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

PRESENT: JANE S. SOLOMON PART 55

Index Number : 116449/2010

NEW YORK TIMES CO.

vs.

CITY OF NEW YORK POLICE DEPT.

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO.

MOTION DATE 6/21/11

MOTION SEQ. NO.

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-4
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Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is decided in accordance with the annexed memorandum decision, order + judgment.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 10/3/11

JANE S. SOLOMON J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

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APPLICATION of THE NEW YORK TIMES COMPANY, JO CRAVEN McGINTY, JANET ROBERTS, and RAYMOND RIVERA,

Petitioners,

For a judgment pursuant to Article 78 of the CPLR and other relief

-against-

CITY OF NEW YORK POLICE DEPARTMENT,

Respondents.

----------X

DECISION, ORDER and JUDGMENT

Index No. 116449/10

JANE SOLOMON, J.S.C.:

Petitioners The New York Times Company (the publisher of the New York Times) (Times), Jo Craven McGinty, Janet Roberts, and Raymond Rivera bring this Article 78 proceeding, seeking a judgment declaring certain records of respondent City of New York Police Department (NYPD) subject to disclosure, pursuant to the Freedom of Information Law (FOIL), Public Officers Law (POL), § 84, *et seq.*, allowing petitioners to inspect and obtain copies of those records, declaring that certain practices of the NYPD, in responding to FOIL requests, are unlawful, ordering the NYPD to comply with FOIL, and awarding petitioners their attorney's fees. McGinty, Roberts, and Rivera are Times reporters who made FOIL requests to the NYPD on behalf of the Times.

Since the petition was filed, a number of the requests have been resolved, or partly resolved, through negotiations between the Times and the NYPD. The requests that have not been resolved are for the following records: (a) a searchable

electronic copy of the home address of each New York City resident who has been granted a license for a handgun; (b) a searchable electronic copy of the residential address at which a hate crime occurred, from January 1, 2005 to the present; and (c) a searchable electronic copy of the crime incident database, dating from January 1, 2004 to the present. The crime incident database contains information about each incident reported to the NYPD, such as the date, location and nature of the incident.

As an initial matter, I construe the request for declarations that certain records are subject to disclosure as seeking review of the NYPD's denial of access to those records. POL § 89 (5) (d) provides that "[a] proceeding to review an adverse determination [of an administrative appeal of a denial of exemption or a denial of access to a record] may be commenced pursuant to article seventy-eight of the civil practice law and rules." Neither FOIL, nor Article 78, "grant[s] to a person requesting access to a record the right to a judicial declaration that the request is or is not one that should be granted." (*Matter of Bernstein Family Ltd. Partnership v Sovereign Partners, L.P.*, 66 AD3d 1, 8-9 [1st Dept 2009]; *see also Burtis v N.Y. City Police Dept.*, 294 AD2d 315 [1st Dept 2002]).

Penal Law § 400.00 (5) provides that "[t]he name and address of any person to whom an application for any [firearm] license has been granted shall be a public record." In *Matter of Kwitny v McGuire* (53 NY2d 968 [1981], *affg* 77 AD2d 839 [1st Dept 1980], *affg* 102 Misc 2d 124 [Sup Ct NY County 1979]), the Court

held that, pursuant to Penal Law § 400.00 (5), the petitioner, a reporter for the Wall Street Journal, was entitled to inspect approved pistol license applications on file with the NYPD. In *Matter of Goldstein v McGuire* (84 AD2d 697 [1st Dept 1981]), the Court cited *Kwitny* and observed that the names and addresses of pistol licensees are available under FOIL. The NYPD acknowledges that Ms. McGinty, who filed the FOIL request for the names and addresses of pistol licensees, is entitled to inspect the records of those addresses, which are on file at the License Division of the NYPD (Respondent's Amended Mem. of Law, at 16), but it argues that she is not entitled to have the addresses in electronic form.

POL § 89 (3) (a) provides, in relevant part, that "[w]hen an agency has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort, it shall be required to do so." In *Matter of New York State Rifle & Pistol Assn., Inc. v Kelly* (55 AD3d 222, 225 [1st Dept 2008]), the Court, citing *Matter of Federation of N.Y. State Rifle & Pistol Clubs v New York City Police Dept.* (73 NY2d 92 [1989]), held that the petitioner was not entitled to a digital list of the addresses of pistol licensees, solely because it was inferable that the petitioner intended to use such a list to solicit the licensees for fund raising purposes (*see also Matter of New York State United Teachers v Brighter Choice Charter School*, 15 NY3d 560 [2010]). POL § 89 (2) allows agencies to withhold lists of names and addresses if those lists would be

used for commercial or fund-raising purposes. Here, the NYPD does not suggest that the Times intends to contact the persons whose addresses it seeks, for any purpose, let alone for purposes of fund raising. However, the NYPD argues that it may deny access to the requested list of addresses in digital form, because the addresses were compiled for law enforcement purposes and, "if disclosed, could endanger the life or safety" (POL § 87 [2] [e] [iv] [f]) of the licensees.

The propriety of an exemption claimed under this section of FOIL requires a court to consider whether the information sought "could by its inherent nature ... endanger the life and safety" of those as to whom the information is sought (*Matter of Bellamy v New York City Police Dept.*, 59 AD3d 353, 355 [1st Dept 2009], quoting *Matter of Johnson v New York City Police Dept.*, 257 AD2d 343, 349 [1st Dept 1999]). Deputy Inspector Andrew Lunetta, who is currently assigned as Commanding Officer of the NYPD License Division, has submitted an affidavit in which he describes certain dangers that both persons who have one or another kind of handgun license, and persons who do not have such licenses, might face were the residential addresses of the licensees published on the internet. However, leaving aside the somewhat speculative nature of Deputy Inspector Lunetta's warnings, Ms. McGinty states in her affidavit, dated November 2, 2010, and submitted to the NYPD pursuant to POL § 89 (3) (a), that neither she, nor anyone else at the Times, would use the names or addresses sought from the NYPD for solicitation or fund

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raising purposes, and that neither she, nor anyone else at the Times, would "give or make available the information to any other person to use the information for solicitation or fund-raising purposes" (McGinty Aff., Exh. E, at 3). Inasmuch as the Times could not control the use to which others might put the addresses requested from the NYPD, were the Times to place them on the Internet, Ms. McGinty's affidavit, in effect, bars the Times from putting the addresses on line. Accordingly, the Times is entitled to have the residential addresses of gun licensees in searchable electronic form, as already redacted to delete the names and addresses of retired law enforcement officers and several current or former civilian government employees. Petitioners have not opposed such redaction.

POL § 89 (2) permits agencies to withhold records, or to delete identifying details, so as to prevent "unwarranted invasions of personal privacy." The NYPD argues that publication of the residential addresses at which hate crimes have been committed would infringe on the privacy of the victims of such crimes, because some circumstances, the victims could be identified on the basis of their residences. Deputy Chief Michael Osgood, who is currently assigned as the commanding officer of the Special Victims Division of the NYPD, states in his affidavit that the public identification of hate crime victims would, in many cases, result in additional psychological trauma to those persons, who have already been victimized; that there are victims of hate crimes, for example, victims of anti-

gay or anti-Muslim crimes, who do not want some of their acquaintances to know of their sexual orientation or their religion; and that, if hate crime victims learn that their identities as victims will be ascertainable on the internet if they report the crime to the police, some may choose not to report the crime.

It is established that, pursuant to FOIL, agency records are presumptively disclosable, and exemptions from disclosure are to be narrowly construed (*Matter of Johnson v New York City Police Dept.*, 257 AD2d 343). "[E]ven when a document subject to FOIL contains ... private, protected information, agencies may be required to prepare a redacted version with the exempt material removed" (*Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 464 [2007], citing POL § 89 [2] [c] [i] and *Matter of Scott, Sardano & Pomerantz v Records Access Officer of City of Syracuse*, 65 NY2d 294 [1985]; *see also Matter of New York Civ. Liberties Union v New York City Police Dept.*, 74 AD3d 632 [1st Dept 2010]). With specific reference to privacy concerns, POL § 89 (2) (c) provides, in relevant part, that:

> disclosure shall not be construed to constitute an unwarranted invasion of personal privacy ...:
>
> i. when identifying details are deleted[.]

Here, the NYPD's legitimate concerns with the privacy of hate crime victims, and the public interest in not deterring such victims from reporting crimes to the police, can be allayed by replacing the last digit of the house numbers in the addresses

with a dash, a deletion that petitioners suggest.[1] Such a deletion would identify the address by the block, rather than by the individual house, and thus make identification of an individual victim highly unlikely.

The NYPD points out that there are no cases requiring agencies to provide a persons' initials, or only part of an address, when providing the full names or addresses would constitute an unwarranted invasion of privacy. That is not a reason not to do so here. While the purpose for which agency records are sought is irrelevant in deciding whether those records should be disclosed, so long as the purpose does not implicate one of the FOIL exemptions (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267 [1996]), it necessarily informs a determination of whether a particular redaction would make sense. Where a requestor seeks records in order to identify or contact an individual, or a group of individuals, it would be absurd to order those records to be disclosed with deletions that would prevent such identification or contact. Here, by contrast, the Times is not concerned with the identity of the persons whose addresses it seeks, or with contacting them, but rather with identifying the frequency of hate crimes in various locations within the city. Accordingly, the disclosure of the addresses that the Times seeks, with the final digit of the street address redacted, would both protect the personal privacy of hate crime

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[1] For example, number "123 Main Street" would be disclosed as "12- Main Street".

victims from unwarranted invasion and comply with the mandate of FOIL that agency records be available to the public to the greatest extent compatible with a narrow construction of exemptions from disclosure (*see Matter of Xerox Corp. v Town of Webster*, 65 NY2d 131 [1985]; *Matter of Harris v City Univ. of N.Y., Baruch Coll.*, 114 AD2d 805 [1st Dept 1985]).

In connection with petitioners' suggestions that the street addresses be disclosed with redactions, or that x/y coordinates be used in place of street addresses, as well as in connection with petitioner's position on the crime incident database, which is discussed below, the NYPD argues that petitioners have failed to exhaust their administrative remedies. In *Matter of Carty v New York City Police Dept.* (41 AD3d 150 [1st Dept 2007]), upon which the NYPD relies, the Court upheld the denial of a motion to amend a FOIL petition to request additional documents, for failure to exhaust administrative remedies by submitting that request to the NYPD. Here, petitioners' suggested redactions to the addresses sought are not "revised FOIL requests," as the NYPD styles them (NYPD Sur-Reply Affirm., at 2, 3), but examples of redactions that would have negated the NYPD's reason for withholding the addresses sought. "When a document subject to FOIL falls within an exemption, the agency 'may be required to prepare a redacted version with the exempt material removed.'" (*Matter of Whitfield v Bailey*, 80 AD3d 417, 418-419 [1st Dept 2011], quoting *Matter of Data Tree, LLC v Romaine*, 9 NY3d at 454). Accordingly, petitioners are entitled

to receive the addresses sought, with last digit of those addresses deleted.

The parties' dispute about the crime incident database has been narrowed by petitioners' discovery that, in two federal court actions that have been brought against the City of New York, the NYPD produced, subject to protective orders, records pertaining to 12 of the 16 matters that petitioners subsequently identified in their FOIL request. Petitioners' discovery of that production postdated both the filing of the petition herein, and the filing of the NYPD's initial answer. Petitioners represent that receipt of those records (the *Floyd* records) would satisfy their FOIL request. The NYPD argues, however, that, because the scope of the *Floyd* records differs significantly from that of petitioners' FOIL request, petitioners must exhaust their administrative remedies with regard to those records. In addition, the NYPD argues on the merits that petitioners are not entitled to the *Floyd* records, because disclosure of some of them would violate state statutes, and are, therefore, exempt from disclosure pursuant to POL §87 (2) (a). To require petitioners to submit a new FOIL request for the *Floyd* records would, in these circumstances, appear to be an empty exercise, and in general, a petitioner is not required to exhaust administrative remedies where such exhaustion would be futile (*see Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52 [1978]; *Coleman v Daines*, 79 AD3d 554 [1st Dept 2010]). However, in *Bankers Trust Corp. v New York City Dept. of Fin.* (1 NY3d 315 [2003]), the Court held

that the futility exception to the requirement of exhaustion of administrative remedies is inapplicable where the statute at issue in a dispute contains an exclusive remedy provision. POL § 89 (4) (b), which sets forth the predicate for bringing an Article 78 proceeding, is such a provision. Accordingly, whether, and subject to what conditions, the *Floyd* records should be disclosed to petitioners must be decided, in the first instance, by the NYPD.

With regard to petitioners' initial FOIL request, Deputy Chief Ruben Beltran, who for the last six years has been assigned as the Executive Officer of the NYPD's Office of Information Technology, states in his affidavit that it would cost approximately $1.2 million to create a computer program that would both generate the records that petitioners seek and enable the NYPD to avoid disclosing information that is statutorily protected from disclosure. Petitioners request that they be permitted to take discovery as to that estimate. While Chief Beltran's estimate may be excessive, inasmuch as he envisages a program that would track the changes in information that occur in the course of police investigations, petitioners do not dispute that, leaving the *Floyd* records aside, the NYPD cannot provide the information that petitioners seek without developing application software designed to create a new document. That the NYPD is not required to do (POL § 89 [3] [a]; *Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, *supra*; *Matter of New York Comm. for Occupational Safety and Health v Bloomberg*, 72 AD3d 153 [1st

Dept 2010]).

Finally, I turn to petitioners' claim that the NYPD has a pattern and practice of violating certain provisions of FOIL. Petitioners contend that as a matter of practice the NYPD: fails to decide administrative appeals within the 10-day period set forth in POL § 89 (4) (a); fails to respond to appeals of constructive denials; fails to determine whether to grant or deny requests within the time set forth in POL § 89 (3) (a); fails to set a date certain for the production of documents, as required by POL § 89 (3) (a), when documents cannot be produced within the 20-day period set forth in that subsection; and, instead of considering the circumstances of each request when setting a date to respond to the request when it is unable either to make the requested documents available or to deny the request within five days thereof, as required by POL § 89 (3) (a), routinely extends the deadline for its response by three months.

The NYPD acknowledges that it has routinely failed to comply with FOIL, and it represents that, as of May 2011, it has changed some of its practices so as to bring them into compliance with FOIL. However, contrary to the NYPD's argument, those changes do not make this proceeding moot. Moreover, the NYPD apparently believes that it can continue to take more than 20 days to determine whether to grant or deny a FOIL request, although POL § 89 (3) (a) requires that such a determination be made with 20 days of the request, as does the implementing regulation promulgated by the Committee on Open Government (*see*

21 NYCRR 1401.5 [c] [3] and [4]).

Nonetheless, I conclude that petitioners are not entitled to declaratory or coercive relief. POL § 89 (5) (d), which, as discussed above, provides for judicial review of an adverse determination of an administrative appeal granting or denying access to agency records, does not by its terms abrogate such rights as a person might otherwise have to seek judicial review of an agency's other alleged violations of FOIL, and CPLR 3001 provides, in relevant part, that "[t]he supreme court may render a declaratory judgment ... as to the rights ... of the parties to a justiciable controversy whether or not further relief is or could be claimed." All those matters as to which petitioners seek declaratory and coercive relief pertain to the NYPD's failures timely to respond to petitioners' demands. However, an agency's failure to comply with the time limits set forth in POL § 89 (3) (a) for initially replying to a request constitutes a denial of the request, triggering the requestor's right to an administrative appeal (POL § 89 [4] [a]), and an agency's failure to decide an administrative appeal within the time set forth in POL § 89 (4) (a) is deemed a denial of the appeal, triggering the requestor's right to commence an Article 78 proceeding (POL § 89 [4] [b]). Courts have uniformly held that the only relief available for an agency's failure to comply with a FOIL request in a timely manner is the commencement of an Article 78 proceeding seeking an order requiring the agency to provide the requested records. In *Matter of Miller v New York*

State Dept. of Transp. (58 AD3d 981, 983 [3d Dept 2009]), for example, the Court noted that the remedy for an agency's failure timely to respond to a FOIL request is for the requester to deem the request denied and to commence an Article 78 proceeding (*see also Matter of Goyer v New York State Dept. of Envt. Conservation*, 12 Misc 3d 261 [Sup Ct, Albany County 2005]; *Matter of Burtis v New York City Police Dept.*, 294 AD2d 315 [stating that POL § 89 (4) limits the relief obtainable for an agency's failure properly to comply with an information request to an administrative appeal and an Article 78 proceeding]).

Attorney's fees and other costs may be awarded to a FOIL requestor if the agency unreasonably denied access to the records sought, or failed to reply within the statutory time to the initial request, or to an administrative appeal (POL § 89 [4] [c]). Here, it is undisputed that the NYPD failed timely to respond either to the initial requests for records, or to petitioners' administrative appeals. However, the NYPD's reasons for withholding the records that it withheld were not unreasonable, and in the circumstances of this action, I decline to award attorney's fees solely because the NYPD failed to comply with the FOIL deadlines.

Accordingly, it hereby is

ORDERED and ADJUDGED that the petition is granted to the extent that the NYPD is directed to provide to petitioner The New York Times Company, within 30 days of service upon the NYPD of a copy of this judgment with notice of entry: (a) an

electronic copy of the database containing the names and addresses of New York City residents who have been granted handgun licenses, as already redacted to delete the names and addresses of retired law enforcement officers and several current or former civilian government employees, and (b) an electronic copy of the database of hate crimes reported to the Police Department from January 1, 2005 to the present, redacted so as to replace, with a dash, the last digit of building numbers at which a hate crime was reported that is a residential address.

Dated: October 3 , 2011

ENTER:

J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

JANE S. SOLOMON