

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. ARLENE P. BLUTH
J.S.C.

PRESENT: _____
Justice

PART 32

Bronx Defenders

Interim Decision

INDEX NO. 156520-16

MOTION DATE _____

MOTION SEQ. NO. 1

-v-
NYC Police Dept et al

The following papers, numbered 1 to 4, were read on this motion to/for Article 78

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ + memo | No(s). 1

Answering Affidavits — Exhibits _____ + memo, + memo | No(s). 2, 3

Replying Affidavits _____ | No(s). 4

Upon the foregoing papers, it is ordered that this ~~motion is~~ cross motion to dismiss petition is Denied.

See accompanying

Interim Dismissal Order

Oral Argument: 7-25-17

10 AM

5/19/17

Dated: _____, J.S.C.

HON. ARLENE P. BLUTH

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

-----X
THE BRONX DEFENDERS

Petitioner,

-v-

**INTERIM
DECISION & ORDER
Index No. 156520/2016**

THE NEW YORK CITY POLICE DEPARTMENT,
WILLIAM BRATTON, IN HIS OFFICIAL CAPACITY
AS COMMISSIONER OF THE NEW YORK CITY
POLICE DEPARTMENT

Mot. Seq. 001

Respondents.

-----X

The cross-motion by respondents to dismiss the petition is denied and respondents are directed to file an answer.

Background

This proceeding arises out of petitioner's July 29, 2014 FOIL request seeking an accounting and the disclosure of records relating to respondents' policies and procedures regarding property seized from people incident to arrest. Petitioner argues that it has received only two hard-copy documents and an electronic copy of the NYPD Patrol Guide. Petitioner maintains that respondents do not publicly account for how much money and property it seizes incident to arrest or how many resources are expended in this area.

Petitioner insists, upon information and belief, that respondents maintain an inventory of property in an online database called the Property and Evidence Tracking System (PETS).

Petitioner contends that some of the property seized is retained by respondents and converted to respondents' property through the civil forfeiture process. Petitioner theorizes that respondents retain property worth millions of dollars every year.

Respondents cross-move to dismiss on the ground that a diligent search was conducted and, therefore, the instant request is moot. After the instant petition was filed, respondents insist that they conducted an additional search and provided some additional documents in a determination dated October 11, 2016. Respondents argue that there are no additional records other than those already disclosed. Respondents contend that the PETS system is incapable of generating aggregate reports nor does it track property in the ways sought in petitioner's FOIL request.

In opposition to the cross-motion, petitioner claims that respondents' production constitutes only a small portion of the information requested. Petitioner contends that its FOIL request did not seek only aggregate data and, instead, seeks documents and data that show how much private property and money is seized by respondents. Petitioner observes that respondents' papers do not argue that PETS does not retain the information petitioner seeks but that software limitations prevent respondents from providing responsive documents. Petitioner contends that the additional documents produced indicate the existence of additional information responsive to the FOIL request. Petitioner insists it is willing to take raw data. Petitioner emphasizes that respondents have only certified that they are unable to produce a limited subset of information, aggregate data and totals from PETS, but has not certified that they are unable to produce raw data.

Discussion

“Pursuant to FOIL, government records are presumptively available to the public unless they are statutorily exempted by Public Officers Law § (2). Those exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption” (*Thomas v New York City Dept of Educ.*, 103 AD3d 495, 496, 962 NYS2d 29 [1s Dept 2013] [internal quotations and citations omitted]).

“When an agency is unable to locate documents properly requested under FOIL, Public Officers Law § 89(3) requires the agency to certify that it does not have possession of a requested record or that such record cannot be found after diligent search . . . Neither a detailed description of the search nor a personal statement from the person who actually conducted the search is required” (*Rattley v New York City Police Dept.*, 96 NY2d 873, 875, 730 NYS2d 768 [2001][internal quotations omitted]).

Respondents’ Claim that Petitioner’s Challenge is Moot

Respondents insist that this petition is moot, and should be dismissed, because they have produced some documents and have certified that no additional responsive records exist.

As an initial matter, the Court observes that respondents’ tactic of producing documents *after* petitioner filed the instant proceeding gives the appearance that respondents had no intention of timely responding to petitioner’s request. Petitioner should not have to file a petition in order to get respondents to respond to a FOIL request. Certainly, petitioner’s voluminous request required significant investigation, but petitioner’s request is dated July 2014 and respondent produced the vast majority of responsive documents on October 11, 2016.

Respondents insist that the October 11, 2016 letter makes this proceeding moot. The letter states that respondents found 89 additional pages in response to certain requests and observes that “[w]ith regard to the remaining categories of records, we have conducted a diligent search for records responsive to your request and determined that there are no such responsive records maintained by the NYPD other than the 14 pages consisting of the 2013 Accounting Summary and Revenue Report, previously disclosed to you” (affirmation in support of respondents’ cross-motion, exh 3). At first glance, this letter might appear to satisfy respondents’ burden on a cross-motion to dismiss the instant proceeding. However, the assertion that no other responsive documents exist is inconsistent with respondents’ papers which claim that PETS cannot generate aggregate reports. There is a clear distinction between the capabilities of PETS to generate certain types of reports and whether PETS contains that information at all. That makes this situation distinguishable from *Rattley* which involved missing documents.

Although the data might not exist in the aggregate form that petitioner seeks, the data might exist in forms responsive to petitioner’s FOIL request. In fact, the affirmation of Matthew Russo, submitted in reply, suggests an alternative. Russo states that the “only way to determine the total amount of money obtained through civil forfeiture by settlement, by judgment, or by other means would require a manual tally of each individual piece of property’s value obtained through each means” (Russo affirmation, ¶ 4). It appears there may be a way for respondents to give petitioner the raw data sufficient to allow petitioner to tabulate the totals it seeks.

Critically, respondents argue in reply that it would be extremely burdensome to produce the information in raw data form. Respondents have effectively changed their argument from stating that no responsive documents exist to insisting that producing the information would be

too burdensome. This argument directly relates to a troubling assertion by petitioner that respondents refused to confer with petitioner about the way in which these records are kept. 21 NYCRR 1401.2(b)(2) requires the records access officer to “assist persons seeking records to identify the records sought, if necessary, and when appropriate, indicate the manner in which the records are filed, retrieved or generated to assist persons in reasonably describing records.” It is obvious that it would be *necessary* to assist a petitioner seeking records from a database under the complete control of the agency and a database not available for public use.

Otherwise, petitioner is forced to make requests without any knowledge of the capabilities of the database. That is what has occurred here. Respondents do not directly contest this point in their reply to the cross-motion and simply assert that they have no duty to solicit additional information about the requests. While that might be true, there is a difference between soliciting more information and assisting the requestor in reasonably describing the records sought especially where, as here, the records are kept on a specialized database.

The record before this Court shows that respondents have only now, more than two years after petitioner’s FOIL request, attempted to describe the ways in which these records are kept. This type of ‘gotcha’ litigation tactic is especially troublesome in a FOIL proceeding where petitioner does not have access to the database containing the requested information. Respondents’ claims about the burdensome nature of producing individual invoices clearly demonstrates the purpose of assisting a requestor— it is consistent with the spirit of FOIL to let a requestor know how records are kept so that the petitioner can conform requests to receive the information sought and try to avoid unduly burdening an agency.

Further, as petitioner correctly points out, petitioner seeks information other than aggregate totals, including information about policies for seizures incident to arrest and where unclaimed property is distributed (*see e.g.*, petition, exh 4 ¶¶ 38, 39). Despite the fact that respondents insist, as described above, that the production of individual invoice entries from PETS would be burdensome, the basis of respondents' motion to dismiss is that they have produced all responsive documents. This just does not make sense and the cross-motion to dismiss is denied.

Summary

Although the parties' papers mainly focus on the ultimate outcome of this proceeding—whether respondents must produce additional documents—this Court can only consider whether respondents have met their burden on a motion to dismiss. The fact is that there are too many outstanding questions regarding the capabilities of PETS to generate, in whatever form, the information petitioner seeks. For instance, the moving papers include the affidavit of Timothy Hollywood, the Executive Officer in the Property Clerk Unit, who states that “the PETS system was not designed to generate accurate reports of aggregate numbers of invoiced property by type of hold, with values, precinct, type of investigations, and whether the investigation led to an arrest or not . . .” (Hollywood aff, ¶ 5). Does that mean that PETS can generate inaccurate or somewhat inaccurate reports? These unanswered questions compel this Court to direct respondents to file an answer to the petition.

Accordingly, it is hereby

ORDERED that respondents' cross-motion to dismiss is denied; and it is further

ORDERED that respondents shall serve their answer to the petition pursuant to the CPLR and the parties are directed to appear for oral argument on the petition and answer on July 25, 2017 at 10:00 a.m.

Dated: May 19, 2017
New York, New York



ARLENE P. BLUTH, JSC