

**Matter of Freewheels Bicycle Defense Group, Inc. v
New York City Police Dept.**

2008 NY Slip Op 33763(U)

April 23, 2008

Supreme Court, New York County

Docket Number: 108444/07

Judge: Marilyn G. Diamond

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

PRESENT: HON. MARYLIN G. DIAMOND

PART 48

Justice

Matter of FREEWHEELS BICYCLE DEFENSE GROUP, INC.,

INDEX NO. 108444/07

Petitioner,

MOTION DATE

- v -

NEW YORK CITY POLICE DEPARTMENT

Respondent

UNFILED JUDGMENT SEQ. NO. 001
This judgment has not been entered by the County Clerk and notice of entry cannot be given. To appear in person at the Judgment Clerk's Desk (Room 141E).

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that: This is an article 78 proceeding seeking review of the denial by the respondent New York City Police Department ("NYPD") of two separate requests petitioner made under the Freedom of Information Law ("FOIL") (Public Officers Law, article 6) for documents or materials in its possession. Both of petitioner's FOIL requests were made to the NYPD's Records Access Officer on June 1, 2006.

The first of these requests sought information and documents concerning a bicycle ride known as "Critical Mass" which was held on March 25, 2005. It sought (1) officer logs and other documents which reveal the identity of officers, including plainclothes officers, who were assigned to cover the event, as well as the numbers of the vehicles they used, including unmarked vehicles, (2) any and all "Critiques of Policing" and "After Action Reports" which were generated as a result of the event, (3) records pertaining to overtime which was paid with respect to the Critical Mass detail, (4) flight logs, video footage and photographs from an NYPD helicopter used in connection with the policing of the event, and (5) radio tapes and transcripts of communications pertaining to the policing of the event, as well as video footage and photographs. By letter dated January 9, 2007, the Records Access Officer granted access to thirteen pages of records sought in this request, but some of the information in these records was redacted on the ground that disclosure would allegedly "endanger the life and safety of any person." The Access Officer also furnished a videotape and an aviation log. However, he certified that, after a diligent search, the NYPD could not locate the requested Critique of Policing, After Action Report, police overtime records, video footage and photographs from an NYPD helicopter, and radio tapes and transcripts.

The second request sought (1) unredacted copies of records pertaining to the policing of protests during the World Economic Forum in 2002 and (2) all written policies governing redactions of documents released in response to FOIL requests after January 1, 2000. By letter dated January 9, 2007, the Records Access Officer denied access to the documents relating to the World Economic Forum on the grounds that a previous order of a federal magistrate had denied disclosure of these very materials and that the documents were otherwise exempt from disclosure, pursuant to POL § 87(2)(e)(i), since disclosure would interfere with a pending judicial proceeding. The Access Officer did not address the petitioner's request for copies of the NYPD's written policies governing redactions of documents released in response to FOIL requests.

By letters dated February 8, 2007, petitioner administratively appealed both decisions. Both appeals were denied by the Records Access Appeals Officer on February 16, 2007. As to the request regarding the Critical Mass event, the Appeals Officer noted that petitioner had been furnished with 14 pages of records and went on to state that records regarding plainclothes officers and unmarked vehicles are exempt from

disclosure, pursuant to POL §§ 87(2)(e)(iii), 87(2)(e)(iv) and 87(2)(f). As to the second request, the Appeals Officer repeated that the records sought regarding the World Economic Forum are exempt from disclosure under POL § 87(2)(e)(i) because disclosure would interfere with a pending judicial proceeding. The Officer also stated that the NYPD does not have any records reflecting policies for redacting documents in response to FOIL requests but, rather, merely follows the provisions of the FOIL and related case law.

This article 78 proceeding challenges these decisions. In lieu of an answer, the respondent has moved to dismiss the petition on the grounds that (1) the petitioner's first FOIL request is moot since the requested materials have, with proper redactions, been produced or could not be located, (2) the second FOIL request is without merit, as a matter of law, since the NYPD cannot release the records sought with regard to the World Economic Forum given an order issued by a federal magistrate and, moreover, does not maintain any records reflecting policies for redacting documents and (3) the petitioner failed to exhaust its available administrative remedies.

Discussion

The respondent has failed to establish that it is entitled, as a matter of law, to an order dismissing the petition. As to its argument that, with proper redactions, it provided the petitioner with the records sought with regard to the officers and vehicles involved in the Critical Mass detail, the respondent has failed to address the petitioner's claim that the documents received are incomplete and otherwise unresponsive in that they fail to identify or include, *inter alia*, (1) various officers whom petitioner claims to have been present, (2) any vehicles used during the event, (3) Polaroid pictures which are seen in a videotape as having been taken at the event by police officers and (4) photographs of officers who can be seen along with persons whom they arrested at the event. In view of the fact that the petitioner has provided a demonstrable factual basis to support its contention that the NYPD's response was incomplete and should have contained the information and photographs sought, it is incumbent upon the respondent to explain why such materials were not included. *See Matter of Gould v. New York City Police Department*, 89 NY2d 267, 279 (1996). In addition, it is reasonable to expect that, at the very least, overtime records and radio tapes relating to the event were generated. Their purported absence also requires an explanation. As to the redacted information, it is well settled that exemptions are to be narrowly construed and that the burden rests on the agency to demonstrate that the requested material so qualifies. *See Matter of Gould v. New York City Police Department*, 89 NY2d at 275; *Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 NY2d 106, 109 (1992). In redacting information from the documents provided to the petitioner, the respondent merely stated that it was doing so because disclosure would endanger the life and safety of the officers. This conclusory assertion requires further explanation.

As to the petitioner's second request, the respondent has provided an entirely reasonable explanation that it does not maintain any records reflecting policies for redacting documents but, rather, follows the governing provisions of the POL and applicable case law. In the absence of any concrete factual basis supporting petitioner's contention that such records exist, the court is persuaded that this issue has been resolved.

The respondent's contention that it cannot release the records sought with regard to the World Economic Forum because of an order issued by a federal magistrate is not, however, resolvable on the record before the court. First, in the decision on which the respondent relies, the magistrate did not rule that the documents at issue were exempt from disclosure or need not otherwise be produced in the discovery which was undertaken in that case. *See Allen v. City of New York*, 420 F Supp2d 295 (SDNY 2006). Rather, the magistrate merely referred to the fact that it had, in an earlier decision from the bench, sustained the City's assertions of privilege as to some documents and rejected it as to others. *Id.* at 298. The magistrate did not specify which documents it had ruled were privileged and did not explain its reasoning in the earlier decision. Thus, this court has no basis for determining whether the magistrate even

addressed the same or similar issues which are before the court. Second, although the respondent asserts that production of the requested documents is exempt under POL § 87(2)(e)(i) because disclosure would interfere with a pending judicial proceeding, it has failed to articulate how and why such interference would occur. Indeed, it is not even clear from the record before the court whether the federal proceeding is still pending. The mere fact that a magistrate in a federal civil case may have ruled, on a discovery-related motion, that the City did not have to produce certain documents hardly means that the production of those same documents to a nonparty pursuant to the FOIL somehow interferes with that proceeding. Notably, the respondent has not cited any case law to the contrary. Although the respondent suggests that, as a matter of comity, this court should decline issuing an order which directs the production of documents which a federal court has exempted from disclosure, a party's rights under FOIL should not be abrogated merely to give effect to the principle of comity. See *The New York Environmental Law & Justice Project v. City of New York*, NYLJ, 5/6/06. See also *Lemmon v. People*, 20 NY 562, 602-603 (1860).

Finally, there is no merit to the respondent's argument that the petition should be dismissed for failure to exhaust available administrative remedies. The petitioner's administrative remedies were exhausted once the two decisions were issued by the Records Access Appeals Officer on February 16, 2007.

Accordingly, the respondent's motion to dismiss is hereby denied. The respondent shall serve the petitioner with its answer within ten days of service upon it of a copy of this order with notice of entry. The case shall be re-noticed for hearing pursuant to the time limits set forth under CPLR 7804(f). In the event the respondent believes it is appropriate, some or all of the records sought by the petitioner may be submitted to the court for an in camera inspection.

ENTER ORDER

Dated: 4/23/08



MARYLIN G. DIAMOND, J.S.C.
 NON-FINAL DISPOSITION

Check one: FINAL DISPOSITION

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be given based hereon. To obtain entry, counsel for each party must appear in person at the Judgment Clerk's Desk (Room 141B).