

Hurtado v City of New York
2017 NY Slip Op 31890(U)
September 8, 2017
Supreme Court, New York County
Docket Number: 150234/2014
Judge: James E. d'Auguste
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
CARLOS HURTADO and ANDREW MELENDEZ,

Plaintiffs,

-against-

DECISION AND ORDER
Index No. 150234/2014

THE CITY OF NEW YORK, et al.,

Defendants.

-----X
Hon. James E. d'Auguste

This is an action to recover monetary damages for personal injuries allegedly sustained by plaintiffs Carlos Hurtado and Andrew Melendez, as a result of an altercation with a New York City Police Department ("NYPD") officer. The plaintiffs allege that on September 14, 2013, they were walking out of a bar known as "Tonic East" located at 411 3rd Avenue, New York, New York, when they were assaulted by a "John Doe." According to the plaintiffs, "John Doe" displayed a police officer's badge and claimed that he was a cop. The unidentified individual was seen on Tonic East's surveillance cameras flashing a badge. The plaintiffs claim to have identified the person in the video as the "John Doe" who assaulted them.

The NYPD performed an internal investigation of the plaintiffs' allegations to determine if "John Doe" was actually employed by the NYPD. The plaintiffs claim they made numerous requests for information about the status of the investigation, all of which were denied. In 2015, The City of New York ("City") informed the plaintiffs that the investigation was closed and that the NYPD was unable to identify the individual seen in the video footage. Counsel for the plaintiffs sent Freedom of Information Act requests for the file but did not receive any information about the NYPD's investigation. The plaintiffs maintain that the investigation was inadequate. The plaintiffs now seek to inspect the closed NYPD investigation file in order to

determine whether the NYPD's investigation into the identity of "John Doe" was sufficient and proper.

As part of the discovery process in this action, the City has agreed to provide this Court with unredacted copies of the entire NYPD internal investigation file for an *in camera* review. The Court will review the file to determine whether the documents can be disclosed to the plaintiffs or whether certain information or documents are privileged or otherwise exempt from disclosure, pursuant to New York Civil Rights Law ("CRL") Section 50-a, the Freedom of Information Law ("FOIL"), or Public Officers Law ("POL") Sections 87 and 89.

Discussion

Under POL Section 84, the New York Legislature declared "that government is the public's business" and that "[t]he people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality." Accordingly, "[a]ll government records are thus presumptively open for public inspection and copying unless they fall within one of the enumerated exceptions of Public Officers Law § 87 (2)." *Matter of Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 274-75 (1996). One of the exceptions is found in POL Section 87(2)(g), which exempts inter-agency or intra-agency materials from disclosure. These materials are exempt to "protect the deliberative process of the government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers." *Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 132 (1985) (quoting *Matter of Sea Crest Constr. Corp. v. Stubing*, 82 A.D.2d 546, 549 (2d Dep't 1981)). While such pre-decisional materials are exempt from disclosure, to the extent such materials contain "statistical or factual tabulations or data" or

constitute “final agency policy or determinations,” they are not fully exempt from disclosure.

Matter of New York Times Co. v. City of New York Fire Dep't, 4 N.Y.3d 477, 487 (2005); *Matter of Dunlea v. Goldmark*, 54 A.D.2d 446, 447 (3d Dep't 1976), *aff'd*, 43 N.Y.2d 754 (1977); POL § 87(2)(g)(i), (iii).

The City, in a cover letter to the Court, asserts that certain materials are exempt from disclosure merely because they are part of the “deliberative process.” If the materials are not final agency determinations, they may be part of the deliberative process. Courts have distinguished final agency policy or determinations from “predecisional material, prepared to assist an agency decision maker in arriving at his decision.” *Matter of Xerox Corp.*, 65 N.Y.2d at 132. While the deliberative process is protected, it is only protected to the extent that it does not constitute “factual data” which has been defined as “objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making.” *Matter of Gould*, 89 N.Y.2d at 277; *see Matter of New York Times Co.*, 4 N.Y.3d at 488.

In its privilege log, the City also claims that certain materials are not discoverable because they are “post-accident investigative documents.” The City asserts that investigative documents and records created after the incident at issue are privileged and are therefore not discoverable in a negligence case. *See Hualde v. Otis Elevator Co.*, 235 A.D.2d 269, 270 (1st Dep't 1997) (citing *Klatz v. Armor Elevator Co.*, 93 A.D.2d 633, 633-37 (2d Dep't 1983)). The City also argues that the mere fact that the documents sought by the plaintiffs relate to the investigation of the incident at Tonic East does not automatically mean that they are relevant or material to the plaintiffs' claims. The Court has reviewed the relevancy and materiality of the requested documents, but rejects the City's broad claims of post-accident privilege as unfounded.

This is not simply a negligence case, it is also a case alleging police misconduct. As detailed above, the plaintiffs are entitled to disclosure of the investigative records, unless they fall into one of the enumerated exceptions of POL Section 87(2). There is nothing in the case law cited by the City that supports its assertion of a broad privilege over the documents contained in the NYPD investigation file from disclosure of material that would otherwise be relevant to a claim of police misconduct or assault. Internal affairs and NYPD investigative records are discoverable, as are records of any disciplinary actions taken against officers or other remedial actions taken, to the extent they contain information relevant to the plaintiffs' claims. *See Ramos v. City of New York*, 285 A.D.2d 284, 307 (1st Dep't 2001) (holding that the plaintiff was entitled to information regarding internal discipline or other remedial action); *McFarlane v. County of Suffolk*, 79 A.D.3d 706, 708 (2d Dep't 2010); *Blanco v. County of Suffolk*, 51 A.D.3d 700, 701-02 (2d Dep't 2008); *McBride v. City of Rochester*, 17 A.D.3d 1065 (4th Dep't 2005) (directing defendants to produce post-incident investigation reports).

As discussed below, certain portions of the NYPD investigation file contain materials that are relevant and material to the plaintiffs' claims and are not otherwise exempt from disclosure. The City is ordered to disclose these materials, subject to redactions of certain confidential personal information such as addresses, telephone numbers, tax identification numbers, social security numbers, or any other information contained in 22 NYCRR 202.5(e).

1. Bates Numbers 1-18

These documents are transcribed interviews of the plaintiffs. They should be disclosed subject to the City's proposed redactions. The redactions appropriately omit personal information relating to the plaintiffs.

2. *Bates Numbers 19-22*

These documents are part of the NYPD's Internal Complaint Tracking System. They should be disclosed to the plaintiffs in their entirety. They are relevant and material to the plaintiffs' claims and are not otherwise privileged or exempt from disclosure. The documents mostly consist of references to statements made by the complaining witness, Mr. James Mattone, who is also counsel for the plaintiffs in this action.

3. *Bates Numbers 23-30*

These documents consist of various NYPD arrest reports. The City has redacted certain portions of these reports. The documents, as not related to the plaintiffs, should not be disclosed as the arrest records of these individuals are unrelated and not relevant to this action. Further, they are protected pursuant to Section 160.50 of the New York Criminal Procedure Law.

4. *Bates Numbers 35-39*

The City does not object to the disclosure of these documents.

5. *Bates Numbers 40-41*

These documents consist of New York City Transit Authority Fare Card History records. The City has redacted certain portions of these records. The documents should be disclosed subject to the City's proposed redactions that contain personal information exempt from disclosure pursuant to 22 NYCRR 202.5(e).

6. *Bates Numbers 42-46*

These documents consist of requests for Line of Duty Injury Reports and Line of Duty records relating to the investigation of the subject incident. The City has redacted certain portions of these requests. The documents should be disclosed subject to the City's proposed redactions. The redacted portions contain personal information exempt from disclosure pursuant

to 22 NYCRR 202.5(e).

7. Bates Numbers 47-142

These documents constitute the Line of Duty Control Log for NYPD officers employed at the time of the subject incident, including reports about NYPD officers who were injured while in the line of duty at the time of the subject incident. The City has requested that the Log be redacted in its entirety. The City's proposed redactions are overbroad and unwarranted. The information contained in the Log is relevant and material to the investigation of the plaintiffs' claims and is not otherwise privileged or exempt from disclosure. The information may assist in determining the thoroughness and adequacy of the NYPD's efforts to determine the identity of the "John Doe" who allegedly assaulted the plaintiffs. The documents should be disclosed, subject to redactions of any personal information pursuant to 22 NYCRR 202.5(e), such as tax identification numbers, birth dates or social security numbers for the police officers in the line of duty injury reports from September 14-28, 2013.

8. Bates Numbers 143-151

These documents include NYPD Profiles and automobile registration information for NYPD officers. The City has redacted certain portions of these documents. The documents should be disclosed subject to the City's proposed redactions, except that the photographs of the officers contained in the documents should also be disclosed. The City may redact all other personal information pursuant to 22 NYCRR 202.5(e), POL Sections 87(2)(b) and 89(2)(b), such as the police officers' tax identification numbers, birth dates, license plate numbers, and home addresses. *See Beyah v. Goord*, 309 A.D.2d 1049, 1050 (3d Dep't 2003).

9. Bates Numbers 152-153

The City has no objection to the production of these documents.

10. Bates Numbers 154-168

These documents include receipts from Tonic East generated on the night of the subject incident. The City has redacted certain portions of these documents. The documents should be disclosed, subject to the City's proposed redactions of personal information pursuant to 22 NYCRR 202.5(e), including redactions of credit card numbers.

11. Bates Numbers 169-189

The City has no objection to the production of these documents.

12. Bates Numbers 190-191

These documents include e-mail correspondence with the plaintiffs' counsel. The City has redacted portions of these documents. The documents should be produced subject to the City's proposed redactions, which contain personal identifying information that would constitute an unwarranted invasion of the police officer's personal privacy. Presumably, the plaintiffs already possess the redacted information. *See James, Hoyer, Newcomer, Smiljanich & Yanchunis, P.A. v. State of New York*, 27 Misc. 3d 1223(A), at *12 (Sup. Ct. N.Y. County Mar. 31, 2010) (Edmead, J.).

13. Bates Numbers 192-193

These documents include contact information for Department of Corrections officers. The City has redacted portions of these documents. The documents should be disclosed subject to the City's proposed redactions. The redactions contain personal information that should be redacted pursuant to 22 NYCRR 202.5(e), such as telephone numbers for the officers.

14. Bates Numbers 194-197

These documents include a description of the subject incident based on narratives from the plaintiffs. They also include copies of e-mail correspondence. The City has redacted

portions of these documents. The documents should be disclosed subject to the City's proposed redactions. The redactions contain personal information that should be redacted pursuant to 22 NYCRR 202.5(e), such as telephone numbers for NYPD officers.

15. Bates Numbers 198-199

The City has no objection to the production of these documents.

16. Bates Numbers 200-201

These documents contain an e-mail from an NYPD officer requesting a conferral with the Department of Corrections regarding the subject incident for the purpose of identifying the "John Doe." The City has redacted portions of these documents. The documents should be disclosed subject to the City's proposed redactions. The redactions contain personal information that should be redacted pursuant to 22 NYCRR 202.5(e), such as telephone numbers and e-mail addresses for NYPD officers.

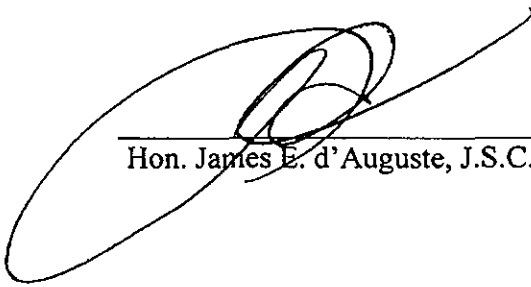
17. Bates Numbers 202-203

The City has no objection to the production of these documents.

Conclusion

Accordingly, the City is ordered to produce the documents reviewed by the Court in the manner directed above. The release of said documents shall be stayed thirty (30) days from the entry of this order to allow any aggrieved party to seek appellate review, if warranted. This constitutes the decision and order of this Court.

Dated: September 8, 2017



Hon. James E. d'Auguste, J.S.C.