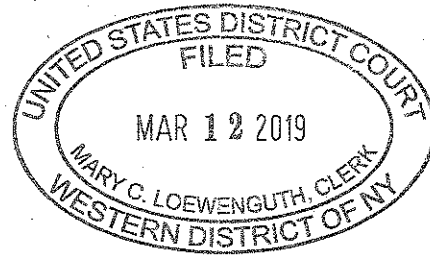UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

KAHENE PETERKIN,

        v.

C.O. SUMMER, et al.,
               Defendants.

DECISION & ORDER
17-CV-6106-FPG-JWF

[Filed stamp: UNITED STATES DISTRICT COURT FILED MAR 1 2 2019 MARY C. LOEWENGUTH, CLERK WESTERN DISTRICT OF NY]

Factual Background

Currently before the Court is plaintiff's motion to compel production of the following documents: (1) "Go-Round list for morning of July 6, 2016 for E Block, 2 Company" and (2) "Go-Round list for afternoon of July 6, 2016 for E-Block, 2 Company." Docket # 44. Defendants contend that "these documents do not exist" and that they were preserved for at most one year before being destroyed. Docket # 46, at ¶ 6. Hence, they argue, the documents plaintiff seeks did not exist at the time of his July 26, 2018 request, or, for that matter, at the time the lawsuit was served on the defendants in November 2017. Id. at ¶ 7.

Discussion

The Court cannot compel defendants to produce documents that no longer exist. As an officer of the court, Assistant Attorney General Hillel Deutsch, Esq., has represented that the documents plaintiff requests have been destroyed. There are, therefore, no documents to compel.

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Plaintiff strenuously objects, asserting that New York State Department of Corrections and Community Supervision's ("DOCCS") policy is to retain such documents for three years and that the documents should have been disclosed with defendants' mandatory disclosures. If plaintiff can point the Court to a DOCCS retention policy or regulation supporting his argument, he may make a motion for sanctions for improper destruction of these documents. However, based on the current record, the documents that plaintiff seeks no longer exist and there is no policy, rule, or regulation that plaintiff has pointed to or the Court is aware of that places DOCCS or the defendants under any obligation to preserve or safeguard materials sought for the period of time plaintiff suggests.

Accordingly, plaintiff's motion to compel (Docket # 44) is **denied as moot.**

SO ORDERED.

JONATHAN W. FELDMAN
United States Magistrate Judge

Dated: March **11**, 2019
            Rochester, New York