

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

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THE NEW YORK CIVIL LIBERTIES UNION, : Index No. \_\_\_\_\_  
: :  
Petitioner, : :  
: :  
-against- : :  
: :  
THE ALBANY POLICE DEPARTMENT, : :  
: :  
Respondent. : :  
: :  
For a Judgment Pursuant to Article 78 : :  
Of the Civil Practice Law and Rules : :  
----- X

**MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION**

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Dated: August 30, 2010  
New York, New York

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## INTRODUCTION

This Article 78 petition seeks to vindicate the right of the public and of Petitioner the New York Civil Liberties Union (NYCLU) to obtain information about police departments' official policies governing the use of force, particularly with respect to TASER weapons. In response to increasing reports of TASER misuse by law enforcement officials in New York and around the country, the NYCLU initiated a statewide study of this issue by sending identical Freedom of Information Law (FOIL) requests to ten New York law enforcement agencies seeking information about TASER usage, including the agencies' use-of-force policies governing TASERS.

Eight of those law enforcement agencies produced their policies in full (or reported that no such policy exists). Two others – Respondent Albany County Police Department and the Saratoga Springs Police Department – agreed to produce their policies, but with redactions, citing the “public safety” exemption to FOIL. After the NYCLU brought suit in a separate action against the City of Saratoga Springs, the Supreme Court, Saratoga County, found that those redactions had “no basis.” Despite this outcome, Respondent Albany Police Department continues to assert a right to substantially redact large portions of its policy. This action challenges Respondent the Albany Police Department's decision.

Like the City of Saratoga Springs, Respondent has not met its burden to show why disclosure of its un-redacted policy poses any threat to the life or safety of any person. The law is clear that an agency seeking to redact or withhold public records under FOIL must articulate a “particularized and specific” fact-based justification for doing so. Respondent has not met this burden, as its denial of the NYCLU's request cites

no facts, let alone any particularized or specific facts, to support its conclusory statements. Indeed, Respondent's conclusion is contradicted not only by the court's decision in the Saratoga Springs case, but by the judgment of the other police departments that responded to the NYCLU's FOIL request without redacting their policies. The fact that all of these other law enforcement agencies have now disclosed their full use-of-force policies belies the notion that Albany's policy contains uniquely sensitive information. Given the controversy surrounding TASER weapons, government transparency on this issue is critical. Accordingly, Petitioner asks the Court to order Respondent to follow in the footsteps of its fellow law enforcement agencies around the state and produce its un-redacted TASER use-of-force policy. Moreover, because of the lack of any reasonable basis for making these redactions and because of Respondent's repeated failure to abide by FOIL's statutory deadlines for response, Petitioner also requests that the Court award it attorneys' fees and litigation costs.

### FACTS

In New York State and across the country, reports of law enforcement officers' inappropriate use of TASERs, also known as conducted energy devices or CEDs, have raised serious concerns. TASERs deliver a high-voltage electric shock of typically 50,000 volts. See Amnesty International, *'Less Than Lethal'?: The Use of Stun Weapons in US Law Enforcement* 6 (December 2008) (hereinafter "Amnesty International Report") (attached as Ex. H to Affirmation of Corey Stoughton (August 31, 2010) (hereinafter, "Stoughton Aff.")). Although they are promoted as non-lethal, TASERs sometimes cause death. Amnesty International reports that between 2001 and 2008, 334 individuals

died in the U.S. after being electrocuted by police using TASERS. *Id.* at 20. Alarminglly, at least 299 of the individuals killed were reportedly unarmed. *Id.* at 4.

Incidents of law enforcement officers using TASERS inappropriately, either in situations where the use of force is plainly indefensible or against individuals who are especially vulnerable to the effects of electrocution, have been widely reported. For example, in February 2005 Florida police reportedly tasered a 13 year-old, 65 pound girl who was already handcuffed in a squad car. *See Dana Treen, Police Defend Use of Taser on Girl, 13*, Florida Times-Union, March 2, 2005 (Stoughton Aff. Ex. I). That same year, the Ninth Circuit ruled that a California police officer's tasing of an unarmed man after pulling him over for a seat belt violation was "unconstitutionally excessive." *See Bryan v. McPherson*, 590 F.3d 767, 770 (9th Cir. 2009). In March 2009, it was reported that a 15 year-old boy died after being tasered by the Michigan police. *See Michigan Teen Dies From Police Tasing*, CBS News.com, March 23, 2009 (Stoughton Aff. Ex. J). As recently as March 2010, it was reported that Indiana police tasered a 10-year-old boy for being unruly and aggressive in day care. *See Cops Who Tasered 10-Year-Old Spark Outrage from Mayor and Citizens*, CBS News.com, April 2, 2010 (Stoughton Aff. Ex. K). These are merely a few examples of reports of TASER misuse by police officers nationwide.

Such incidents mirror recent reports of TASER misuse by police in New York State. In September 2008, police in New York City reportedly killed an emotionally disturbed man by tasing him while he was standing outdoors on a second-story ledge. *See Al Baker, City Is Sued in Fatal Use of a Taser*, N.Y. Times, February 24, 2009 (Stoughton Aff. Ex. L). In January 2009, it was reported that an Onondaga County

Sheriff's Deputy tasered a mother twice in front of her children after accusing her of driving while on a cell phone. *See* Mike Celizic, *Mom Tasered in Front of Kids 'Posed No Threat,'* MSNBC.com, August 14, 2009 (Stoughton Aff. Ex. M). Finally, in September 2009, it was reported that police officers in Syracuse tasered two students resulting in a shot missing its target and hitting another student. *See* Robert A. Baker, *Syracuse Police Chief: Officer's Use of Taser Justified During Fight at High School,* Syracuse Post-Standard, September 29, 2009 (Stoughton Aff. Ex. N).

Prompted by these and other reports, on January 4, 2010, the NYCLU filed a FOIL request with Respondent Albany Police Department seeking records related to its use of TASER weapons. *See* NYCLU FOIL Request (January 4, 2010) (Stoughton Aff. Ex. A). This request was one of nine identical requests sent on that same day to a variety of law enforcement agencies around New York as part of a statewide inquiry into law enforcement officials' use of TASERS. *See* Stoughton Aff. ¶ 3. Other than Respondent, all of these agencies produced un-redacted versions of their use-of-force policies governing TASERS, except for two which reported that they do not use TASERS at all and thus had no policy to produce. *Id.* ¶ 14; *id.* Exhibit O (attaching produced use-of-force policies).

The NYCLU earlier had requested such records from a tenth police department, the Saratoga Springs Police Department. *Id.* ¶15. On October 14, 2009, the NYCLU brought an Article 78 proceeding because that police department had not responded to the NYCLU's request. *Id.* ¶ 16. In the course of the litigation, Saratoga Springs agreed to produce records, but redacted portions of its use-of-force policy. *Id.* The NYCLU challenged those redactions, and the Hon. Thomas D. Nolan, Jr., Supreme Court,

Saratoga County, found that there was “no basis” to redact the policy pursuant to either the public safety exemption or the exemption for law enforcement investigative techniques, Public Officers Law § 87(2)(e)(iv). *Id.* ¶ 17 (unpublished Decision & Order attached to Stoughton Aff. as Ex. P).

Unlike these other law enforcement agencies, Respondent has not been (or yet been forced to be) so forthcoming. Despite acknowledging receipt of the NYCLU’s request on January 15, 2010, and promising to respond within 10 business days, *see* Acknowledgement Letter (Jan. 15, 2010) (Stoughton Aff. Ex. B), Respondent did not respond to the request for more than two months – well beyond FOIL’s statutory time frame and only after the NYCLU formally demanded a response in writing. *See* Letter from J. Jou to J. Marsolais (Mar. 16, 2010) (Stoughton Aff. Ex. C); Letter from J. Marsolais to C. Stoughton (Mar. 19, 2010) (Stoughton Aff. Ex. D).

In that belated response, Respondents invoked the public safety exemption to FOIL, Public Officers Law § 87(2)(f), to justify substantial redactions to its TASER use-of-force policy. Letter from J. Marsolais to C. Stoughton (Mar. 19, 2010) (Stoughton Aff. Ex. D). Respondent provided no factual information or other information to support the invocation of this exemption. *Id.* These redactions black out nearly half of the text of the policy. Redacted Albany Police Department TASER Policy (Stoughton Aff. Ex. E).

On April 15, 2010, the NYCLU administratively appealed this response, challenging the redactions, as well as other matters regarding other records the NYCLU requested that have since been resolved between the parties and are not at issue in this proceeding. *See* Administrative Appeal (Stoughton Aff. Ex. F). On May 14, 2010 – more than two weeks past FOIL’s 10 business-day deadline for responding to

administrative appeals – Respondent denied that appeal. *See* Letter from H. Greenstein to J. Jou (undated) (Stoughton Aff. Ex. G). In its belated denial, Respondent again invoked the public safety exemption, explaining that the release of the un-redacted portions of the use-of-force policy “would lead to the perpetrators attempting to evade or thwart a police officers [sic] ability to perform his/her duties. Movements attempting to evade the police officer would lead to the inability to effectively administer the TASER, thus creating a heightened threat of safety [sic] to the subject, the police officer and any other civilians nearby.” *Id.* The denial did not provide any factual or evidentiary basis for its conclusion that disclosure would “creat[e] a heightened threat of safety.” *Id.*

Following the denial of the administrative appeal, Petitioner contacted the Albany County Attorney’s office to inform that office of the decision of the Supreme Court, Saratoga County, and attempt to resolve this matter without the need for litigation. Stoughton Aff. ¶ 18. Unfortunately, these attempts were unsuccessful, as Respondent continued to assert the need to redact substantial portions of its TASER use-of-force policy. *Id.*

## ARGUMENT

### **I. THE FREEDOM OF INFORMATION LAW CREATES A BROAD RIGHT OF ACCESS TO AGENCY RECORDS.**

In FOIL, the New York State legislature created a broad right of access to government records to ensure transparency and accountability in government. *See Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 565-66 (1986) (finding the “Freedom of Information Law expresses this State’s strong commitment to open government and public accountability”). As the Court of Appeals has repeatedly

emphasized, FOIL is founded upon “the premise that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government.” *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979); see also *M. Farbman & Sons v. New York City Health and Hosp. Corp.*, 62 N.Y.2d 75, 79 (1984) (FOIL “imposes a broad standard of open disclosure upon agencies of the government”). As the legislature stated in enacting the statute:

[A] free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. . . . The people’s right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality. The legislature therefore declares that government is the public’s business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article.

Public Officers Law § 84. Consistent with the legislative intent for a broad right of access, “[a]ll agency records are presumptively available for public inspection and copying,” unless they fall within one of FOIL’s enumerated exemptions. *Gould v. N.Y. City Police Dep’t*, 89 N.Y.2d 267, 275 (1996); see also *Hanig v. State Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109 (1992).

**II. RESPONDENT FAILED TO MEET ITS BURDEN OF SHOWING THAT REDACTIONS TO ITS USE-OF-FORCE POLICY ARE NECESSARY TO PROTECT THE LIFE OR SAFETY OF ANY PERSON.**

In invoking the exemption for records that, if disclosed, would “endanger the life or safety of an person,” Public Officers Law § 89(2)(f), Respondent failed to meet its burden to provide “particularized and specific justification” for the redactions it made to its TASER use-of-force policy. It has provided no evidentiary facts to support a conclusion that any person would be endangered by full disclosure of this record.

Moreover, a recent decision by the Supreme Court, Saratoga County, ordering the Saratoga Springs Police Department to un-redact its policy, as well as the judgment of several other police departments that found no need to redact their policies, undermine Respondent's position.

FOIL exemptions are to be "narrowly construed, with the agency that seeks to prevent disclosure bearing the burden of demonstrating that the requested material falls squarely within the exemption by articulating a particularized and specific justification for denying access." *Matter of Carnevale v. City of Albany*, 68 A.D.3d 1290, 1292 (3d Dept 2009). In particular, the "public safety" exemption "requires a particularized showing. It cannot be based on mere speculation." *Rodriguez v. Johnson*, 17 Misc.3d 1120(A) (N.Y. Sup. 2007).

To support the extensive redactions to its TASER use-of-force policy, the Albany Police Department simply asserted that disclosure of the full policy would "lead to the inability to effectively administer the TASER, thus creating a heightened threat of safety to the subject, the police officer and any other civilians nearby." Letter from H. Greenstein to J. Jou (undated) (Stoughton Aff. Ex. G). This conclusory assertion lacks any evidentiary factual basis and thus falls far short of the meeting Respondent's burden to provide a specific and particularized justification sufficient to overcome FOIL's strong presumption of openness. *See Buffalo Broadcasting Co. Inc. v. New York State Dept of Corr. Servs.*, 155 A.D.2d 106, 112 (3d Dept 1990) (finding the public safety exemption inapplicable where respondent "made no factual showing whatsoever in their submissions in the record" but rather made only "conclusory allegations, unsupported . . . by other evidentiary facts").

Although Respondent's lack of specificity makes it impossible to know what information it is attempting to protect from public disclosure, there is every reason to believe that even if it had attempted to justify its redactions, it could not have done so. The Supreme Court, Saratoga Springs, recently rejected the Saratoga Springs Police Department's attempt to redact portions of its TASER use-of-force policy in response to a nearly identical FOIL request by the NYCLU. *New York Civil Liberties Union v. City of Saratoga Springs*, Index. No. 2009-4158 (Decision and Order, May 10, 2010) (Stoughton Aff. Ex. O). Like the Albany Police Department here, the Saratoga Springs Police Department invoked the public safety exemption to FOIL but offered no factual basis for doing so. Stoughton Aff. ¶¶ 16, 17. The court found that there was "no basis" for the redactions under that exemption. *Id.* This case is no different.

As in the Saratoga Springs case, it severely undermines Respondent's argument that several other New York law enforcement agencies have made public un-redacted versions of their TASER use-of-force policies. Stoughton Aff. ¶ 14. Moreover, courts have ordered police departments to disclose similar standard policies and procedures for the use of police technology, where the department cannot show any factual evidence to support a claim of danger to the public. *See, e.g., Capruso v. N.Y. State Police*, 751 N.Y.S.2d 179, 180 (1st Dept 2002) (ordering disclosure of operating manuals for police radar guns). There is no reason to believe that the information Respondent has redacted poses any more of a threat to public safety than other police departments' TASER use-of-force policies or the radar gun manuals at issue in *Capruso*. As a result, Petitioner respectfully requests that the Court order Respondent to produce its TASER use-of-force policy in un-redacted form.

**III. PETITIONER IS ENTITLED TO ATTORNEYS' FEES AND LITIGATION COSTS UNDER FOIL.**

Because of the unreasonableness of Respondent's response and its failure to abide by the statutory time limits of FOIL, Petitioner is entitled to its attorneys' fees and litigation costs. FOIL permits this Court, in its discretion, to assess reasonable attorneys' fees and litigation costs provided the moving party "substantially prevailed" in its proceeding. If this threshold is met, attorneys' fees and litigation costs may be assessed in two instances: when an agency had "no reasonable basis for denying access" to records and also when an agency "fail[s] to respond to a request . . . within the statutory time." Public Officers Law § 89(4)(c). Petitioner meets both of these alternative bases for awarding fees.

As set forth above, the Albany Police Department had no reasonable basis for redacting its TASER use-of-force policy. *See* Part II, *supra*. The case for awarding fees is made more compelling by the fact that the NYCLU made every effort to avoid the necessity of court intervention, informing Respondent's counsel of the Saratoga Springs decision and the results of its other FOIL requests and pursuing settlement of this matter even after the agency denied the NYCLU's administrative appeal. *Stoughton Aff.* ¶ 18.

Moreover, the NYCLU is entitled to fees on the independent basis that, as detailed above, Respondent repeatedly failed to comply with the statutory time limits set by FOIL, failing to respond to the request for more than two months, and failing to respond to the administrative appeal in a timely manner. *See* Facts, pages 5-6, *supra*. Therefore, the NYCLU respectfully requests an award of attorneys' fees and litigation costs. Because the total hours expended on this matter cannot be determined until this

Petition is fully submitted, Petitioner will submit billing records either on reply to Respondent's answer to this Petition or in a separate submission.

**CONCLUSION**

For the foregoing reasons, Petitioner respectfully requests that the Court compel Respondent to comply with the Freedom of Information Law and disclose the records Petitioner sought in its January 4, 2010 FOIL request, and award Petitioner its attorneys' fees and litigation costs.

Dated: August 30, 2010  
New York, New York

Respectfully submitted,



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