

SUPREME COURT, NEW YORK COUNTY

NYLJ, December 17, 2001

MATTER OF LINZ v. THE POLICE DEPARTMENT OF THE CITY OF NEW YORK — Petitioners bring this Article 78 proceeding seeking to compel respondents to provide records and documents pursuant to Public Officers Law §89, et. seq., which is the NY Freedom of Information Law (FOIL). Petitioners are professors at three different colleges and are engaged in research on sociological/criminal law issues. The data sought by petitioners is fully described in the petition. Basically, petitioners seek a "data disk/CD-ROM" containing information for the period from July 1, 1998 to June 30, 2001 of logged 911 calls leading to dispatch and reported by geographic section (also referred to as CFS-911 calls). Petitioners also seek a copy of the codebook used to interpret the 911 calls and physical sector maps for the five boroughs of New York City.

During June and July of this year, petitioners were in communication with and met with staff in the NY Police Department Management, Analysis & Planning Division regarding this data request. Petitioners claim that based on these conversations and meetings, they believed that the NYPD was going to provide the data, that the preparation of a data disk/CD-ROM containing the requested information was either done or almost done by mid-July, and that the materials would be available for pickup on July 12, 2001. Petitioners further contend that this pickup did not happen because on July 20, 2001, petitioner Larry Heuer was informed that the release of the data was not being approved by senior or supervisory personnel employed by respondents. In his affidavit submitted to this Court, petitioner Heuer contends that Lt. Costello of the NYPD told him that there were "political forces" that were preventing the release of the data.

Respondents have submitted affidavits, including one from Lt. Costello, disputing that petitioners ever were told that a CD-ROM had been compiled or that all the materials were available for pickup. Rather, Lt. Costello contends that any statement he made about the data being on someone's desk referred to the underlying documents and not to any CD-ROM. Furthermore, Lt. Costello contends that he specifically asked petitioner Heuer if he had received approval from a Deputy Commissioner and informed petitioner that the information could not be released without approval from a supervisor.

On July 26, 2001, petitioner Linz made a written FOIL request concerning the materials that are the subject of this litigation. On July 30, 2001, Lt. Daniel Gonzalez of the NYPD Legal Bureau wrote to petitioner Linz stating that a preliminary determination had been made that, if the requested materials were contained in the files of the NYPD, they were at least partly disclosable under FOIL. However, Lt. Gonzalez indicated that the disclosure request could not be granted until the records were located and a review was conducted to determine whether any part of the data was exempt from disclosure under FOIL. Lt. Gonzalez indicated that this process would be completed within 120 days of the letter, which would be November 30, 2001.

On August 8, petitioner Linz wrote to the Records Access Appeal Officer of the NYPD indicating that he believed that his FOIL request had been constructively denied and he was appealing that decision. In that letter, petitioner contends that the 120 day period outlined in Lt. Gonzalez' letter violates FOIL and that the Police Department could not have legitimately needed 120 days since the data had been available for pickup in mid-July.

In September, petitioners filed the instant action seeking an order directing respondents to provide immediate access to the records listed in the FOIL request and also seeking attorneys' fees and other reasonable litigation costs. Respondents filed a cross motion to dismiss contending

that this Court lacks jurisdiction since respondents have not yet denied petitioners' request, but merely indicated that they would take 120 days to review the documents. Furthermore, respondents contend that the instant action should be dismissed because petitioners failed to exhaust administrative remedies.

Public Officers Law §89(3) does not set forth the time period for delivery by an agency of documents requested under FOIL. Rather, the statute merely requires that the agency, within five business days of the receipt of a written request, make the record available, deny the request in writing, or furnish a written acknowledgment containing an approximate date when the request will be granted or denied. Respondents contend that this litigation is premature since no challenge was appropriate until the 120 day period requested by the NYPD had passed and a final determination had been made by the agency. This argument, if accepted, would completely insulate from judicial review an agency's decision about the amount of time it needed to respond to FOIL requests. It would also undermine the very purpose of FOIL, which is to promote the public's right to know about the workings of government by allowing access to information kept by government agencies. See generally, *Russo v. Nassau County Comm. College*, 81 N.Y.2d 690 (1993); *Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979).

In the absence of a specific statutory period, this Court concludes that respondents should be given a "reasonable" period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL.

The Court concludes that petitioners had a right to file this Article 78 action seeking to compel respondents to provide these documents. Indeed, it is undisputed that an Article 78 proceeding would be the appropriate vehicle to challenge respondents' actions if they ultimately informed petitioners that they were not going to provide some or all of the requested materials. See *In re Alicea v. NYPD*, ___ A.D.2d ___ 731 N.Y.S.2d 19 (1st Dept. 2001); *In re New York Public Interest Research Group v. Cohen*, 188 Misc.2d 658 (Sup. Ct. N.Y. Cty. 2001). This Court sees no reason to conclude that such a proceeding is inappropriate now simply because respondents, in essence, contend that they are entitled to a "waiting" period of 120 days before petitioners have a right to bring such an action.

In denying respondents' motion to dismiss, this Court recognizes that there may be cases in which a lawsuit, such as the one filed here, might indeed be premature. Certainly, an individual requesting documents under FOIL should give the agency some time to respond to the request before commencing litigation. This Court, however, need not decide what such a period should be since at this point the 120 days originally requested by respondents to answer the FOIL request have now passed.² Furthermore, although the factual affidavits submitted to this Court raise some question about whether the data had been fully compiled prior to this litigation, the affidavits also unquestionably establish that petitioners had been working with respondents to identify the specific data for several months prior to the actual commencement of this litigation. Thus, petitioners did not act precipitously, under all the circumstances, in bringing the instant case.

Finally, this Court rejects respondents' claim that the instant action should be dismissed because petitioners failed to exhaust administrative remedies by appealing respondents' FOIL actions. First, petitioners did file an administrative appeal on August 8 by writing to the Record Access Appeals Officer. Furthermore, respondents' argument that petitioners' letter of appeal to the Records Access Officer was premature is simply a reiteration of their position, which this Court finds unpersuasive, that petitioners were not entitled to take any action until the entire 120 day period had passed.

Respondents have requested additional time to answer on the merits in the event this Court denies their motion to dismiss. Although it is difficult to determine what purpose could be served by adjourning the matter for more legal papers, this Court must allow respondents time to file an answer. See *Garlick v. Sclaff*, 202 A.D.2d 192 (1st Dept. 1994); *230 Tenants Corp. v. Board of Standards and Appeals*, 101 A.D.2d 53 (1st Dept. 1984). This Court will permit respondents ten days from the issuance of this decision to file an answer.³ Furthermore, petitioners' request for attorneys' fees and other litigation costs is held in abeyance pending receipt of respondents' answer, which should also address this issue.

Accordingly, respondents' cross-motion to dismiss is denied. If respondents wish to file an answer, they must do so no later than December 13.

This constitutes the decision and order of the Court.

(1) The Appellate Division in *Lecker v. NYC Board of Education*, 157 A.D.2d 486 (1st Dept. 1990), declared invalid a regulation issued by the Committee on Open Government requiring that record access be granted or denied within ten days of the request. The Lecker opinion did not provide any further guidance on what standard should be used in evaluating the timeliness of an agency's document production.

(2) This case has taken some time to resolve because the Court was attempting to settle the matter and the respondents needed additional time to obtain certain factual affidavits. In particular, respondents had some difficulty contacting certain police officers who had been redeployed to various security details and the family assistance center in the weeks following the September 11 disaster.

(3) Although the Court is not ruling on the merits at this time, the Court reminds respondents that the four months they originally requested has passed and any responding papers should, at this point in the case, inform the Court and petitioners whether and when respondents intend to comply with the FOIL request.