.L.R. § 3020(d)(3).

2. I have read the attached Verified Petition and know its contents.

3. The statements in the Verified Petition are true to my own knowledge, or upon information and belief. As to those statements that are based upon information and belief, I believe those statements to be true.

CHRISTOPHER DUNN

Dated: New York, NY
Aug. 4, 2008

Sworn and subscribed to me
this ___ day of August 2008

NOTARY PUBLIC