

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

In the Matter of the Application of
THE BRONX DEFENDERS,

Petitioner,

– against –

The NEW YORK CITY POLICE DEPARTMENT, and
WILLIAM BRATTON, in his 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.:

VERIFIED PETITION

Petitioner The Bronx Defenders (“Petitioner”), by its undersigned attorneys, for its verified petition alleges and avers the following:

PRELIMINARY STATEMENT

1. This Article 78 petition seeks to vindicate the right of the Petitioner The Bronx Defenders and of the public to have access to New York City Police Department (“NYPD”) records pertaining to the policies and procedures regarding, and accounting for, money and property seized from defendants incident to arrest. This right springs from New York’s Freedom of Information Law (“FOIL”), Public Officer’s Law §§ 84-90, and its implementing regulations, found at Chapter 21 New York Code of Rules and Regulations (“N.Y.C.R.R.”) Part 1401, as well as 18 N.Y.C.R.R. Part 340 and the Uniform Rules and Regulations for All City Agencies Pertaining to the Administration of the Freedom of Information Law (“Uniform FOIL Rules”), Title 43, Rules of the City of New York (“R.C.N.Y.”), Chapter 1.

2. In January 2014, an independent journalist reported that the NYPD seizes and retains millions of dollars in cash each year by civil forfeiture, and millions more in “unclaimed”

cash and property. The NYPD does not publicly account for how much money and property it receives through seizures incident to arrest, or how such resources are spent or allocated.

3. On or about July 29, 2014, The Bronx Defenders served the NYPD with a broad FOIL request seeking disclosure of records pertaining to NYPD policies and procedures regarding, and an accounting for, money and property seized from people incident to an arrest (the “Request”).

4. Nineteen months later—after numerous extensions and delays—the NYPD responded to the Request, enclosing only two hard-copy documents and an electronic copy of the NYPD Patrol Guide (the “Denial”). These documents satisfy, at best, only a small fraction of the records requested by Petitioner. With respect to the remaining records requested, the NYPD did not disclose the records sought, claim specific exemptions to disclosure, or certify that, after making a diligent search, it had determined that it does not possess the requested records. Instead, it claimed that the NYPD was unable to locate additional records “based on the information that [Petitioner] provided.”

5. On or about April 13, 2016, The Bronx Defenders timely appealed the Denial to the NYPD’s Records Access Appeals Office.

6. The NYPD’s failure to issue a determination on the appeal within the 10 business days prescribed by FOIL Section 89(4)(a) of the Public Officials Law (or by April 27, 2016) is a constructive denial that violates the law.

7. Having exhausted its administrative appeals, The Bronx Defenders now seeks an Order from this Court, pursuant to Article 78 of the New York Civil Practice Law and Rules, directing the NYPD to produce the information The Bronx Defenders requests. The Bronx

Defenders also seek attorneys' fees and such other and further relief as this Court deems just and proper.

PARTIES

8. The Bronx Defenders is a 501(c)(3) not-for-profit organization that provides free legal services to tens of thousands of New Yorkers every year on a wide range of matters, from defending the accused in criminal cases to defending property owners in civil forfeiture cases to representing parents accused of abuse and neglect. It is duly incorporated in New York State and has its principal place of business in New York City.

9. Respondent New York City Police Department ("NYPD") is a law-enforcement agency administered under Title 14 of the New York City Administrative Code. The NYPD is a public agency subject to the requirements of the Freedom of Information Law ("FOIL").

10. Respondent William Bratton is a public officer who is named in his official capacity as the Commissioner of the NYPD.

VENUE

11. Venue lies in New York County pursuant to C.P.L.R. §§ 506(b) and 7804(b) because it is the judicial district in which Respondents took the action challenged in this proceeding and where the offices of Respondents are located.

STATEMENT OF FACTS

A. Relevant Background

12. The Bronx Defenders provides holistic civil legal services, criminal and family defense, and community programs to over 35,000 low-income families in the Bronx each year.

13. Attorneys and advocates at The Bronx Defenders seek to mitigate the civil and other enmeshed penalties, or so-called "collateral" consequences, faced by clients who have been

arrested and prosecuted in criminal court. The majority of criminal defendants have their personal property seized at the time of arrest and The Bronx Defenders assists hundreds of clients every year in retrieving said property from the custody of the NYPD.

14. In January 2014, an independent journalist for the website *Gothamist* reported that the NYPD seizes and retains millions of dollars in cash each year by civil forfeiture, and millions more in “unclaimed” cash and property, citing documents obtained from the New York City Office of Management and Budget. The *Gothamist* articles also charged the NYPD with routinely giving citizens contradictory, arbitrary or extremely convoluted instructions for retrieving their property; with arbitrary enforcement of the existing forfeiture laws; and with illegitimate and/or unlawful uses of civil forfeiture and of forfeited assets. The articles called for reform of New York’s civil forfeiture laws and practices. True and correct copies of the articles are attached hereto as **Exhibit 1**.

15. The NYPD does not publicly account for how much money and property it receives through seizures incident to arrest, or how such resources are spent or allocated.

16. On information and belief, all of the property is inventoried shortly after the seizure in the NYPD’s online Property and Evidence Tracking System. While much of the seized property is ultimately returned to the arrested individual, large amounts are permanently retained by the NYPD. For instance, some portion of the retained property is converted to NYPD ownership through the civil forfeiture process, and some portion is converted to NYPD ownership because the arrested person is unable to retrieve the property. On information and belief, the NYPD seizes tens of millions—and retains millions—of dollars every year.

17. The NYPD publicly reports the proceeds from “Unclaimed Cash & Property Sale” as a line item on its budget. This line item totaled \$6.5 million for 2014 and more than \$7

million in 2015. A true and correct copy of an excerpt of the Preliminary Budget and the Fiscal 2016 Preliminary Mayor's Management Report: New York Police Department to the Council of the City of New York, dated March 21, 2016, is attached hereto as **Exhibit 2**. The full report is available at <http://council.nyc.gov/html/budget/2017/pre/056%20NYPD.pdf> (last visited August 1, 2016).

18. The paramount need for transparency from the NYPD has also been recognized by New York City Council members Ritchie J. Torres and Daniel R. Garodnick, who introduced a bill that would require the NYPD to report seized property data on an annual basis. No action has been taken on the bill since its introduction in November 2015. A true and accurate copy of Intro. 1000-2015, "A Local Law to amend the administrative code of the city of New York, in relation to requiring the police department to report seized property data on an annual basis," is attached hereto as **Exhibit 3**.

B. Procedural Background

19. On or about July 29, 2014, The Bronx Defenders filed a Request for information pursuant to New York's FOIL ("July 2014 FOIL Request"). A true and correct copy of the Request is attached hereto as **Exhibit 4**. (*See also* Affirmation of Adam Shoop, Esq., filed herewith ("Shoop Aff.") ¶ 4 and Exhibit A thereto.)

20. The Request sought copies, in electronic format, of records pertaining to, *inter alia*, NYPD policies and procedures regarding seized money and property, including property held for safekeeping during the arrest and booking process, property held as potential evidence in a criminal proceeding, and property subject to civil or criminal forfeiture, and an accounting of the same. (*See* Ex. 4; *see also* Shoop Aff. ¶¶ 5-6, Ex. A.)

21. Acquiring the information about the NYPD's policies and procedures related to seizure of property and money is critical to The Bronx Defenders' understanding of the NYPD policies and procedures that affect New York City residents, including many of The Bronx Defenders' clients, when they are arrested.

22. On or about November 10, 2014—almost four months later—the NYPD sent a form letter regarding Petitioner's July 2014 FOIL Request, stating that it estimated that the processing of the request would be completed by February 9, 2015. A true and correct copy of the July 2014 FOIL Request is attached hereto as **Exhibit 5**. (*See also* Shoop Aff. ¶¶ 7-9 and Ex. B.) The document contained checkboxes to indicate the reasons for the extended timeframe, including that “[n]umerous records must be reviewed [...]”; “Record(s) have not yet been received from other NYPD unit(s);” and “Request is extremely voluminous and/or complex.” (*See id.*)

23. Having received no documents by that date, The Bronx Defenders sent an additional letter to the NYPD on July 31, 2015, and on August 13, 2015, the Bronx Defenders received a substantially identical form letter from the NYPD, now stating that the request would be processed by September 11, 2015. True and correct copies of the July 31, 2015 letter and August 13, 2015 response are attached hereto as **Exhibit 6** and **Exhibit 7**, respectively. (*See also* Shoop Aff. ¶¶ 10-13 and Exs. C-D.)

24. On December 2, 2015, after the NYPD again failed to respond to the Request in any way, The Bronx Defenders administratively appealed the constructive denial of the July 2014 FOIL Request, noting that the NYPD's failure to disclose the records sought, issue a written denial, claim specific exemptions to disclosure, or certify that it does not possess the records after a diligent search, amounted to a constructive denial under Section 89(4)(a) of the

Public Officers Law. (See Shoop Aff. ¶¶ 16-17 & Ex. E.) A true and correct copy of the appeal letter is attached hereto as **Exhibit 8**.

25. By letter dated December 24, 2015, the NYPD denied the administrative appeal as “premature” because the Request had not yet been “denied.” The NYPD then extended the deadline a third time, representing that its response would be issued, in writing, by February 26, 2016. A true and correct copy of the letter is attached hereto as **Exhibit 9**. (See also Shoop Aff. ¶¶ 18-19, Ex. F.)

26. On March 18, 2016—one year and seven months after Petitioner filed its FOIL Request—the NYPD issued an inadequate, half-page written response (the “Denial”) enclosing only two hard-copy documents and an electronic copy of the NYPD Patrol Guide. (See Shoop Aff. ¶ 20, Ex. G-I.) A true and correct copy of the Denial is attached hereto as **Exhibit 10**. True and correct copies of the two hard-copy documents, which are (1) 11 pages titled “NYPD Property Clerk Division 2013 Accounting Summary,” including each month of the 2013 fiscal year except February 2013 and (2) a three-page spreadsheet titled NYPD Revenue Generated for July 1, 2012 to June 30, 2013, are attached hereto as **Exhibits 11** and **12**, respectively.

27. According to the records disclosed by the NYPD in the Denial, there are millions of dollars in “intakes” and “disposals” of U.S. currency during each month of the 2013 calendar year. How currency is disposed of is not explained in the records. (See Ex. 11.) The records also indicate that the NYPD generated \$6,088,976.44 in revenue in fiscal year 2013, comprised of \$477,736.00 from the forfeiture division and \$562,930.90 from auctions, towing and storage fees. (See Ex. 12.) A true and correct copy of an excerpt comprising the sections of the Patrol Guide that are potentially responsive to the Request is attached hereto as **Exhibit 13**.

28. The Denial did not identify the requests to which the NYPD believed the Patrol Guide or the two documents it produced to be responsive. (*See* Ex. 10.) With respect to the other records requested by Petitioner, the NYPD did not disclose the records sought, claim specific exemptions to disclosure, or certify that it does not possess the records after a diligent search, as required by Section 89(3) of the Public Officers Law. (*See id.*; *see also* Shoop Aff. ¶¶ 21-22.) Instead, it claimed that the NYPD was unable to locate additional records “based on the information that [Petitioner] provided.” (*Id.*)

29. At no time did the NYPD seek clarification from Petitioner or otherwise seek to assist Petitioner to identify the records sought with greater specificity. (*See* Shoop Aff. ¶ 22.)

30. By letter dated April 13, 2016, Petitioner The Bronx Defenders timely appealed the Denial to Jonathan David, the NYPD’s Records Access Appeals Officer, attaching copies of the July 2014 Request and the Denial (the “Appeal”). A true and correct copy of the Appeal is attached hereto as **Exhibit 14**. (*See also* Shoop Aff. ¶ 23, Ex. J.) As Petitioner noted in the Appeal, the very fact that the NYPD compiles “Accounting Summary and Revenue Report[s]” reveals that there are other documents and records responsive to Petitioner’s Request. (*Id.*)

31. To date, The Bronx Defenders has received no response to its Appeal, even though Section 89(4)(a) of the FOIL provides that the NYPD’s designated Appeals Officer:

shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal when received by the agency and the ensuing determination thereon.

(*See* Shoop Aff. ¶ 24.)

32. The NYPD’s failure to timely issue a determination on the appeal within 10 business days—or by April 27, 2016—is a constructive denial of the appeal.

C. Relevant Legal Authorities

33. New York Courts interpret the Freedom of Information Law, codified at sections 84 to 90 of the New York Public Officers Law, broadly, such that “all records of governmental agencies are presumptively available for public inspection and copying, without regard to the status, need, good faith or purpose of the applicant requesting access.” *Scott, Sardano & Pomeranz v. Records Access Officer of City of Syracuse*, 65 N.Y.2d 294, 296-97, 491 N.Y.S.2d 289, 291 (1985).

34. 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.” Pub. Off. Law § 87(2). Failure to provide either written explanation of the reason(s) for a denial, to 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.

35. Here, Respondents have improperly refused to respond to the bulk of Petitioner’s Request. They have neither specified the reasons for the denial nor have they responded within the statutory timeframe. The records that they produced indicate that Respondents are in possession of a large amount of information that is responsive to Petitioner’s Request. Accordingly, this Court should find that Respondents are in violation of the Freedom of Information Law.

FIRST CAUSE OF ACTION **(Article 78 Petition – Directing NYPD to Produce the Requested Documents)**

36. Petitioner repeats and realleges Paragraphs 1 through 35 as if fully set forth herein.

37. Article 78 of New York’s Civil Practice Law & Rules is the appropriate method for review of agency determinations concerning FOIL requests.

38. Petitioner The Bronx Defenders has a clear right to the information about money and property seized by the NYPD under FOIL, its implementing regulations, and the Uniform FOIL Rules to the records sought. *See, e.g.*, Pub. Off. Law § 87(2) (“Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, . . .”); FOIL § 84 (Legislative declaration); 21 N.Y.C.R.R. § 1401.1; 21 N.Y.C.R.R. 1401.5; 43 R.C.N.Y. § 1-01. FOIL places the burden squarely on the government to justify denial of access. (*Id.*)

39. The Request reasonably described the requested records.

40. Respondents’ obligation under FOIL to disclose information about the money and property it seizes from New Yorkers is mandatory, not discretionary.

41. Respondents failed in their obligations to respond timely or adequately to the Request and the Appeal and to conduct a meaningful search for the required records.

42. Respondents have not produced more than a tiny fraction of the records sought and have not justified that failure.

43. The records produced by Respondents with their Denial are plainly incomplete. For instance, the “Accounting Summary” and revenue report produced by Respondents (*see* Exs. 11-12, hereto) are on their face “*summaries*” of large sets of data that exist elsewhere in the NYPD’s files. Such data would be responsive to Request Numbers 11-12, 25-28, and 34-36.

44. The records produced by Respondents fail to address Petitioner’s Request in myriad respects. For example, Respondents failed to provide any documents concerning:

- (a) the NYPD’s policies and procedures for handling of property invoiced and/or handled by the NYPD pursuant to arrests, investigations, etc. (Request Number 3);

- (b) the total number/total value of various types of property invoiced by the NYPD in the fiscal year preceding the Request (Request Numbers 4-8, 16-19, 30-31);
- (c) NYPD's policies, procedures and instructions for returning property to its owner (Request Number 37);
- (d) the total number/total value of property that was returned to a third party or to the registered or titled owner in the fiscal year preceding the Request (Request Numbers 20-23, 32);
- (e) NYPD policies used to determine when to seek a civil forfeiture (Request Numbers 9, 24, 33);
- (f) the total number/total value of various types property retained by the NYPD in the fiscal year preceding the Request (Request Numbers 10-12, 25-28, 34-36);
- (g) NYPD policies regarding how the property and/or proceeds from the sale of such property is distributed (Request Numbers 1-2); or
- (h) how the retained property and/or proceeds from the sale of such property was distributed in the fiscal year preceding the Request (Request Numbers 13-15, 29, 38-40).

45. The NYPD's Denial therefore was arbitrary, capricious, an abuse of discretion, contrary to law, and constituted an unreasonable denial of the Request.

46. In handling the Request, Respondents failed to comply with the requirements of FOIL § 89(3)(a), which require the NYPD to either produce the requested records or to "certify that it does not have possession of such record or that such record cannot be found after diligent search." Respondents also did not comport with the similar requirements of 21 N.Y.C.R.R. § 1401.2(b)(7) and 43 R.C.N.Y. § 1-05(c)(4).

47. In handling the Request, Respondents failed to comply with the requirements under 21 N.Y.C.R.R. § 1401.2 (b)(2) to "Assist persons seeking records to identify the records sought, if necessary, and when appropriate, to indicate the manner in which the records are filed, retrieved or generated to assist persons in reasonably describing the records."

48. Petitioner exhausted its administrative remedies when it timely appealed the NYPD's Denial of its FOIL Request and the NYPD constructively denied the appeal. Petitioner has no other remedy at law.

49. The NYPD should be compelled to provide a copy, in electronic format, of all records responsive to Petitioner's Request.

50. In these circumstances, an award of the attorneys' fees and costs incurred by Petitioner to prepare the Appeal and to prepare and prosecute the Article 78 Petition is clearly warranted. *See* FOIL § 89(4)(c).

51. This action is timely commenced under the applicable statutes of limitations in that it was commenced within four (4) months of the NYPD's April 27, 2016 deadline to issue a written determination on the appeal.

PRIOR APPLICATION

52. No application has been made for the relief requested herein.

REQUEST FOR RELIEF

WHEREFORE, Petitioner The Bronx Defenders respectfully requests a judgment pursuant to Article 78 of the Civil Practice Law and Rules:

(a) Directing Respondents to comply with their duty under the Freedom of Information Law ("FOIL") to perform an adequate search for the records requested in the Petitioner's July 29, 2014 FOIL Request and disclose all portions of the responsive records that are not subject to any exemption or other privilege;

[Continued on next page]

(b) Awarding Petitioner attorneys' fees, costs and disbursements pursuant to Public Officers Law §§ 89 *et seq.* in an amount to be determined at the end of this proceeding; and

(c) Granting such other and further relief as this Court deems just and proper.

Respectfully submitted,

Dated: Bronx, New York
August 3, 2016

THE BRONX DEFENDERS



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Dated: New York, New York
August 3, 2016

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Attorneys for Petitioner

VERIFICATION

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

Robin G. Steinberg, an attorney duly admitted to practice law in the State of New York, hereby affirms under penalty of perjury the following:

1. I am the Executive Director of The Bronx Defenders, the Petitioner in the within proceeding. I make this verification pursuant to C.P.L.R. § 3020(d)(3).
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 made based upon information and belief, I believe those statements to be true.

Dated: August 3, 2016
Bronx, New York


