

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

----- X  
NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

-against-

NEW YORK CITY POLICE DEPARTMENT,  
and RAYMOND KELLY, in his official capacity as  
Commissioner of the New York City Police  
Department,

Respondents.

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

Index No. 12/102436

VERIFIED PETITION

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CITY OF N.Y. LAW DEPT.  
OFFICE OF CORP. COUNSEL  
COMMUNICATIONS UNIT

**PRELIMINARY STATEMENT**

1. This Article 78 proceeding seeks to vindicate the right of the public and of the petitioner, the New York Civil Liberties Union (NYCLU), to learn how the New York City Police Department (NYPD) is adjudicating charges against police officers found to have engaged in misconduct by the New York City Civilian Complaint Review Board (CCRB), the independent city agency charged with overseeing the NYPD. Under the Freedom of Information Law, the NYCLU sought final judicial opinions issued since 2001 by NYPD judges after the conclusion of hearings open to the public. Those opinions include a summary of trial testimony, findings of fact, and conclusions of law supporting the determination of an officer's guilt or innocence and the appropriate penalty. The NYPD has categorically withheld all the requested decisions from the NYCLU.

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OFFICE OF CORP. COUNSEL  
COMMUNICATIONS UNIT

2. There is a vital public interest in knowing how the NYPD is disposing of cases charging police officers with misconduct in their treatment of civilians. To take one example, the department's increased use of stops and frisks has received constant attention in recent years from the media, advocacy organizations such as the NYCLU, elected officials, and members of the public. Complaints about stop-and-frisk are among the most common type of complaint received and substantiated by the CCRB, and all of those concerned about stop-and-frisk practices would benefit from seeing the legal analysis used by the department to assess substantiated cases about misconduct related to stops and frisks. In addition, the NYCLU and others are concerned about the lack of functional accountability mechanisms for NYPD misconduct, and proposals to reform the CCRB have recently been discussed by high-level city officials and in the media. An understanding of how substantiated complaints are handled once they are brought to trial within the NYPD is vital for the public to gauge the efficacy of the accountability mechanisms currently in place for those charged with breaching the public trust.

3. The NYPD has invoked several FOIL exemptions in an attempt to justify withholding the DCT opinions from the public, but none of the exemptions prevents disclosure. The NYPD's primary argument is that the opinions never become "final," even after the police commissioner approves the DCT recommendation in full. New York City regulations as well as the NYPD's standard practices demonstrate that a DCT opinion becomes final when the police commissioner adopts it by signing it, stamping "APPROVED", removing a stamp that said "DRAFT for ATTORNEY Comment", and sending the final opinion it to the accused officer and his counsel. The NYPD invokes several other exemptions, designed to protect personnel records, personal privacy, and law enforcement investigations, to avoid disclosure. But to the extent that any of those exemptions applies to the records at all, the NYPD has no authority

under FOIL to withhold the documents entirely and instead can only redact from the documents specific exempt material.

### **PARTIES**

4. Petitioner the New York Civil Liberties Union is a not-for-profit corporation that seeks to defend civil rights and civil liberties on behalf of individuals who have experienced injustice and to promote transparency in government. For over fifty years, the NYCLU has been involved in litigation and public policy advocacy on behalf of New Yorkers, fighting against discrimination, advocating for individual rights, and demanding government accountability.

5. 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.

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

### **FACTS**

7. The NYCLU is a not-for-profit, non-partisan organization whose mission is to defend civil rights and civil liberties and to preserve and extend constitutionally guaranteed rights to people whose rights have historically been denied. Police accountability has long been an issue of major concern to the NYCLU. The NYCLU played a central role in the creation of the New York City Civilian Complaint Review Board (CCRB) as an independent city agency in 1992. Since then, the NYCLU has devoted substantial resources to monitoring and reporting about the activities of the CCRB.

8. A primary responsibility of the CCRB is to investigate complaints from civilians of misconduct of uniformed members of the NYPD. In particular, the CCRB investigates complaints of excessive force, abuse of authority, discourtesy, and offensive language.

9. After CCRB staff members investigate a complaint, the case goes to the board (which consists of 13 individuals appointed by the Mayor) for decision on a final disposition of the case. One option available to the board is to “substantiate” the case, which means the board concludes that the officer did engage in at least one act of alleged misconduct. In those cases where it substantiates at least one allegation against an officer, the CCRB sends the case to the NYPD for prosecution and discipline. When it refers a substantiated case to the NYPD, it also makes a recommendation about actions to be taken by the NYPD.

10. Once a substantiated case is referred to the NYPD, the department assumes responsibility for it. At that point, it can simply drop the case, negotiate a plea with the officer, or prosecute the case in the NYPD’s Trial Room, which is an adjudicatory forum inside the NYPD. The NYPD Trial Room is overseen by the Deputy Commissioner of Trials, who has jurisdiction over disciplinary matters adjudicated by the NYPD. The DCT office includes judges who act as hearing officers in the Trial Room.

11. A relatively small number of CCRB-substantiated cases go to trial. According to CCRB reports, the number of such cases that have gone to trial over the last five years are as follows: 2011: 17; 2010: 14; 2009: 20; 2008: 19; 2007: 11. For those cases that go to trial, the NYPD’s hearing process closely resembles a conventional trial. The NYPD and the officer are represented by lawyers, a judge (appointed by the NYPD) presides over the case, the lawyers make arguments and introduce evidence (including witness testimony), and briefs are filed. The hearing must be open to the public unless the DCT finds a legally recognizable ground for

closure of all or a portion of the hearing.

12. After the hearing is concluded, the judge issues a written opinion that “consist[s] of a summary and analysis of the testimony, recommended findings of fact and conclusions of law, and recommendations for the disposition of the Charges and Specifications.” That opinion is a draft and is marked “DRAFT for ATTORNEY Comment.” It is sent to the officer’s counsel for review and comment. Once comments are received, the office of Deputy Commissioner of Trials forwards the draft opinion, the comments, and other trial materials to the police commissioner for his review and final decision.

13. After the police commissioner reviews the materials, he makes a final disposition in the case. In doing so, the police commissioner may approve the DCT’s recommendation or modify the findings or the penalty consistent with the record. The NYPD then sends to the officer and his counsel two documents. One is a document identifying the final disposition of the case. The second is the trial commissioner’s opinion with the stamp “DRAFT for ATTORNEY Comment” removed and with the police commissioner’s signature on a stamp with the word “APPROVED.”

14. In a small percentage of cases (upon information and belief less than 10%), the police commissioner does not adopt the decision of the trial judge in full. Upon information and belief, when this happens the police commissioner prepares a separate memo that supplements the original judicial opinion and explains any changes to the opinion made by the police commissioner. When this happens, that memorandum is also provided to the officer and his counsel.

15. The NYCLU has long been interested in learning of the legal and factual bases on which the police commissioner disposes of CCRB-substantiated cases that proceed to trial. To

take just one example, the NYCLU wishes to see the legal analysis being used by the department to assess substantiated cases about stops and frisks. The NYCLU is deeply involved in stop-and-frisk issues, and complaints about stop-and-frisk are among the most common type of complaint received and substantiated by the CCRB.

16. On August 17, 2011, the NYCLU submitted a FOIL request on behalf of the NYCLU to the NYPD seeking (1) the final versions of the DCT decisions issued in conjunction with CCRB substantiated cases dating from January 1, 2001 and (2) the final dispositions issued in conjunction with those decisions.

17. On September 21, 2011, the NYPD denied the NYCLU's request in its entirety.

18. On October 20, 2011, the NYCLU appealed the NYPD's denial of the NYCLU's August 2011 FOIL request.

19. In a letter dated December 15, 2011 and subsequently received by the NYCLU, the NYPD denied the NYCLU's appeal in part and granted it in part. The NYPD denied the appeal with respect to the request for the final DCT opinions but granted it for the dispositions associated with those opinions.

#### **CAUSE OF ACTION UNDER ARTICLE 78**

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

21. Petitioner, the NYCLU, has a clear right under FOIL to the records sought.

22. There is no basis in law or fact for Respondent to withhold the final Deputy Commissioner of Trials opinions. Respondent's obligation under FOIL to disclose the records is mandatory, not discretionary.

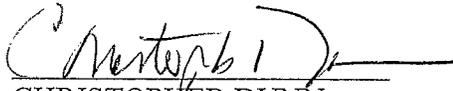
23. Petitioner exhausted its administrative remedies with the NYPD when it appealed the NYPD initial denial of its request for the DCT opinions and received a denial of that appeal. Petitioner has no other remedy at law.

### **REQUESTED RELIEF**

WHEREFORE, Petitioner seeks judgment:

- (1) Pursuant to C.P.L.R. § 7806, directing Respondent to comply with its duty under FOIL and provide the records sought by Petitioner in its request dated Aug. 17, 2011;
- (2) Awarding reasonable attorney's fees and 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,

A handwritten signature in black ink, appearing to read "Christopher Dunn", is written over a horizontal line.

CHRISTOPHER DUNN

DANIEL MULLKOFF

New York Civil Liberties Union  
Foundation

125 Broad Street, 19<sup>th</sup> Floor

New York, NY 10004

Tel: (212) 607-3300

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Counsel for Petitioner

Dated: April 12, 2012

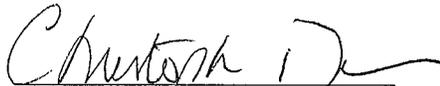
New York, New York

**VERIFICATION**

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

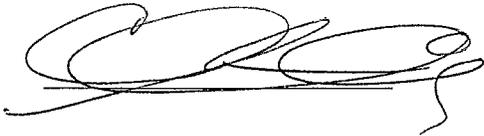
Christopher Dunn, an attorney admitted to practice in the State of New York, affirms pursuant to C.P.L.R. § 2106 under the penalties of perjury:

1. I am an attorney for and an employee of the Petitioner in the within proceeding. I make this Verification pursuant to C.P.L.R. § 3020(d)(1).
2. I have read the attached Verified Petition and know its contents.
3. All of the material allegations of the Verified Petition are true to my personal 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: April 12, 2012  
New York, New York

Sworn and subscribed to me  
this 12<sup>th</sup> day of April 2012



**CORINNE A. CAREY**  
Notary Public, State of New York  
No. 02CA6039440  
Qualified in Kings County  
Commission Expires April 17, 2014