

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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In the Matter of	:	
	:	
NEW YORK CIVIL LIBERTIES UNION,	:	
	:	
Petitioner,	:	Index No. _____
	:	
-against-	:	
	:	
NEW YORK STATE DEPARTMENT OF	:	
CORRECTIONAL SERVICES,	:	
	:	
	:	
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: May 19, 2010
New York, New York

TABLE OF CONTENTS

TABLE OF AUTHORITIESii

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS2

ARGUMENT.....7

**I. THE FREEDOM OF INFORMATION LAW CREATES A BROAD
RIGHT OF PUBLIC ACCESS TO GOVERNMENT RECORDS..... 8**

**II. DOCS’S INCOMPLETE RESPONSE TO PETITIONER’S FOIL
REQUEST VIOLATES ITS STATUTORY OBLIGATIONS TO
PRODUCE RESPONSIVE RECORDS AND PROVIDE A BASIS FOR
WITHHOLDING ANY RECORDS. 10**

III. PETITIONER NYCLU IS ENTITLED TO ATTORNEYS’ FEES. 13

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Data Tree, LLC v. Romaine, 9 N.Y.3d 454, 463 (2007)12

Gould v. N Y City Police Dep't, 89 N.Y.2d 267 (1994).....10, 12

N. Y. Civil Liberties Union v. City of Schenectady, 2 N.Y.3d 657 (2004)12

Wagstaffe v. David, No. 402062/09, 2010 WL 723754 (N.Y. Sup. Ct. Feb. 22, 2010)10

Statutes

N.Y. Pub. Off. Law § 84.....8

N.Y. Pub. Off. Law § 87.....9

N.Y. Pub. Off. Law § 89.....7, 9, 10, 13

Other Authorities

2005 Legis. Bill Hist. N.Y, S.B. 701113

Legislative Memo, Justification for A.809-C, 231st Sess., Reg, Sess. (2008).....9

PRELIMINARY STATEMENT

This Article 78 proceeding seeks to vindicate the right of Petitioner, the New York Civil Liberties Union (NYCLU), and the right of the public under the Freedom of Information Law (FOIL) to have access to records concerning Respondent New York State Department of Correctional Services' (DOCS) use of ion scanning technology on prison visitors.

Ion scanning is a method of testing for exposure to drugs by swiping the surface of an object with fabric and testing that fabric for trace molecular particles thought to be associated with drugs. Concerned with the substantial number of complaints from New Yorkers seeking to visit loved ones in prison regarding the use and accuracy of these machines and studies questioning the high rate of false positives associated with using this technology to test for drug exposure, Petitioner submitted a FOIL request on September 22, 2009 seeking records of DOCS's policies and procedures for the use of ion scanners; assessments of the scanners and their accuracy; complaints and grievances regarding the scanners; and policies and procedures regarding the maintenance and use of records of New Yorkers who have been tested with the ion scanner. Respondent replied to Petitioner's request by providing a single 12-page record titled "Overview of Department's Ion Scanning Procedures," which addressed only a fraction of the request.

Based on Respondent's patently incomplete response, Petitioner sent an administrative appeal on January 21, 2010. Having received no response, and in hope of avoiding an Article 78 proceeding, Petitioner sent a letter to DOCS on March 15, 2010 reminding it of its duties under FOIL to reply to the administrative appeal. To date,

Respondent has provided no response to either that letter or to the January 21 administrative appeal.

Petitioner seeks relief based on Respondent's unlawful actual and constructive denial of Petitioner's FOIL request. The single document that Respondent produced to Petitioner's request demonstrates a superficial effort to comply with its statutory obligations and illustrates Respondent's general disregard for the broad right of access to government records granted to the public under FOIL. Indeed, the single record Respondent produced to Petitioner itself identifies many other records that are both plainly responsive to Petitioner's request and non-exempt under FOIL. Respondent has not provided these documents, has not offered any reason for nondisclosure, and has not responded to Petitioner's administrative appeal or any attempts to follow up on that appeal. Therefore, Petitioner seeks relief from this Court.

STATEMENT OF FACTS

The NYCLU's mission is to defend civil liberties and civil rights in New York and to preserve and to ensure government openness. For over fifty years, the NYCLU has been involved in litigation and public policy on behalf of New Yorkers, fighting against discrimination and advocating for individual rights and government accountability. New York's Freedom of Information Law is a crucial vehicle in the organization's efforts to ensure the accountability of the government, monitor state and municipal agencies, learn about governmental policies and, when appropriate, challenge the legality of problematic policies. *See* Affirmation of Corey Stoughton ¶ 2 (May 19, 2010) (hereafter "Stoughton Aff.").

Ion Scanning Technology in DOCS Facilities

Beginning in at least 2003, DOCS has used ion scanning technology to screen visitors to DOCS facilities for exposure to drugs. According to DOCS, the ion scanner is an electronic detection device that aims to identify minute traces of drugs on clothing, body parts, and other surfaces. *See Overview of Department's Ion Scanning Procedures at 1 (attached to Stoughton Aff. as Ex. 1).*

Under DOCS's procedures for executing an ion scanning test, an ion scanner operator takes the hand-held scanning device and passes it over areas on the individual's body, clothing, or personal items. *Id.* at 3-4. The operator then puts the samples in the ion scan machine in an attempt to detect the presence of certain microscopic substances. *Id.* at 3. A positive test result may occur in any case where a person has come into contact with a tested-for substance, regardless of whether the person has used that substance or not, whether the contact has been inadvertent or intentional, or whether the person may be authorized, for example by a doctor's prescription, to use the substance. *Id.* at 4. If a positive reading results, no further investigation is conducted into whether the individual actually possesses illegal drugs. *Id.* at 6. Visitors do not receive a pat frisk or any other type of search after a positive test result, even if they request or consent to a more invasive scan. *Id.* at 6. A person who refuses to submit to the ion scanner is treated the same as someone who has a confirmed, positive test result. *Id.* at 4.

If a visitor tests positive, he or she is not allowed to enter the facility. *Id.* at 4. DOCS personnel photograph the visitor and photograph the visitor's ID. *Id.* at 5. These records are attached to the positive scanner results and distributed to prison superintendents and members of the ion scan team to identify the visitor during future

visits. *Id.* at 4-5. Visitors that test positive or refuse to test will be subject to mandatory testing until three consecutive tests show negative results. *Id.* at 5.

In the decade since DOCS began using ion scanners, the NYCLU has received many complaints concerning the machine's accuracy and, in particular, its propensity to trigger positive results based on the handling of non-contraband. *See* Stoughton Aff. at ¶ 5. Given the significant personal and monetary hardships visitors endure in journeying to visit incarcerated friends and family members, it is unsurprising that some report taking burdensome measures to ensure they will not be turned away: avoiding cash transactions on the day of the visit, wearing freshly-purchased clothing, and even forgoing prescribed pain medication. *See* Stoughton Aff. ¶ 6.

Suspension of Ion Scanning Technology in Federal Bureau of Prisons' Facilities

Complaints regarding the machine's inaccuracy were confirmed in April of 2008 when all Federal Bureau of Prisons (BOP) facilities suspended the use of any ion spectrometry drug detection equipment due to problems with the machines' software. *See* Memorandum for All Chief Executive Officers (April 10, 2008) (attached to Stoughton Aff. as Ex. 8). On October 2, 2009, BOP reinstated the ion scanning programming, but only under limited conditions and with changes in policy and equipment that BOP deemed "necessary to improve the overall effectiveness of the program."¹ *See*

¹ Among these changes, BOP upgraded its equipment to be "less susceptible to false alarms by pharmaceuticals." *See* Memorandum for All Chief Executive Officers (Oct. 2, 2009) (attached to Stoughton Aff. as Ex. 9). BOP also prohibited staff from testing visitor's hands ("Staff will only test the other suggested items ... such as the tops of pants pockets, waist area, pants cuff (or shoe area), personal identification, etc. This will virtually eliminate the possibility of false alarms caused by hand sanitizers, hand lotions, handling of prescription drugs, and nuisance contact of drugs from money, doorknobs, etc. ..."). *Id.* In further recognition of the capability for ion scanning equipment to produce false positives, BOP conditioned use of the equipment on a flexible visitor entry policy, stating:

An initial positive and second confirmation positive are not grounds for an immediate denial of a visit ... Wardens should assess every situation in which a visitor produces a
(cont'd)

Memorandum for All Chief Executive Officers (Oct. 2, 2009) (attached to Stoughton Aff. as Ex. 9).

The NYCLU's FOIL Request

On September 22, 2009, as a result of its ongoing concern regarding the accuracy of ion scanning machines and the impact of their use on New Yorkers seeking to visit loved ones who are in prison, the NYCLU filed a FOIL request seeking copies of records maintained by DOCS regarding the use of ion scanners to test prison visitors for narcotics. *See* FOIL Request (Sept. 22, 2009) (attached to Stoughton Aff. as Ex. 2).

Specifically the NYCLU requested:

(1) Policies and procedures governing the use of ion scanners on visitors to DOCS facilities, including but not limited to: (a) policies and procedures governing when, under what circumstances, for what reasons, and upon whom the ion scanners may be used; (b) records reflecting the calibration or settings of ion scanners operated by DOCS; (c) policies and procedures to be followed in the event of positive test results; and (d) any policies and procedures reflecting exemptions from ion scanning requirements or accommodations to ion scanning procedures for persons with medical conditions, disabilities, or other conditions;

(2) Records and reports reflecting assessment of the capabilities, limitations, accuracy or reliability of ion scanners, whether created by DOCS or created by third parties and received by DOCS, including but not limited to: (a) assessments of which substances the ion scanners can test for and to what level of specificity; (b) records concerning the possibility of "false positives," including the rate of false positives and the substances or activities that can cause false positives;

(3) Records related to complaints or grievances regarding ion scanners, including any responses to those complaints or grievances; and

(4) Policies and procedures governing the maintenance and usage of records related to individual ion scan tests and test results.

confirmed positive test on his/her own merit before reaching a final decision. Wardens possess broad discretion to require pat/visual searches as a prerequisite to visitation, controlled or non-contact visitation, or complete denial of visitation.

Id.

DOCS's Incomplete Response to the NYCLU's FOIL Request

On October 8, 2009, the NYCLU received an acknowledgment letter from DOCS stating that a response to its FOIL request would be provided by November 6, 2009. *See Acknowledgement Letter (Oct. 8, 2009) (attached to Stoughton Aff. as Ex. 3).* DOCS sent a second letter on November 10, 2009, further postponing its response to December 10, 2009. *See Ltr from C. Powell to C. Stoughton (Nov. 10, 2009) (attached to Stoughton Aff. as Ex. 4).*

Finally, more than two months after its original FOIL request, on November 27, 2009, DOCS sent a letter stating that it had 12 pages of responsive records available and sought advance payment of \$3.00. *See Ltr from C. Powell to C. Stoughton (Nov. 27, 2009) (attached to Stoughton Aff. as Ex. 5).* Following payment on December 7, 2009, *see Stoughton Aff. ¶ 10*, DOCS produced a single 12-page document titled "Overview of Department's Ion Scanning Procedures" on December 22, 2009. *See Overview of Department's Ion Scanning Procedures (attached to Stoughton Aff. as Ex. 1)*

Neither DOCS's November 27 letter nor its December 22 letter indicated that DOCS was denying the NYCLU's request on any grounds within the FOIL statute, that any records were withheld pursuant to any FOIL exemption, or that no additional responsive documents existed. Nonetheless, it was clear that the single 12-page record that DOCS produced did not constitute a complete response to the NYCLU's request. That record, titled "Overview of Department's Ion Scanning Procedures," briefly describes ion scanning technology and provides a broad overview of department procedures and protocols for the Ion Scanner Unit. *See Overview of Department's Ion Scanning Procedures (attached to Stoughton Aff. as Ex. 1).* It also cites to numerous

other documents and records concerning ion scanners that were not made available by DOCS. *Id.*

The NYCLU's Administrative Appeal and DOCS's Complete Failure to Respond

As a result of the incomplete response and DOCS's failure to explain its nondisclosure, on January 21, 2010, the NYCLU administratively appealed the FOIL request as having been partially denied. *See* Administrative Appeal from C. Stoughton to W. Gonzales (Jan. 21, 2010) (attached to Stoughton Aff. as Ex. 6). The appeal called into question the thoroughness of DOCS's search for the responsive documents and requested DOCS undertake a renewed, full search for records responsive to the FOIL request.

FOIL requires that an agency respond to an administrative appeal within ten days. N.Y. Pub. Off. Law § 89(4)(a). However, on March 15, 2010, after having received no response from DOCS for nearly two months, the NYCLU sent a letter requesting that DOCS promptly respond to its administrative appeal in order to avoid an Article 78 proceeding. *See* Ltr from C. Stoughton to W. Gonzales (Mar. 15, 2010) (attached to Stoughton Aff. as Ex. 7). To date, DOCS has not responded to this letter. Petitioner is, therefore, authorized to sue pursuant to N.Y. Pub. Off. Law § 89(4)(b).

ARGUMENT

The NYCLU's FOIL request touches on a matter of public importance: namely, the Department of Correctional Services' use of a controversial technology whose purpose is to screen for drug exposure but whose practical effect may be to wrongly deny innocent New Yorkers their ability to visit loved ones who are incarcerated. The suspension of ion spectrometry drug detection equipment in all Federal BOP facilities due to technical problems as well as the numerous complaints received by the NYCLU,

raise serious doubts as to the propriety of using this technology to bar people from visiting DOCS facilities.

Petitioner's FOIL request sought four discrete and well-defined categories of agency records: policies and procedures governing ion scanning technology; records containing assessments of that technology; records of complaints and grievances regarding the technology; and policies and procedures governing the maintenance of the records of individual ion scan tests. In response, DOCS produced a single 12-page document that relates to only the first of these four categories of records. This response is plainly incomplete. In addition, DOCS failed – both in its initial response and in its failure to provide any response to Petitioner's administrative appeal – to provide any explanation for its incomplete response or any statutory justification for withholding responsive records. As a result, Petitioner seeks relief from this Court.

Further, because DOCS has repeatedly and flagrantly ignored its statutory obligations under FOIL, ignored Petitioner's request to comply with those obligations, and had no reasonable basis for denying access to these records, the NYCLU is entitled to attorneys' fees.

I. THE FREEDOM OF INFORMATION LAW CREATES A BROAD RIGHT OF PUBLIC ACCESS TO GOVERNMENT RECORDS.

The New York State Freedom of Information Law, codified as Article 6 §§ 84-90 of the Public Officers Law, provides the public with a legal right to broad access of government records. As noted in the statute's legislative declaration:

The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of government actions. The more open a government with its citizenry, the greater the understanding and participation of the public in government.

N.Y. Pub. Off. Law § 84. The declaration also states that “it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible” and further that “[t]he 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.” *Id.*

The scheme of FOIL is straightforward. Section 87 provides that government agencies “shall...make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof” that fall within certain exemptions specified in the statute. N.Y. Pub. Off. Law § 87(2). In amending the statute to increase public access to government records in 2008, the Legislature re-emphasized the breadth of the statute’s intended reach:

The legislation supports the position that has been taken in numerous court decisions that government records in all forms, including non-paper records, are preemptively open for public inspection and copying unless those records fall within a specific statutory exemption. The courts also have repeatedly ruled that these exemptions are to be narrowly construed.

See Legislative Memo, Justification for A.809-C, 231st Sess., Reg. Sess. (2008).

Section 89 of the Public Officers Law contains the provisions addressing the procedure for processing FOIL requests. Section 89(3) specifies how an agency is to process an initial request; section 89(4)(a) provides that a person whose request is denied can appeal that denial to the agency; and section 89(4)(b) provides that a person whose administrative appeal is denied may bring an action under Article 78 to challenge the denial. An agency’s failure to either provide written explanation of the reason(s) for denial, respond within the statutory timeframe, or to provide access to the requested materials as required by section 89, constitutes a “constructive denial” of the FOIL

request and entitles the person who made the request to seek relief pursuant to Article 78. *See Wagstaffe v. David*, No. 402062/09, 2010 WL 723754, at *3 (N.Y. Sup. Ct. Feb. 22, 2010) (citing *Matter of Barrett v. Morgenthau*, 74 N.Y.2d 907 (1989)).

§ 89(4) also provides that in any such Article 78 proceeding, the agency involved shall have the burden of proving that records withheld fall within the exemptions of § 87. When reviewing the denial of a request, under the Freedom of Information Law, the reviewing court must presume that all records of a public agency are open to public inspection, and require the agency to bear the burden of showing that the records fall squarely within an exemption to disclosure by articulating a particularized and specific justification for denying access. *Gould v. N Y City Police Dep't*, 89 N.Y.2d 267 (1994); N.Y. Pub. Off. Law § 89 4(b)(5)(e)-(f).

II. DOCS'S INCOMPLETE RESPONSE TO PETITIONER'S FOIL REQUEST VIOLATES ITS STATUTORY OBLIGATIONS TO PRODUCE RESPONSIVE RECORDS AND PROVIDE A BASIS FOR WITHHOLDING ANY RECORDS.

Based on the flagrant inadequacy of the single record provided and the references in that document to additional documents that were not produced, it is clear that additional records exist that should have been produced in response to Petitioner's request. In light of DOCS's inadequate response and failure to provide reasons for its denial, it is clear that DOCS has violated both the spirit and letter of the Freedom of Information Law.

A. DOCS's Response to Petitioner's FOIL Request Was Incomplete.

DOCS's production of a single 12-page record does not constitute a complete response to Petitioner's FOIL request. Petitioner's request sought four categories of documents: policies and procedures governing ion scanning technology; records

containing assessments of that technology; records of complaints and grievances regarding the technology; and policies and procedures governing the maintenance of the records of individual ion scan tests. DOCS failed to produce any documents whatsoever responsive to the second, third and fourth of these categories.

Moreover, the single record that it did produce does not even constitute a complete response to the first part of the NYCLU's request which sought the production of DOCS's policies and procedures governing the use of ion scanners. For example, that record does not address the calibration settings for ion scan tests that DOCS performs, a procedure that is crucial to the question of the propensity of the technology to produce false positives, and one that was expressly requested in the NYCLU's request. *See* FOIL Request (Sept. 22, 2009) (attached to Stoughton Aff. as Ex. 2).

Moreover, the single record that DOCS disclosed refers extensively to other records that should have been produced in response to Petitioner's request. For instance, according to that policy:

[T]eam supervisors will be responsible for reviewing and correlating their *team report, test results and actions taken*. They will maintain a centralized HUB file *including all information dealing with the testing procedures, condition and maintenance of the testing device, and the security measures taken to secure the Ion Scanner device*. The team supervisor will complete and submit a monthly report to the HUB superintendent...Each team supervisor will meet ... at least bi-annually to be briefed on upcoming events, assignments and *to review procedural issues and protocol*.

Overview of Department's Ion Scanning Procedures at 7 (attached to Stoughton Aff. as Ex. 1) (emphasis added). No such "team reports," information from a "HUB file" or protocols such as the ones referenced in the document were produced. The disclosed document references records such as: daily maintenance forms; written notification and

copies of visitor testing results and entrance denial; logbooks recording visitors and machine print out results for the testing; photos of denied visitors for purposes of identification in future visits; “appropriate paperwork” referring to non-attached “Appendix A”; findings documented by Ion Scanner Staff; and certification training for Ion Scanning Operators. *See Id.* at 5-8. Yet DOCS produced none of these records.

The patent incompleteness of DOCS’s response calls into question the thoroughness of DOCS’s search for responsive documents. Thus, DOCS must be required to perform a thorough search for responsive records and to produce those records.

B. DOCS Failed to Meet Its Burden to Establish Entitlement to Withhold Any Documents.

To the extent that DOCS seeks to withhold any responsive documents, it has failed to meet its statutory burden to justify doing so. DOCS failed to cite any exemptions for the documents that were withheld, an omission that falls far short of the standard courts apply when evaluating justifications for withholding public records under FOIL. “The agency must articulate particularized and specific justification for not disclosing the document.” *Gould*, 89 N.Y.2d at 275; *Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 463 (2007); *N. Y. Civil Liberties Union v. City of Schenectady*, 2 N.Y.3d 657, 661 (2004) (emphasizing that *Gould* establishes that “government records are ‘presumptively open,’ statutory exemptions are ‘narrowly construed,’ and the [agency] must articulate a ‘particularized and specific justification’ for nondisclosure”).

DOCS has failed to enumerate or describe any of the documents withheld and has failed to offer any specific basis regarding claims of exemption. For this reason as well, Petitioner is plainly entitled to the records requested.

III. PETITIONER NYCLU IS ENTITLED TO ATTORNEYS' FEES.

Petitioner requests attorneys' fees and reasonable litigation costs under the Freedom of Information Law. Section 89(4)(c) authorizes a court to award reasonable attorneys' fees and other litigation costs when the moving party has substantially prevailed in its Article 78 petition and the agency had no reasonable basis for having withheld the records in dispute. N.Y. Pub. Off. Law § 89(4)(c).

Section 89(4)(c) was amended in 2006, in part, to remove the previous requirement that "the record involved was, in fact, of clearly significant interest to the general public." The legislative history to the 2006 amendment states that "[t]his bill strengthens the enforcement of such a right [citizens' right to access certain government records via FOIL requests] by discouraging agencies from denying public access to records by guaranteeing the award of attorneys' fees when agencies fail to respond in a timely fashion or deny access without any real justification." 2005 Legis. Bill Hist. N.Y., S.B. 7011.

Thus, the only showing that now must be made for an award of attorneys' fees under the Freedom of Information Law is that the petitioner substantially prevailed and that "the agency had no reasonable basis for denying access." N.Y. Pub. Off. Law § 89(4)(c). Further, section 89(4)(c) alternatively awards attorneys' fees when an agency has not responded to the FOIL request within the statutory timeframe.

Both of these provisions authorizing attorneys' fees apply here. DOCS plainly had no reasonable basis for denying the NYCLU access to the range of records that are responsive to its request. Indeed, DOCS has made no attempt to provide such a basis, despite having been given numerous opportunities to do so, and thereby to avoid the

expenditure of attorneys' time and resources, as well as the Court's time and resources. Further, DOCS utterly failed to respond to Petitioner's administrative appeal, even after Petitioner sent a second letter prompting the agency to do so and thereby to avoid the necessity of an Article 78 proceeding. For these reasons, Petitioner is entitled to attorneys' fees.

CONCLUSION

For all the foregoing reasons, Petitioner NYCLU respectfully asks the Court to grant its Article 78 petition and to order the Department of Correctional Services to produce the records the NYCLU requested concerning ion scanning at DOCS's facilities and to grant attorneys' fees.

Respectfully submitted,



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