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

PRESENT: JAFFE **PART** 5

Index Number : 106579/2010
LINO, CLIVE
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
COMPEL DISCLOSURE
CAL #56

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for dismiss + compel

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☒ **Yes** ☐ **No**

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
JUN 28 2011
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/24/11
JUN 24 2011

BARBARA JAFFE
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 : PART 5

----------x

CLIVE LINO and DARYL KHAN, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

THE CITY OF NEW YORK, *et al.*,

Defendants.

----------x

Index No. 106579/10

Motion Subm.: 4/12/11
Motion Seq. No.: 001
Calendar No.: 56

DECISION & ORDER

BARBARA JAFFE, JSC:

For plaintiff:
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For defendants:
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By notice of motion dated November 10, 2010, plaintiffs move for an order compelling defendants to provide discovery responses. Defendants oppose the motion and, by notice of cross motion dated December 6, 2010, cross-move pursuant to CPLR 3211(a)(7) and 7804(f) for an order dismissing plaintiffs' complaint on the grounds that: (1) it fails to state a cause of action; (2) the named plaintiffs lack standing to sue; and (3) plaintiffs' constitutional claims are barred by law and/or by the applicable statute of limitations. In the alternative, defendants seek an order severing plaintiffs' third, fourth, and fifth causes of action. Plaintiffs oppose the cross motion. By letter dated April 12, 2011, the parties advised that they had resolved plaintiffs' motion to compel in the event that the complaint is not dismissed.

I. PLAINTIFFS' COMPLAINT

Plaintiffs allege that the New York City Police Department (NYPD) Patrol Guide requires police officers to complete a "Stop, Question and Frisk" worksheet, also known as an UF-250, each time an officer stops and questions someone. The worksheet is used to record information about the encounter, including the name and home address of the person stopped, and an officer is required to fill out the form even if the stop does not result in an arrest or summons. In May 2006, the NYPD issued an Operations Order which required that information from all UF-250s be compiled in a centralized computer database or "stop-and-frisk" database (database).

In the complaint, plaintiffs quote from a letter dated June 29, 2009 in which the NYPD Commissioner advised that information collected during stop-and-frisk encounters is "a tool for investigators to utilize in the subsequent location and apprehension of criminal suspects," and that information in the database "remains there indefinitely, for use in future investigations."

On or about May 19, 2010, plaintiffs commenced the instant class action lawsuit on behalf of those who have been arrested or issued summonses, whose NYPD records are subject to sealing, and whose personal information is maintained in the database. They contend that a class action is necessary as joinder of all class members is impractical, observing that since 2003 NYPD officers have stopped, frisked, and arrested or issued a summons approximately 360,000 times, and that there are common issues of law and fact including whether the Criminal Procedure Law requires the sealing of database records. Plaintiffs claim that by maintaining the database, defendants violated their rights under CPL 160.50 and 160.55 and their constitutional rights under the First, Fourth, and Fourteenth Amendments to the Constitution, 42 USC § 1983,

the New York State Constitution, and New York's common law.

Plaintiff Lino alleges that between February 2008 and August 2009, he was targeted by the NYPD and stopped at least 13 times, and that on April 18, 2009, he was stopped by the NYPD, frisked, and issued two summonses which were dismissed and the related records sealed. On another occasion, Lino was issued a summons for a noncriminal violation for which he paid a fine. Plaintiff Khan asserts that on October 7, 2009, he was falsely accused of violating the law, detained, questioned, and searched, and he received two summonses which were dismissed. Both plaintiffs allege that the NYPD has not sealed information in its database about them despite the termination of criminal proceedings in their favor.

II. APPLICABLE STATUTES

Pursuant to CPLR 3211(a)(3), a cause of action may be dismissed where a party lacks legal capacity or standing to sue. The critical issue in determining whether a party has standing to sue is whether the party has suffered an "injury in fact, which is "an actual legal stake in the matter being adjudicated" and "ensures that the party seeking review has some concrete interest in prosecuting the action." (*Socy. of Plastic Ind., Inc. v County of Suffolk*, 77 NY2d 761 [1991]).

Section 160.50(1) of New York Criminal Procedure Law (CPL) provides that:

> Upon the termination of a criminal action or proceeding against a person in favor of such person . . . the record of such action or proceeding shall be sealed and the clerk of the court wherein such criminal action or proceeding was terminated shall immediately notify the commissioner of the division of criminal justice services and the heads of all appropriate police departments and other law enforcement agencies that the action has been terminated in favor of the accused, and unless the court has directed otherwise, that the record of such action or proceeding shall be sealed.
>
> Upon receipt of notification of the sealing, as pertinent here:
>
> (a) every photograph of such person and photographic plate or proof, and all

palmprints and fingerprints taken or made of such person" shall be destroyed or returned forthwith to the person by any police department that had it in its possession;

(b) any police department that transmitted or forwarded any such photograph, palmprint or fingerprint shall forthwith formally request in writing that all such copies be destroyed or returned to the police department, and if returned, the police department shall, at its discretion, destroy or return them; and

© all official records and papers relating to the arrest or prosecution on file with a police agency shall be sealed and not made available to any person or public or private agency.

(CPL 160.50).

Section 160.55 of the CPL is identical to CPL 160.50 except that it pertains to the termination of a criminal action or proceeding against a person by the conviction of such person of a traffic infraction or certain types of minor violations.

The purpose of the sealing statutes is to protect the rights of those against whom criminal charges were brought but which did not ultimately result in a conviction and

> to remove any "stigma" flowing from an accusation of criminal conduct terminated in favor of the accused, thereby affording protection (i.e., the presumption of innocence) to such accused in the pursuit of employment, education, professional licensing and insurance opportunities.

(*People v Patterson*, 78 NY2d 711, 715-716 [1991]). Thus, pursuant to CPL 160.60:

> Upon the termination of a criminal action or proceeding against a person in favor of such person, as defined in [CPL 160.50], the arrest and prosecution shall be deemed a nullity and the accused shall be restored, in contemplation of law, to the status he occupied before the arrest and prosecution. The arrest or prosecution shall not operate as a disqualification of any person so accused to pursue or engage in any lawful activity, occupation, profession, or calling.

III. PLAINTIFFS' STANDING

A. Contentions

Defendants contend that the individual plaintiffs lack standing to sue as they have failed to allege how the inclusion of their names in the database has injured them and their claim that their information may potentially be used in future criminal investigations is unduly speculative, that a violation of CPL 160.50 does not support a claim for federal or state constitutional violations and thus does not constitute an injury, that plaintiffs' individual lack of standing is fatal to their attempt to bring a class action here, and that in any event, a class action would be superfluous as a judgment in the individual plaintiffs' favor would yield the same result. (Defendants' Memorandum of Law, dated Dec. 6, 2010).

In opposition, plaintiffs contend that the database constitutes a violation of CPL 160.50 and 160.55 as well as their constitutional rights, and observe that as they have not yet moved to certify a class, whether they have standing to represent a class is not in issue. They also maintain that their injury consists of defendants' failure to seal their records and observe that as the purpose of the sealing statutes is to protect the person wrongfully accused from future injury that might result from the disclosure of a sealed record, their claim of future injury is not fatal to their standing to sue. (Plaintiffs' Memorandum, dated Jan. 25, 2011).

In reply, defendants assert that the CPL 160.50 does not require that they destroy any covered records and thus their maintenance of the database, by itself, neither violates the sealing statutes nor constitutes an injury to plaintiffs, especially as the statute requires them to preserve sealed records and disclose them under specific circumstances. Absent any allegation that plaintiffs' records have been disclosed improperly, defendants argue that plaintiffs have not

shown that they have suffered any injury. (Reply Memorandum, dated Feb. 3, 2011).

B. Analysis

Neither statute requires the NYPD to destroy or request the destruction of any records relating to an arrest other than photographs, palmprints or fingerprints, and as to all other records, the NYPD is required only to seal them and decline to provide them to anyone other than the entities specified in the statutes and under specific circumstances. In effect, the NYPD is a custodian of the sealed records with the obligation to provide them if necessary or ordered to do so. Thus, absent any provision in the sealing statutes prohibiting defendants from maintaining the personal information of plaintiffs and others in the database, and in light of defendants' obligation to maintain sealed records, plaintiffs have failed to establish that the inclusion of their personal information in the database violates CPL 160.50 or 160.55. (*See eg Matter of Palacio v Morgenthau*, 13 AD3d 282 [1st Dept 2004] [petitioner not entitled to expungement of sealed records]; *Matter of Brown v Hallman*, 278 AD2d 604 [3d Dept 2000], *lv denied* 96 NY2d 709 [2001] [rejecting argument that CPL 160.50 required expungement from petitioner's criminal history of indicia of arrest which did not result in criminal conviction or criminal proceedings which terminated in his favor]; *Matter of Catterson v Corso,* 244 AD2d 407 [2d Dept 1997], *lv denied* 92 NY2d 828 [1998] [no authority in CPL requiring petitioner Attorney General to destroy tapes made in connection with criminal action that had been dismissed]).

Even if the NYPD's maintenance of the database violates the sealing statutes, the Court of Appeals has held that the statutes grant only a statutory, not a constitutional, privilege to one whose records should be sealed, and thus a statutory violation does not implicate a constitutional right, even if records that should and have not been sealed are used in another proceeding. In

Patterson, the defendant's photograph had been taken in connection with an unrelated charge which was dismissed and the file ordered sealed. (78 NY2d at 711). The photograph was then used in an identification procedure held in connection with the prosecution of the defendant in a second, unrelated, proceeding, and the Court held that even though such use violated CPL 160.50, it did not infringe upon any of the defendant's constitutional rights, finding that the nature of the statutory remedy in the sealing statutes "is unrelated to any Fourth or Fifth Amendment protections" and that "[a] defendant has no inherent or constitutional right to the return of photographs, fingerprints or other indicia of arrest where charges are dismissed." (*See also People v Mosquea*, 18 AD3d 228 [1st Dept 2005] [even if defendant's arrest resulted from use of information that should have been sealed, violation of CPL 160.50 did not require suppression or dismissal]; *People v Gilbert*, 136 AD2d 562 [2d Dept 1988], *lv denied* 71 NY2d 896 [dismissal of indictment or suppression of identification testimony not required based on NYPD's identification of defendant through fingerprints that should have been sealed]; *People v Midgley*, 196 Misc 2d 19 [Sup Ct, Kings County 2003] [rejecting defendant's argument that failure to seal DNA profile and re-use of profile, which lead to second arrest, deprived him of due process and equal protection of law and violated constitutional rights]).

Courts have applied this holding in the context of non-criminal actions and proceedings. (*See Reeb v Woods*, 751 F Supp 2d 484 [WD NY 2010] [violation of CPL 160.50 did not implicate federal or state constitutional rights]; *Walls v New York City Police Dept.*, 2005 WL 1861629 [ED NY 2005] [dismissing 42 USC § 1983 claim based on defendant's alleged failure to expunge records related to arrest]; *Grandal v City of NY*, 966 F Supp 197 [SD NY 1997] [dismissing claim for violation of constitutional right to due process based on NYPD's use of

photograph, which should have been returned to plaintiff pursuant to CPL 160.50, in subsequent criminal investigation, absent allegation that NYPD had engaged in pattern of misconduct or that plaintiff's reputation had been damaged]; *Matter of Charles Q. v Constantine*, 85 NY2d 571 [1995] [evidence used in disciplinary hearing which should have been sealed pursuant to CPL 160.50 did not require annulment of hearing determination]; *Matter of Ono v Long Is. Coll. Hosp.*, 12 AD3d 299 [1st Dept 2004] [in administrative proceeding, respondent's reliance on sealed documents not improper]; *Brown v City of New York*, 289 AD2d 95 [1st Dept 2001] [dismissing section 1983 claim based on defendants' use of photograph that should have been sealed pursuant to CPL 160.55]; *Clapper v Ragonese*, 274 AD2d 654 [3d Dept 2000], *lv denied* 95 NY2d 958 [dismissing constitutional tort claim based on violation of CPL 160.50]; *Moore v Dormin*, 173 Misc 2d 836 [Sup Ct, New York County 1997], *lv denied* 92 NY2d 816 [1998] [dismissing claim based on violation of CPL 160.50 as it did not state cause of action for constitutional violation]).

Thus, at issue here is whether the NYPD's alleged violation of the sealing statutes implicates any non-constitutional rights upon which plaintiffs may sue in a civil action or which constitutes an injury for which plaintiffs may recover. (*See Patterson*, 78 NY2d at 714 [although there is "no authorization in (CPL 160.50) for the use in a law enforcement agency's investigatory procedures of a photograph retained in violation thereof," violation only statutory]).

Plaintiffs cite no authority supporting their claim that a violation of CPL 160.50 or 160.55 alone gives rise to a civil claim for damages, and no such authority appears to exist, especially as it has been widely held that a violation of the statutes does not require dismissal or suppression in the criminal context where one's freedom and liberty is at stake. (*See eg Patterson*, 78 NY2d at

716 [observing that nothing in history of sealing statutes indicated that Legislature intended that violation of statutes "without more, would justify invocation of the exclusionary rule with respect to subsequent independent and unrelated criminal proceedings"]; *People v London*, 124 AD2d 254 [3d Dept 1986], *lv denied* 68 NY2d 1001 [CPL 160.50 was "not designed to immunize a defendant from the operations of a law enforcement official's investigatory display of a photograph"]). In other words, if a violation of the sealing statutes during a criminal investigation which leads to a person's arrest, prosecution, and/or conviction does not warrant or require suppression or dismissal or a new criminal proceeding, it is unlikely that a violation may be compensated via a civil cause of action.

Moreover, nothing in the sealing statutes reflects that the Legislature intended to create a private right of action for their violation, nor did plaintiffs cite any authority holding that a private right of action exists under CPL 160.50 or 160.55. (*See Nekos v Kraus*, 62 AD3d 1144 [3d Dept 2009] [questioning without reaching issue of whether private right of action exists for violation of CPL 160.50]). In an analogous context, it has been held that a statute requiring the sealing of all official records upon a youthful offender adjudication (CPL 720.35), the purpose of which is to ensure that a youthful offender is not stigmatized by a criminal conviction or record (*Capital Newspapers Div. of the Hearst Corp. v Moynihan*, 71 NY2d 263 [1988]), does not create a private right of action based on a breach of the statute (*Anderson-Haider v State*, 29 Misc 3d 816 [Ct Cl 2010] [claim for damages arising from violation of statute dismissed]; *Yanicki v State*, 174 Misc 2d 149 [Ct Cl 1997] [same]; *see also Burton v Matteliano*, 81 AD3d 1272 [4th Dept 2011], *lv denied* ___ NE2d ___, 2011 NY Slip Op 75498 [violation of statute imposing duty to maintain confidentiality of patient treatment records did not support private

right of action]; *35 New York City Police Officers v City of New York*, 34 AD3d 392 [1st Dept 2006] [police officers had no private right of action for violations of statute governing privacy of their personnel records]; *Fine v State*, 10 Misc 3d 1075[A], 2005 NY Slip Op 52240[U] [Ct Cl 2005] [although statute required confidentiality of files relating to investigation of professional misconduct, its violation did not create private right of action for money damages]).

Plaintiffs have thus failed to show that they have suffered or will suffer any injury sufficient to confer on them standing in this action. In light of this result, I need not address the parties' remaining contentions.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' cross motion to dismiss is granted, and the complaint is hereby dismissed in its entirety; and it is further

ORDERED, that plaintiffs' motion to compel is denied as moot.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: June 24, 2011
New York, New York

JUN 24 2011

FILED

JUN 28 2011

NEW YORK
COUNTY CLERK'S OFFICE