

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

PRESENT: MANUEL J. MENDEZ Justice PART 13

In the Matter of the Application of

JAMES LOGUE, Petitioner, -against-

INDEX NO. 153965/16 MOTION DATE 12-07-2017 MOTION SEQ. NO. 001 MOTION CAL. NO.

NEW YORK CITY POLICE DEPARTMENT, and WILLIAM BRATTON, in his official capacity as Commissioner of the New York City Police Department, Respondents.

The following papers, numbered 1 to 14 were read on this petition to/for Art. 78 relief :

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered and Adjudged that the petition for Article 78 relief to enforce the New York Freedom of Information Law (FOIL) and Public Officers Law §§84 et seq., seeking declaratory and other relief, is granted as stated herein. The remainder of the petition is denied.

In late November of 2014, Petitioner participated in Black Lives Matter protests conducted at Grand Central Terminal, Manhattan, New York. Petitioner alleges that while participating in the protests he observed both uniformed and plainclothes police officers regularly and openly recording events as they were taking place.

Petitioner's January 25, 2015 FOIL requests sought: (1) "all pictures, videos, audio recordings, data, and metadata related to Grand Central Station protests collected or received by your agency," (2) records describing the information collected and the purpose for collecting it, (3) "copies of files documenting the use of property within Grand Central Station related to monitoring of the protests" and (3a) "records describing the surveillance equipment used by officers within Grand Central Station," (4) "copies of all communications sent or received by your agency between November 2014 and January 2015 pertaining to protests at Grand Central Station," (5) the names of governmental organizations and private security companies who collaborated in the collection of information, and (6) "the names of all organizations public and private with whom the information was shared."

MTA and Metro North both responded to the FOIL requests and provided substantial production of responsive records with partial redactions (Pet. Exhs. G, H, I, J and K). Petitioner shared the FOIL responses received with the media, resulting in news reports of potentially unlawful surveillance (Pet. Exhs. L and M). The New York State Police denied the FOIL request in its entirety, and Petitioner failed to seek an appeal.

In a letter dated November 6, 2015, NYPD Records Access Officer, Lt. Richard Mantellino, rejected the FOIL request stating there were no documents responsive to demands 1, 2, 3, 3a, 5, and 6 and denied access to items sought in request #4 (Pet. Exh.

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

O). The items sought in FOIL request 4 were denied: pursuant to Public Officers Law (POL) §87[2][b],[e][i],[iii][iv], [f] and [g], no additional details or explanations of the denials were provided (Pet. Exh. O).

Petitioner through his attorney appealed the November 6, 2015 denial of his FOIL request. Jonathan David, NYPD's Records Access Appeals Officer in a letter dated January 11, 2016 issued a final denial of the FOIL request served on NYPD. The denial letter states that Petitioner's January 25, 2015 FOIL request did not specifically identify Black Lives Matter protests and those records not specifically sought could not be addressed (Pet. Exh. Q). The denial letter reiterated the POL §87[2], [e][i][iii][iv], and [f] exemptions without details and stated, "Other exemptions under FOIL may apply" (Pet. Exh. Q).

Petitioner seeks a judgment pursuant to Article 78, annulling and vacating Respondents' final determination and ordering the disclosure of records; alternatively, an order directing an in camera review of the records to determine which records are subject to disclosure under FOIL, and the disclosure of those records subject to FOIL. Petitioner also seeks a declaratory judgment that he is entitled to access requested records under FOIL, together with a judgment for attorney fees and litigation costs incurred pursuant to POL§89 [4][c].

FOIL imposes a broad duty on agencies to promote public accountability and open government by making records available (Gould v. New York City Police Dept., 89 N.Y. 2d 267, 675 N.E.2d 808, 653 N.Y.S. 2d 54 [1996]). FOIL requests are subject to statutory exemptions under Public Officers Law §87[2], which are to be narrowly construed. The burden is on the agency to demonstrate that requested material falls within one of the statutory exemptions (Hanig v. State Dept. of Motor Vehicles, 79 N.Y. 2d 106, 588 N.E. 2d 750, 580 N.Y.S. 2d 715 [1992]). Agencies relying on exemption, "must articulate, particularized and specific justification" for the failure to disclose the documents sought (Gould v. New York City Police Dept., 89 N.Y. 2d 267, supra at 275, citing to, Matter of Fink v. Lefkowitz, 47 N.Y. 2d 567, 393 N.E. 2d 463, 419 N.Y.S. 2d 467 [1979]). Blanket exemptions are adverse to FOIL's open government policy (Matter of Thomas v. New York City Dept. Of Educ., 103 A.D. 3d 495, 962 N.Y.S. 2d 29 [1<sup>st</sup> Dept., 2013]).

Respondents in opposition to the petition argue that the initial FOIL request refers only to "protests" and does not mention Black Lives Matter, which was named for the first time in the administrative appeal. The limitation sought by Respondents that the scope of this petition be limited to materials and records sought relating to surveillance of "Black Lives Matter protests" conducted at Grand Central Terminal for the period of November of 2014 through January of 2015, has merit and is granted.

The Respondents argue that there were and remain, no documents responsive to items 2, 3, 3a, 5, or 6 sought by Petitioner in their records, and that any arguments that they exist, are unsupported speculation. Petitioner has not identified or established a factual basis for the claim that documents responsive to items 2, 3, 3a, 5 or 6 exist (See Tarantino v. New York City Police Department, 136 A.D. 3d 598, 27 N.Y.S. 3d 601[1st Dept., 2016]). The relief sought in the petition as to items 2, 3, 3a, 5 and 6, is denied.

Respondents claim that they have located "multimedia records" responsive to item 1, in addition they possess two sets of records responsive to item 4 which have been withheld (hereinafter referred to collectively as "withheld documents"). The first set of item 4 records withheld is alleged to consist entirely of communications between and among undercover officers and their handlers, and the second set consists of a single communication between an NYPD undercover officer and his base. Respondents allege that a large amount of a third set of documents responsive to item 4 were already provided to Petitioner through the MTA FOIL responses and after a comparison, on August 22, 2016 about two months after this special proceeding was commenced, an additional two records were disclosed by e-mail to Petitioner's attorney. Respondents argue that all of the withheld documents are subject to statutory exemptions as stated in POL §§ 7[2],[e][i][iii] [iv], [f], [g] and [l].

Respondents have stated a basis to exempt almost all of the third set of documents responsive to item 4 of Petitioner's FOIL request. Respondents provided two documents claiming the remaining responsive documents in the third set were provided by MTA and Metro North. Receipt of documents responsive to a FOIL request, regardless of the source, renders the relief sought moot as to those documents, absent an allegation in evidentiary form to compel a second production of the same materials (See *Matter of Fappiano v. New York City Police Dept.*, 95 N.Y. 2d 738, 747 N.E. 2d 1286, 724 N.Y.S. 2d 685 [2001] and *Matter of Moore v. Santucci*, 151 A.D. 2d 677, 543 N.Y.S. 2d 103 [2nd Dept., 1989]). Petitioner concedes receipt of responsive documents from MTA and Metro North and the two documents provided from the third set are responsive. He fails to provide proof in evidentiary form that require the Respondents to produce all of the documents in the third set responsive to item 4 of the FOIL request.

Respondents argue that the first set and second set of item 4 records withheld, are exempt pursuant to POL § 87[2],[e][I],[iii],[iv], [f] and [g]. Respondents have not met their burden for exemption under POL §87[2],[e][I],[iii],[iv], [f] and [g].

POL § 87[2],[e][I] is applied to records which if provided would interfere with law enforcement investigations or judicial proceedings which can be satisfied by generic risks posed by disclosure (*Loevy & Loevy v. New York City Police Dept.*, 139 A.D. 3d 598, 33 N.Y.S. 3d 185 [1<sup>st</sup> Dept., 2016]). Conclusive assertions of potential pending cases, fail to, "meet the burden of identifying..the generic risks posed by disclosure of these categories of documents" (*Law Offices of Adam D. Perlmutter, P.C. v. New York City Police Dept.*, 123 A.D. 3d 500, 999 N.Y.S. 2d 26 [1<sup>st</sup> Dept., 2014] citing to *Matter of Leshner v. Hynes*, 19 N.Y. 3d 57, 968 N.E. 2d 451, 945 N.Y.S. 2d 214 [2012]).

Respondents fail to meet their burden for exemption under POL § 87[2],[e][I], by not stating a causal connection and making only conclusive assertions related to the materials sought. The affidavit of Assistant Chief John Donohue of the NYPD Intelligence Bureau fails to meet Respondent's burden for exemption pursuant to POL § 87[2],[e][I]. His speculative and conclusive claims of potential related ongoing investigations of incidents against police officers, both in New York and outside of the state and generalized references to use of the materials by the ISIS and ISIL terrorists, fail to provide a causal connection to the protesters and are insufficient to state a generic risk.

POL § 87[2],[e][iii],[iv] are commonly known as the "law enforcement privilege" and applied to disclosure that would identify confidential sources and information relating to, "criminal investigations and non-routine investigative techniques or procedures" (*Asian American Legal Defense and Educ. Fund v. New York City Police Dept.*, 125 A.D. 3d 531, 5 N.Y.S. 3d 13 [1<sup>st</sup> Dept., 2015]). A factor used in determining investigative procedures are non-routine is whether disclosure would create, "a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by personnel." (*Matter of Fink v. Lefkowitz*, 47 N.Y. 2d 567 supra at pages 572-573).

POL § 87[2],[f] applies an exemption to disclosure that, "could endanger the life or safety of any person." It requires a determination of whether the information sought, by its intrinsic nature gives rise to the implication that the life and safety of witnesses is endangered (*Bellamy v. New York City Police Dept.*, 59 A.D. 3d 535, 874 N.Y.S., 2d 60 [1<sup>st</sup> Dept. 2009]). The blanket exemption on public safety grounds is not necessarily warranted and the competing FOIL interests must be balanced (*Johnson v. New York City Police Dept.*, 257 A.D. 2d 343, 694 N.Y.S. 2d 14 [1<sup>st</sup> Dept., 1999]).

Respondents fail to meet their burden under POL § 87[2],[e][iii],[iv], in this proceeding. Petitioner was already provided with records from MTA and Metro North that include the descriptions, impressions and routines for both MTA and Metro North Railroad officers and at least one undercover NYPD detective (Pet. Exhs. G, H, I, J and K). Respondents fail to meet their burden under POL § 87[2],[f] by not stating the manner in which the materials sought would place NYPD undercover police officers at greater risk than the MTA and Metro North officers. Conclusory and speculative statements

that protection is needed, even with redactions, to avoid exposure and potential identification of officers, “ does not rise to the level of ‘a particularized and specific justification for denying access’ to the [entirety of] the records requested” (Police Benevolent Ass’n of New York State, Inc. v. State, 145 A.D. 3d 1391 [3<sup>rd</sup> Dept., 2016]). Respondents make blanket assertions and fail to particularize or distinguish their surveillance or undercover techniques and records. They fail to show that redacting the relevant information, as was done with the MTA and Metro North records, would not provide sufficient protection for NYPD undercover officers, their techniques and records.

POL § 87[2],[g] exemption applies to inter-agency or intra-agency materials that are not, “ statistical or factual tabulations or data or instructions to staff that affect the public.” The exception is used to permit the exchange of opinion and advice, which can be redacted in documents to eliminate non-factual material (The New York Times Co. v. City of New York Fire Dept., 4 N.Y. 3d 477, 829 N.E. 2d 266, 796 N.Y.S. 2d 302 [2005]).

Respondents seek to exempt all of the documents sought based on opinion and advice and to allow undercover officers to speak freely with their handlers. They have not shown that this cannot be accomplished by redacting statements that are opinion or advice as was done with the MTA and Metro North records.

Two months after the commencement of this proceeding Respondents determined, for the first time after administrative review, that they were in possession of “multimedia records” responsive to item 1. Respondents claim that Petitioner is not entitled to the “multimedia records” because pursuant to POL §87[2][i] “they would reveal the placement or use of cameras,” and potentially expose gaps in the surveillance system diminishing successful prosecution.

A generalized argument that software might be used for illegal or fraudulent purposes is an overly broad interpretation of the POL § 87[2][i] exemption and fails to establish the exemption (TJS of New York, Inc. v. New York State Dept. of Taxation and Finance, 89 A.D. 3d 239, 932 N.Y.S. 2d 243 [3<sup>rd</sup> Dept., 2011]).

Petitioner was provided with numerous photographs and “multimedia” records from MTA and Metro North (Pet. Exhs. G, H, I, J and K). Respondents have failed to distinguish the “multimedia records” in their possession that are alleged to warrant protection, from those already provided. Petitioner provides proof that he was aware of the location of some of the cameras during the protests, which openly remain in place at Grand Central Station (Pet. Reply Exh. B).

Petitioner has not objected to the use of redacted or altered materials. He provides the expert affidavit of Christopher Soghoian, a principal technologist with the American Civil Liberties Union’s Speech, Privacy and Technology Project, explaining that the relevant information Respondents claim is potentially harmful, could be scrubbed using free tools, or easily converted into standard formats and scrubbed, without any potential harm or risk of exposure to Respondents. There was no showing by Respondents that scrubbing the files would result in substantial time and expense or the creation of a new record warranting the exemption (See New York Civil Liberties Union v. New York City Police Dept., 74 A.D. 3d 632, 902 N.Y.S. 2d 356 [1<sup>st</sup> Dept., 2010] and Data Tree, LLC v. Romaine, 9 N.Y. 3d 454, 880 N.E. 2d 10, 849 N.Y.S. 2d 489 [2007]).

Respondents have not met their burden, the failure to raise the § 87[2][i] exemption until after the administrative review and the overly broad stated application and interpretation, warrants providing Petitioner with the “multimedia records” in response to item 1 in his FOIL request.

Pursuant to POL §89[4][c], attorney’s fees may be assessed against an agency and awarded where the Petitioner has “substantially prevailed” and it is established that there was no reasonable basis for the denial. A denial may be reasonable even after a finding that the records were not exempt. The award of fees is within the discretion of the Court. (New York State Defenders Ass’n v. New York State Police, 87 A.D. 3d 193, 927

N.Y.S. 2dd 423 [3<sup>rd</sup> Dept., 2011] and Grabell v. New York City Police Dept., 139 A.D. 3d 477, 32 N.Y.S. 3d 81 [1<sup>st</sup> Dept., 2016]].

Petitioner has not established entitlement to all the documents sought and Respondents have stated a rational basis for some of the denials. Petitioner is not entitled to an award of attorney fees and litigation costs.

Accordingly, it is ORDERED AND ADJUDGED that the petition seeking a judgment pursuant to Article 78, annulling and vacating Respondents' final determination and ordering the disclosure of records, alternatively, an order directing an in camera review of the records to determine which records are subject to disclosure under FOIL, and the disclosure of those records subject to FOIL, together with a declaratory judgment that Petitioner is entitled to access requested records under FOIL, and for attorney fees and litigation costs incurred pursuant to Public Officers Law §89 [4][c], is granted as stated herein, and it is further,

ORDERED and ADJUDGED that Petitioner's FOIL request is deemed limited to materials and records sought relating to surveillance of "Black Lives Matter protests" conducted at Grand Central Terminal for the period of November of 2014 through January of 2015, and it is further,

ORDERED and ADJUDGED that Respondents final determination is vacated and annulled as to "multimedia records" responsive to item 1 in Petitioner's FOIL request, and it is further,

ORDERED and ADJUDGED that within thirty (30) days of receipt of a copy of this Order with Notice of Entry, Respondents are directed to provide Petitioner with the "multimedia records" that may be "scrubbed" in response to item 1 in his FOIL request, and it is further,

ORDERED and ADJUDGED that Respondents final determination is vacated and annulled as to, the first set and second set of documents responsive to item 4 of Petitioner's FOIL request, and it is further,

ORDERED and ADJUDGED that the first set and second set of documents responsive to item 4 of Petitioner's FOIL request, redacted to omit identifying information including the names and e-mail addresses of the NYPD undercover officers, their handlers and the base, shall be produced by Respondents within thirty (30) days of receipt of a copy of this Order with Notice of Entry, and it is further,

ORDERED and ADJUDGED that the remainder of the relief sought in the petition as to items 2, 3, 3a, 5 and 6 and the third set of documents responsive to item 4 of Petitioner's FOIL request, and pursuant to Public Officers Law §89 [4][c], for attorneys fees and litigation costs, is denied, and it is further,

ORDERED that the Petitioner serve a copy of this Order with Notice of Entry on the Respondents, on the trial support clerk located in the General Clerk's Office and the County Clerk's Office pursuant to e-filing protocol, and it is further

ORDERED that the County Clerk is directed to enter judgment accordingly.

ENTER:

Dated: February 6, 2017

MANUEL J. MENDEZ, J.S.C.

MANUEL J. MENDEZ J.S.C.

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

FILED FEB 10 2017 COUNTY CLERK'S OFFICE NEW YORK

Handwritten signature and initials over the stamp.

**THIS IS AN E-FILED CASE.  
ALL DOCUMENTS MUST  
BE FILED ELECTRONICALLY.**

153965/16

JUDGMENT

**FILED**

FEB 10 2017

AT 3:46 P M  
N.Y. CO. CLK'S OFFICE