

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

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

-against-

NEW YORK CITY POLICE DEPARTMENT, and
KEECHANT L. SEWELL, in her 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.

Index No. _____
(NYSCEF Filed)

**NOTICE OF VERIFIED
PETITION**

Oral Argument Requested

PLEASE TAKE NOTICE that, upon the annexed Verified Petition, Affirmation of Beth Haroules and exhibits thereto, and the Petitioner’s Memorandum of Law, each dated March 17, 2023, an application will be filed in the Supreme Court of the State of New York in the County of New York, 60 Centre Street, Room 130, New York, New York, on March 27, 2023 at 9:30 a.m., or as soon thereafter as counsel may be heard, for an order and judgment pursuant to Article 78 of the Civil Practice Law and Rules (“CPLR) and the Freedom of Information Law (“FOIL”):

- a. holding that the Respondent has failed to perform a duty enjoined upon it by law and in an arbitrary and capricious manner;
- b. directing the NYPD and Commissioner Sewell to comply with their duty under FOIL to provide Petitioner access to the records requested by the NYCLU in its December 13, 2022 FOIL request;
- c. awarding Petitioner its reasonable attorney’s fees and other litigation costs pursuant to Public Officers Law § 89(4)(c); and

- d. granting Petitioner such other and further relief as this Court deems necessary and equitable.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR § 7804(c) answering papers, if any, shall be received by the undersigned at least five (5) days before the return date of this application, and any reply shall be served and filed at least one (1) day before the return date of this application.

PLEASE TAKE FURTHER NOTICE that New York County is designated as the venue of this Proceeding pursuant to CPLR Sections 7804(b) and 506(b), as it is the County in which the material events giving rise to this proceeding took place.

Date: March 17, 2023
New York, New York

Respectfully Submitted,

NEW YORK CIVIL LIBERTIES UNION
FOUNDATION



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*Ms. Chikezie, a Legal Fellow at the NYCLU, is a law graduate awaiting admission and practicing under supervision pursuant to 22 NYCRR § 524.3.

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VERIFIED PETITION

PRELIMINARY STATEMENT

1. This Article 78 action seeks to vindicate the public’s right to have essential information about the New York City Police Department’s implementation of a City initiative under which police officers are to forcibly remove people from the street and transport them to facilities for involuntary confinement. Under a directive released by Mayor Eric Adams in November 2022, NYPD officers are to carry out mental-hygiene arrests when they deem an individual unable to meet their “basic needs,” even when no dangerous act has been observed and even if there is no indication of a likelihood of harm to the individual or others.

2. The mayoral directive implicates core civil liberties, including due process, individual autonomy, and dignity. It raises issues ranging from biased-based, racist policing to the harms associated with police contact with people living with mental illness. As interactions between police officers and vulnerable New Yorkers who are unhoused and living with mental health challenges have featured prominently in our local and national conversation as we move

into a so-called post-pandemic period, the public's right to information about the NYPD's implementation of the directive is paramount.

3. Since the day Mayor Adams announced the directive, there has been intense public interest in and extensive press reporting about how the directive will be implemented and the role of the NYPD. Nonetheless, the City has released very limited information about the program. Scrutiny of the program has grown so intense that the New York City Council held an oversight hearing on February 6, 2023, at which it was expected that City officials would release extensive information about the directive's implementation, including by the NYPD. The City, however, balked at most of the Council's requests for information.

4. The mayor directive expressly directed the NYPD (and other agencies implementing the directive) to "update their policies and protocols" and to train their staff to implement the directive. Given the NYCLU's long history of advocating on behalf of those experiencing mental-health crises and of advocating against unlawful policing, it submitted a Freedom of Information Law request to the NYPD on December 13, 2022, seeking any updated policies and protocols and seeking training records developed pursuant to the directive.

5. Continuing its pattern of shielding key information from the public, the NYPD has refused to produce any records responsive to the NYCLU's narrow request. On December 15, 2022, the NYPD advised that the NYCLU "can expect a response on or about Monday, May 1, 2023" -- almost five months after the NYCLU's initial request was made -- and on December 19, 2022, the NYPD rejected the NYCLU's appeal. The NYPD's five-month response time is plainly unreasonable, but the NYCLU had expected this dispute might be resolved through production of documents at the City Council hearing in February. Because the City refused to produce information for that hearing, however, the NYCLU now seeks judicial relief on its FOIL request.

PARTIES

6. Petitioner, the New York Civil Liberties Union (“NYCLU”), is a not-for-profit corporation that defends civil rights and civil liberties on behalf of individuals who have experienced injustice and promotes transparency in government. For over seventy years, the NYCLU has been involved in litigation and public policy advocacy on behalf of New Yorkers to demand government accountability and transparency. The NYCLU works to advance the civil rights of, and ensure equality of opportunity, self-determination, and independence for, people with disabilities. The NYCLU also has long actively advocated to improve the City’s response to individuals experiencing mental health crises. The NYCLU maintains its office at 125 Broad Street, 19th floor, New York, New York 10004.

7. Respondent New York City Police Department is an agency administered under New York City Administrative Code, Title 14. The NYPD is responsible for law enforcement in the City of New York, and is subject to the requirements outlined in FOIL. *See* Pub. Off. Law §§ 84 *et seq.* The NYPD maintains its office at One Police Plaza, New York, New York 10038.

8. Respondent Keechant L. Sewell is a public officer who is named in her official capacity as Commissioner of the NYPD.

FACTAL BACKGROUND AND PROCEDURAL HISTORY

The Involuntary Removals Directive

9. On November 29, 2022, Mayor Eric Adams announced at a press conference that he had issued a directive, titled “Mental Health Involuntary Removals as of 11/28/2022” (the “Involuntary Removals Directive” or the “Directive”). Haroules Affirmation dated March 17, 2023 (“Haroules Aff.”) Ex. F.

10. The Involuntary Removals Directive authorizes the involuntary removal of individuals living with mental illness pursuant to sections 9.41 and 9.58 of the Mental Hygiene

Law when a person “appears to be mentally ill and displays an inability to meet basic living needs, even when no recent dangerous act has been observed.” Haroules Ex. E at 1.

11. The Involuntary Removals Directive mandates that a number of City agencies, including the NYPD, “update their policies and protocols” and train their staff according to the agency roles and responsibilities outlined in the Directive. Haroules Ex. E at 1.

12. The Involuntary Removals Directive requires NYPD police officers with little to no expertise in dealing with individuals with mental disabilities to determine, on the street or in the subways, whether an individual should be forcefully detained against their will and transported to a hospital for psychiatric assessment because those NYPD police officers have determined that person is unable to meet their basic needs. Haroules Ex. E at 1.

13. The Involuntary Removals Directive, as written (and as repeatedly discussed by Mayor Adams), provides vague, broad, and undefined standards that would establish when an individual’s “inability to meet essential needs” rises to the level of “likely to result in serious harm” sufficient to permit the NYPD to effectuate a so-called mental hygiene arrest pursuant to N.Y. Mental Hygiene Law § 9.41. Haroules Ex. E at 1.

14. Mayor Adams and members of his Administration have publicly stated that the NYPD began training its officers on the Involuntary Removals Directive almost immediately after it was issued. For example, Mayor Adams and his team indicated at the November 29, 2022 press conference that the NYPD trainings had begun that day. Haroules Aff. Ex. F.

15. On December 6, 2022, the NYPD issued a “FINEST Message” – a communication sent to all NYPD members -- as part of its training activities regarding the Involuntary Removals Directive. That FINEST Message offered guidance to NYPD officers on examples of circumstances where an individual would appear “incapable of meeting basic human needs.”

Haroules Aff. Ex. G. It also advised NYPD officers that “additional training will be forthcoming to all members of the service.”

16. Unable to obtain any information about the scope and implementation of the Involuntary Removals Directive from the NYPD and the other City agencies identified in the Involuntary Removals Directive, the New York City Council convened an oversight hearing on February 6, 2023.¹ The New York City Public Advocate, a non-voting member of the New York City Council, participated at that hearing as well because, he testified, the City had refused to provide his office with any information about the Involuntary Removals initiative. Haroules Aff. Ex. H at 31, 123.

17. At that hearing, representatives of the NYPD as well as the Mayor’s Office of Community Mental Health, the New York City Health and Hospitals Corporation, the New York City Fire Department Emergency Services Department and the New York City Department of Health and Mental Health produced no documents and shared very little information about the Involuntary Removals initiative, offering vague assurances they were working on some information to provide at some point in the future to the City Council and the Public Advocate.

18. Juanita Holmes, then-Chief of Training for the NYPD, however, did testify about the training on the Directive that the NYPD had rolled out in the weeks and months following the issuance of the Involuntary Removals Directive. Chief Holmes testified that thousands of NYPD officers have reportedly received trainings on its implementation indicating that, as of the February 6 hearing, the NYPD had already trained approximately 88% of agency staff on the

¹ The February 6 oversight hearing was conducted by the four Council Committees: the Committees on Public Safety, Mental Health, Disabilities and Addiction, Fire and Emergency Management and Hospitals.

The agenda, minutes and video recording of the February 6, 2023 oversight meeting is available at <https://legistar.council.nyc.gov/MeetingDetail.aspx?ID=1074331&GUID=E142AADA-1411-4E1B-8F80-D1868ACEF51A&Options=info&Search=>. The transcript of the hearing is attached as Haroules Aff. Ex. H.

Involuntary Removals Directive by way of a roll-call training consisting of approximately 25 minutes of training, lecture, and discussion. Haroules Aff. Ex. H at 59-60. Chief Holmes also testified that the roll call training stopped after NYPD developed a training video that had been viewed by 60% of the agency. *Id.* at 60. Chief Holmes also testified that the new training video is supplemental to a four-day crisis intervention training first developed in 2015, some seven years prior to the announcement of the Involuntary Removals Directive, and that that training has been taken by only approximately 13,400 NYPD officers, not even 50% of the total NYPD force of 33,000 officers. *Id.* at 60, 74.

19. Chief Holmes further testified that, as of the February 6, 2023 New York City Council oversight hearing, 87% of the NYPD's 16,436 patrol officers had received some training, 91% of MTA transit officers had received some training, and 89% of NYCHA housing officers had received some training. *Id.* at 61.

20. According to Chief Holmes, the NYPD's recently implemented trainings focus on the Involuntary Removals Directive's basic-needs standard, which is a departure from past NYPD trainings. Chief Holmes stated that "the training that was put in place as a result of the Mayor's directive encompasses 'not capable of self-care,'" which is "something different" and "something that we weren't really, really focused on when it came to 9.41." *Id.* at 71.

21. While it is clear that the NYPD has developed and rolled out new training materials pursuant to the Involuntary Removals Directive, these materials have been completely shielded from public disclosure.

22. The NYPD is failing to provide transparency regarding its implementation of the Involuntary Removals Directive despite high public interest around the policy. Since the Directive was issued, multiple news outlets, including NPR, CNN, HuffPost News, the New York Times,

and City & State New York, have reported on the measure. Yet, the City, from the Mayor's office to the NYPD to the other agencies participating in the initiative, has refused to respond to reporting inquires and FOIL requests lodged by a number of media outlets seeking details on the implementation of and outcomes resulting from the Involuntary Removals initiative. The City and the NYPD have, to date, also successfully resisted providing any materials concerning the Involuntary Removals initiative in a federal court class action litigation challenging the NYPD's § 9.41 mental-hygiene arrest policies and procedures as violative of the Americans with Disabilities Act.²

23. Given the importance of the Directive, the high amount of public and media attention it has garnered, and the central role the NYPD plays in implementing the Mayor's new involuntary removal standard, it is unacceptable for the NYPD to conceal information regarding its role in the implementation of the Involuntary Removals Directive from the public.

Petitioner's FOIL Request and Respondents' Denials

24. On December 13, 2022, the NYCLU submitted a FOIL request to the NYPD FOIL Unit requesting policies and protocols developed pursuant to the Involuntary Removals Directive. Haroules Aff. Ex. A.

25. In its FOIL Request, the NYCLU sought three discrete and identifiable sets of records encompassing:

1. all policies and protocols developed pursuant to the Involuntary Removals Directive, including any pre-existing policies or protocols that have been modified pursuant to the directive;
2. to the extent not otherwise produced, records concerning any training provided pursuant to Involuntary Removals Directive, including but not limited to training materials or curricula and attendance rosters; and

² See *Baerga, et al. v City of New York, et al.*, U.S. District Court for the Southern District of New York, 21 Civ. 5762 (PAC).

3. to the extent not otherwise produced, any other records created pursuant to the Involuntary Removals Directive.

Haroules Aff. Ex. A.

26. On December 15, 2022, the NYPD informed the NYCLU that it could “expect a response on or about Monday, May 1, 2023.” Haroules Aff. Ex. B. The NYPD did not indicate that it would produce any documents on May 1, 2023. The NYPD’s acknowledgement did not include a reason for the need for the lengthy extension to the legal deadline. Haroules Aff. Ex. B.³

27. On December 16, 2022, the NYCLU administratively appealed the NYPD’s constructive denial of the request to the NYPD’s Records Access Appeals Officer. The NYCLU noted that the “expected” May 1, 2023 response date set by NYPD was not reasonable under the circumstances of the request because the specific and targeted requests relate to the recent Involuntary Removals Directive, which was, according to the Mayor’s representations, already being implemented on the streets and in the subways and on which the NYPD had already been trained. Haroules Aff. Ex. C.

28. On December 19, 2022, the NYPD Records Appeals Officer summarily rejected the NYCLU’s administrative appeal, claiming the NYCLU’s “appeal is premature because, as of the date of your appeal, the Records Access Officer (RAO) had not yet issued a determination on your request, and therefore your appeal lacked the predicate denial of access.” Haroules Aff. Ex. D.

29. Petitioner timely commenced this Article 78 proceeding, within four months of the NYPD’s final determination of Petitioner’s appeal, *see* CPLR. § 217, to force the NYPD to

³ FOIL requests must be submitted to New York City agencies via the NYC OpenRecords platform, <https://a860-openrecords.nyc.gov/>. That platform attaches a blanket response message on the auto-acknowledgment claiming that an agency delay may be expected due to unspecified issues “caused by the COVID-19 pandemic.”

comply with its obligations under FOIL and provide Petitioner with records responsive to its December 13, 2022 FOIL Request.

VENUE AND JURISDICTION

30. Pursuant to C.P.L.R. §§ 7804(b) and 506(b), venue in this proceeding lies in New York County, the judicial district in which both Petitioners' and Respondents' principal offices are located.

31. Article 78 of the C.P.L.R. (§ 7804(b)) confers jurisdiction over this matter upon this Court.

32. This Court has jurisdiction over the matter because the NYPD's denial of the NYCLU's appeal cannot be further "reviewed by appeal to a court or to some other body or officer." C.P.L.R. § 7801(1).

CAUSE OF ACTION

ARTICLE 78 REVIEW OF WRONGFUL DENIAL OF FOIL REQUEST

33. Article 78 is the appropriate method of review of final agency determinations concerning FOIL requests.

34. FOIL recognizes the public's right to access and review government documents, and agency records are presumed to be public and subject to disclosure under FOIL.

35. The respondent's obligation under FOIL to respond to a FOIL request, respond to a FOIL administrative appeal, and produce responsive documents is mandatory.

36. There is no basis in law or fact for the respondent to fail to respond to the request or the administrative appeal.

37. Respondents did not provide any responsive documents and have failed to properly invoke exemptions under FOIL.

38. Petitioner exhausted its administrative remedies with the Respondent when it appealed the Respondent's constructive denial of the request and did not receive records or an adequate response to the appeal within ten business days as required by Public Officers Law § 89(4)(a)

39. Petitioner has not made a prior application for the relief requested herein.

40. The petition is timely under CPLR § 217.

41. Petitioner has a legal right under FOIL to gain access to the public records sought in the Request.

CLAIM FOR RELIEF

Petitioner respectfully requests that this Court enter judgment, pursuant to C.P.L.R. § 7806, on its behalf:

- a. directing the NYPD and Commissioner Sewell to comply with their duty under FOIL to provide Petitioner access to the records requested by the NYCLU in its December 13, 2022 FOIL request;
- b. awarding Petitioner its reasonable attorney's fees and other litigation costs pursuant to Public Officers Law § 89(4)(c); and

- c. granting Petitioner such other and further relief as this Court deems necessary and equitable.

Dated: March 17, 2023
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