

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SARATOGA

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THE NEW YORK CIVIL LIBERTIES UNION, : Index No.
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 Petitioner, :
 :
 : **VERIFIED PETITION**
 :
 -against- :
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 THE CITY OF SARATOGA SPRINGS, :
 and THE SARATOGA SPRINGS POLICE :
 DEPARTMENT, :
 :
 Respondents. :
 :
 For a Judgment Pursuant to Article 78 :
 Of the Civil Practice Law and Rules :
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PRELIMINARY STATEMENT

1. This Article 78 proceeding seeks to vindicate the right of the public and of the New York Civil Liberties Union (NYCLU) to access government records regarding the Saratoga Springs Police Department's use of weapons known as conducted energy devices (CEDs), otherwise known as stun guns and TASER guns. The City of Saratoga Springs has refused to provide any records responsive to a Freedom of Information Law (FOIL) request regarding the use of these devices by the Saratoga Springs Police Department, inappropriately invoking a blanket exemption from disclosure requirements under FOIL. Given the incapacitating effects of these devices and recent reports about their misuse by police officers, transparency on this issue is critical. Petitioner respectfully requests that the Court compel the City of Saratoga Springs and its Police

Department to comply with the dictates of FOIL and basic principles of open government.

PARTIES

2. Petitioner New York Civil Liberties Union is a not-for-profit corporation that defends and promotes civil rights and civil liberties in New York State. It has the capacity to sue and be sued as a corporation pursuant to New York Not-for-Profit Corporation Law § 202(a)(2).

3. Respondent Saratoga Springs Police Department is a law enforcement agency responsible for safety in Saratoga Springs and subject to New York Public Officers Law Article 6.

4. Respondent City of Saratoga Springs “regulate[s] and control[s] the exercise” of the powers it confers on agencies. Charter of the City of Saratoga Springs § 1.3. It is also subject to New York Public Officers Law Article 6.

VENUE

5. Pursuant to C.P.L.R. §§ 7804(b) and 506(b), venue in this proceeding lies in Saratoga County, the judicial district in which the principal offices of the City of Saratoga Springs and the Saratoga Springs Police Department are located.

FACTS

6. Touted as a safe, non-lethal alternative for use in law enforcement, CEDs have increasingly been incorporated into police departments' arsenals, nationally and across New York State. CEDs deliver an electric jolt to an individual, as strong as 50,000 volts, meant to incapacitate them. The weapons, however, can be lethal. According to Amnesty International, between 2001 and 2008, more than 300 individuals died after having these weapons used against them.

7. Notwithstanding their potentially lethal effects, news reports demonstrate that these weapons are sometimes inappropriately used either in situations that do not merit such force or against vulnerable individuals. In March 2009, a 15-year-old died in Michigan after being shocked by a CED. He was not the first minor to die from a CED in 2009. The previous January, a 17-year-old in Virginia died after being shocked by a CED. This past August, police used CED against a 76-year-old man in Wyoming.

8. CED misuse has been reported in New York as well. Approximately one year ago, on September 24, 2008, an emotionally disturbed man plummeted to his death from a ledge after a New York City police officer fired a CED at him. As recently as September 2009, CEDs were used against high school students in two Syracuse high schools. A public defender in the City of Saratoga Springs reported to the NYCLU an increase in the number of cases where CEDs were used against individuals who were not presenting a danger to themselves or others.

9. In response to the report that Saratoga Springs police officers inappropriately used CEDs on citizens who presented no threat to themselves or others, on April 13, 2009, the NYCLU requested from the Saratoga Springs Police Department, pursuant to the New York Freedom of Information Law, the following records:

all documents and records pertaining to the use of conducted energy devices (CEDs), a.k.a. stun guns or tasers, by your police department. This includes, but is not limited to, all department policies, procedures or guidelines pertaining to the use of CEDs, all training material used by the department concerning CEDs, all reports discussing, analyzing, or evaluating the department's use of CEDs; and all reports containing information about any and all instances in which a member of the department has used a CED. We request all records dated from the beginning of the department's use of CEDs to the present.

10. The Saratoga Springs Police Department did not respond to this request until June 16, 2009, approximately two months after the NYCLU requested records. This City's response time exceeded the five business days an agency has to respond to a request under FOIL.

11. In a June 16 letter from an Assistant City Attorney, the City of Saratoga Springs denied the entirety of the request. It claimed the records were exempt from disclosure under the inter-agency or intra-agency materials exemption, N.Y. Pub. Off. Law § 87(2)(g). The denial provided no justification for why the records requested fall into the inter-agency or intra-agency materials exception.

12. The City also denied access to all the records requested under the endangerment to life or safety of persons exemption, NY Pub. Off. Law § 87(2)(f), cursorily stating: "Clearly information about a police agency's training and use of weapons, if made

public, might impair the effectiveness of such training and compromise the safety of officers and of the public.”

14. In its response, the City failed to inform the NYCLU of its right to appeal the determination.

15. The NYCLU, in response to this denial, requested an advisory opinion from the Committee on Open Government (C.O.G.) regarding the propriety of the City’s blanket denial. On July 27, 2009, the Committee issued the requested opinion in which it concluded that the City of Saratoga Springs inappropriately engaged in a blanket denial of records and that an agency has to review its records to determine which records, or portions thereof, are exempt and which can be disclosed.

16. The C.O.G. also noted that in instances where the right to appeal a denial has not been communicated, the denied individual may commence an Article 78 proceeding without further exhausting administrative remedies.

17. The C.O.G. forwarded a copy of its opinion to the City; however, to date, the City has not provided any additional justification for its denial, nor has it provided any records responsive to the request or any information regarding an appeal of its determination.

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

18. Article 78 is the appropriate method for review of agency determinations concerning FOIL requests. N.Y. Pub. Off. Law § 89(4)(b).

19. Petitioner NYCLU has a clear right to records about the use of CEDs by the Saratoga Springs Police Department. The City of Saratoga responded with a wholesale denial of the NYCLU's FOIL request and without satisfying its burden of demonstrating that the withholding of each document or portion thereof is supported by a specific and particularized justification.

20. Respondents have not disclosed records about the use of CEDs sought by the petitioner NYCLU as mandated under FOIL.

21. Petitioner NYCLU need not exhaust its administrative remedies because Respondent failed to inform the NYCLU of its right to appeal its denial of the request.

PRAYER FOR RELIEF

WHEREFORE, Petitioner requests the following relief:

(1) Pursuant to C.P.L.R. § 7806, an order directing Respondents to comply with their duty under FOIL and provide the information sought by Petitioner in its April 13, 2009 request;

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

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

Respectfully submitted,



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Counsel for Petitioner

Dated: October 14, 2009
New York, New York

VERIFICATION

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

Donna Lieberman, being duly sworn, states under penalty of perjury that the following is true:

1. I am the Executive Director of the New York Civil Liberties Union. 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. 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.



DONNA LIEBERMAN

Sworn to before me this
14th day of October, 2009



NOTARY PUBLIC

BETH HAROULES
Notary Public, State of New York
NO: 02HA4890292
Qualified in New York County
Commission Expires March 30, 2011