

**Matter of Time Warner Cable News NY1 v New York
City Police Dept.**

2017 NY Slip Op 30707(U)

April 7, 2017

Supreme Court, New York County

Docket Number: 150305/2016

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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In the Matter of the Application of

TIME WARNER CABLE NEWS NY1,

Petitioner,

-against-

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

Respondents.

DECISION/ORDER
Index No. 150305/2016
Mot. Seq. No. 002

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

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KATHRYN E. FREED, J.S.C.

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS PETITION AND MOTION, REFERRED TO ACCORDING TO THE DOCUMENT NUMBERS
ASSIGNED TO THEM BY THE NEW YORK STATE COURTS ELECTRONIC FILING SYSTEM (NYSCEF):

PAPERS	NUMBERED
NOTICE OF MOTION, AFF. IN SUPP., MEMO. OF LAW IN SUPP.	39-41
NOTICE OF CROSS-MOTION, AFFS. IN SUPP AND OPP.	
AND EXHIBIT ANNEXED	42, 44-46
MEMO OF LAW IN OPP. AND EXHIBITS ANNEXED	47-51
REPLY MEMO OF LAW	52
REPLY AFF. AND EXHIBITS ANNEXED	53-55
AFF. IN OPP. TO CROSS MOTION	56

UPON THE FOREGOING CITED PAPERS, THIS DECISION, ORDER AND JUDGMENT ON THE PETITION AND
CROSS MOTION IS AS FOLLOWS:

In this CPLR article 78 proceeding, petitioner Time Warner Cable News NY1 seeks a
judgment compelling respondents New York City Police Department and former Commissioner
William J. Bratton to comply with its request, pursuant to the Freedom of Information Law ("FOIL")
(Public Officers Law § 84 *et seq.*) for body-worn camera (hereinafter "BWC") footage. In a previous

interim order, dated August 1, 2016, this Court found that the petition and answer raised questions of fact as to whether complying with the request would be unduly burdensome on respondents, necessitating a hearing on that issue. *See* 53 Misc 3d 657, 675-676 (2016). Petitioner now moves for reargument or, in the alternative, for permission to appeal to the Appellate Division on the issue of whether there is a “burden exemption” to a FOIL request. *See* CPLR 5701 (b) (1); (c). Respondents cross-move for permission to appeal to the Appellate Division on the issue of who should bear the costs associated with review and redaction of the video footage. After oral argument, and following a review of the papers submitted and the relevant statutes and case law, **the branch of petitioner’s motion to reargue is granted, and the branch of petitioner’s motion for permission to appeal as well as respondents’ cross motion for permission to appeal are both granted.**

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The details of this case were expounded in the interim order that is the subject of these motions, and will not be repeated at length here. *See* 53 Misc 3d at 658-663. Petitioner seeks an estimated 190 hours of BWC footage consisting of 1,576 separate interactions between the police and members of the public, pursuant to operations order 48. Respondents denied the request at every stage of administrative review. Petitioner thereafter commenced the instant proceeding, and this Court found that there were issues of fact necessitating a hearing. This motion and cross motion then ensued.

CONCLUSIONS OF LAW

It is plain from the papers that both parties have misconstrued this Court's order. It is well settled that a request pursuant to FOIL cannot be rejected merely because of its "breadth or burdensomeness." *Matter of Brown v Goord*, 45 AD3d 930, 932 (3d Dept 2007), *lv dismissed* 10 NY3d 796 (2008); *see Matter of Irwin v Onondaga County Resource Recovery Agency*, 72 AD3d 314, 318 (4th Dept 2010); *Matter of Stein v New York State Dept. of Transp.*, 25 AD3d 846 (3d Dept 2006). So long as the documents sought are "reasonably described" (Public Officers Law § 89 (3) (a); *Matter of Konigsberg v Coughin*, 68 NY2d 245, 249 [1986]) and the format of the documents allows them to be transferred to the requester without "significant time or expense" (*Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 465 [2007]; *see* Public Officers Law § 89 [3] [a]; *Matter of Weslowski v Vanderhoef*, 98 AD3d 1123, 1126 [2d Dept 2012], *lv dismissed* 20 NY3d 995 [2013]), the agency must comply with the FOIL request. Here, the request is both adequately described and the records can be transferred to petitioner with minimal effort. The records are simply video files that can be placed on any number of media formats with minimal manipulation, if any. Thus, as petitioner contends, the NYPD must comply with the request.

This does not end the inquiry, however. Ignoring, for the sake of argument, the possibility that the NYPD can perform redactions, compliance with this FOIL request means reviewing the requested video footage to determine whether any of the videos contain exempt information and then denying total access to any of those videos that contain exempt information. On review, this Court would then be in a position to determine, on an individual basis, whether the exemptions were valid for each particular video. But most importantly, the FOIL request as it pertained to each video would be something like an on-off switch. Either the video contains no exempt material and would be

subject to disclosure or the video contains even a single second of exempt material and would not subject to disclosure.

The only question is whether the NYPD can be compelled to redact those moments in the BWC footage containing exempt material, so that all of the videos can be turned over in some form. The principal case on this issue is *Matter of Schenectady County Socy. for the Prevention of Cruelty to Animals, Inc. v Mills* (18 NY3d 42, 45 [2011]). There, the Court of Appeals held that “an agency responding to a [FOIL] demand . . . may not withhold a record solely because some of the information in that record may be exempt from disclosure. Where it can do so without unreasonable difficulty, the agency must redact the record to take out the exempt information.” *Id.* For the reasons discussed in this Court’s prior order, the papers present a question of fact as to whether redactions of the video footage can be conducted “without unreasonable difficulty.” It is on this very narrow issue that a hearing must be held. If, as a result of the hearing, the NYPD proves that it is unable to perform the redactions without unreasonable difficulty, the NYPD will be permitted to withhold videos containing exempt material in their entirety. If, on the other hand, the NYPD is unable to sustain its burden of showing that it is unreasonably difficult to perform the redactions, it will be compelled to turn over all of the videos to petitioner, with redactions as necessary to prevent the disclosure of exempt material.

Since, regardless of the outcome of the hearing, the NYPD has failed to present any basis on which to refuse to disclose those videos containing no exempt footage or on which to entirely deny the request based on its burden, the NYPD must review the videos and make an individual determination as to each one prior to the hearing. Finally, considering the time and expense involved in holding the hearing, and the interest of the parties in the legal issues surrounding this FOIL

request, the parties should be permitted to appeal to the Appellate Division if they so choose.

Accordingly, it is hereby:

ORDERED that the branch of petitioner's motion seeking reargument is granted and, upon reargument, this Court's prior interim order is amended as stated herein; and it is further

ORDERED that respondents are directed to review the footage and determine, on an individual basis, whether the videos are subject to disclosure, and to provide petitioner a copy of those videos that do not contain exempt material within 60 days after this order is entered; and it is further

ORDERED that respondents may request additional time to comply with this directive, if necessary, by letter, with documentation supporting the request, via e-filing with courtesy copies for the Court; and it is further

ORDERED that, after respondents have complied with the foregoing directives, either party may request that this matter be placed on this Court's calendar for a pre-hearing conference to discuss the parameters of the hearing; and it is further

ORDERED that the branch of petitioner's motion, as well as the cross motion, seeking permission to appeal from this Court's prior order, as amended herein, are both granted; and it is further

ORDERED that this constitutes the decision and order of the Court.

Dated: April 7, 2017

ENTER:



KATHRYN E. FREED, J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**