

Matter of Logue v New York City Police Dept.
2017 NY Slip Op 32493(U)
November 27, 2017
Supreme Court, New York County
Docket Number: 153965/16
Judge: Manuel J. Mendez
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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

11-15-2017

MOTION SEQ. NO.

003

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 8 were read on this motion pursuant to CPLR §5104 and Judiciary Law §753 to hold Respondents in Contempt, pursuant to 22 N.Y.C.R.R. 130.1-1, for sanctions and for equitable relief:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 4</u>
Answering Affidavits — Exhibits _____ cross motion _____	<u>5 - 7</u>
Replying Affidavits _____	<u>8</u>

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Petitioner's motion pursuant to CPLR § 5104 and Judiciary Law § 753 to hold Respondents in contempt, for sanctions pursuant to 22 N.Y.C.R.R. 130-1.1 for frivolous conduct by making false statements and statements that are meritless in the law, for equitable relief, fees and costs, is granted as stated herein. The remainder of the relief sought is denied.

In late November of 2014 Petitioner participated in a Black Lives Matter protest conducted at Grand Central Terminal, Manhattan, New York. Petitioner alleges that while participating in the protest he observed both uniformed and plainclothes police officers regularly and openly recording events as they were taking place. Petitioner claims that out of concern about the effect of the surveillance and potential violations of the First Amendment of the United States Constitution, on January 25, 2015 he delivered written FOIL requests with approximately seven demands to four (4) agencies: Metropolitan Transit Authority Police ("MTA"), Metro North Railroad (herein after referred to as "Metro North"), New York State Police and the New York City Police Department (hereinafter referred to as "NYPD").

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." The FOIL requests sought identical materials for the period of November of 2014 through January of 2015.

MTA and Metro North both responded to the FOIL requests and made substantial production of responsive records, with partial redactions. Petitioner shared the FOIL responses received with the media, resulting in news reports of potentially unlawful surveillance. The New York State Police denied the FOIL request in its entirety, and Petitioner failed to appeal. In a letter dated November 6, 2015 NYPD Records Access Officer, Lt. Richard Mantellino rejected the FOIL request stating there were no documents

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

responsive to six of the demands, and denied access to items sought in request #4. 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 the NYPD.

The petition sought 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 sought a declaratory judgment that he is entitled to obtain requested records under FOIL, with a judgment for attorney fees and litigation costs incurred pursuant to POL §89 [4][c].

The February 6, 2017 Decision, Order and Judgment of this Court filed under Motion Sequence 001, partially granted the relief sought in the petition under the FOIL requested items (1) and (4) (Mot. Exh. A). The February 6, 2017 Decision, Order and Judgment identified relevant documents stating:

"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... 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..." (Mot. Exh. A).

Respondents in opposing the petition sought to exempt these items, and made conclusory, speculative and overly broad arguments that protection was needed in light of the FOIL responses provided by MTA and Metro North, and Petitioner's ability to identify at least some of the stationary cameras. At oral argument counsel for the Petitioner identified the manufacturer and model number of some of the cameras and Petitioner also possesses pictures of about half of the cameras with information on the make and model number (Mot. Exh. I, pg. 9 lines 1-10). Petitioner's counsel stated at oral argument that at least one of the identified cameras had an "NYPD security camera" label identifying it (Mot. Exh. I. Pg. 10, lines 1-10).

The February 6, 2017 Decision, Order and Judgment directed Respondents to provide Petitioner with:

"...the "multimedia records" that may be "scrubbed" in response to item 1 in his FOIL request and...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..." (Mot. Exh. A)

Petitioner under Motion Sequence 002 sought to reargue that portion of the February 6, 2017 Decision, Order and Judgment of this Court that denied attorney's fees and litigation costs in the Judgment. This Court's August 8, 2017 Decision and Order denied the motion to reargue finding that there was "a rational basis for some of the denials and a reason to limit the scope of the petition." (NYSCEF Docket No. 125). Respondents did not seek reargument or file any other motion to modify the February 6, 2017 Decision, Order and Judgment.

On March 13, 2017 Respondents provided to Petitioner's counsel a CD with a seventeen second video recording, and 45 pages of records comprised of communications between undercover officers, their handlers, and their base which included photographs taken on "wireless cellular devices" sent as either an e-mail attachment or text attachments (Mot. Exh. M).

On July 10, 2017, prior to Oral Argument on Motion Sequence 002, Respondents sent letters to Petitioner's Counsel and the Court responding to Petitioner's objections to redactions and the video or multi-media production, seeking an exparte in camera conference to explain their position (Mot. Exhs. R and S). Respondent's letter request was not properly before the Court and no conference was held.

Petitioner's motion seeks an Order pursuant to CPLR § 5104 and Judiciary Law § 753 to hold Respondents in contempt, for sanctions pursuant to 22 N.Y.C.R.R. 130-1.1 for frivolous conduct by making false statements and statements that are meritless in the law; and for equitable relief, fees and costs.

Petitioner claims that the Respondents did not comply with the February 6, 2017 Decision, Order and Judgment by disclosing only a single video and potentially withholding multiple videos from stationary networked cameras in Grand Central Terminal that would be responsive to item 1. Petitioner argues that item 4 was not fully responded to because non-identifying information such as the dates and times of communications and the filenames of attachments were redacted from the communications that were provided.

A finding of contempt for failure to comply with a Court Order, requires the movant to establish with reasonable certainty, on clear and convincing evidence that: (1) the Court Order "expressing an unequivocal mandate was in effect and disobeyed;" (2) "the party to be held in contempt had knowledge of the order;" and (3) "prejudice to the rights of a party to the litigation" (*McCain v. Dinkins*, 84 N.Y. 2d 216, 639 N.E. 2d 1132, 616 N.Y.S. 2d 335 [1994]). "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*Kihl v. Pfeffer*, 94 N.Y.2d 118, 123, 700 N.Y.S. 2d 87, 90, 722 N.E.2d 55, 58 [1999]).

Respondents have not provided an explanation for the failure to include the date and time on the communications records under item 4. Their argument that the information will identify plainclothes and undercover officers, and that "NYPD cannot publicly explain how the redacted information could lead to the identification" fails, given that no proper effort was made to seek in camera inspection of any records, or to seek reargument or modification of the February 6, 2017 Decision, Order and Judgment, and is sufficient for a finding of contempt. The Court concedes that the "file name" might include the name or other identifying information of the officer involved and can remain redacted.

Respondents state that this Court in directing them to disclose responsive "multimedia records" apparently adopted the phrase as used by them in their answering papers. Obviously Respondents knew what they had withheld and what they considered to constitute "multimedia records" (Memo. of Law in Opp., pg. 11). Respondents argument that all of the "multimedia records" compliant with this Court's February 6, 2017 Decision, Order and Judgment have been produced is disingenuous, and relies on their determination of what constitutes "multimedia records." This Court's use of the phrase "multimedia records" meant all photographs and video or media including those taken from cellular telephones, mobile and stationary cameras.

Respondents previously argued that disclosure would reveal surveillance capabilities. Their argument was addressed and rejected in the February 6, 2017 Decision, Order and Judgment and Respondents did not seek reargument or modification. Respondents in choosing to use their interpretation over what this Court actually stated prior to and in the directives under item 1, have failed to substantially comply with this Court's Order.

Petitioner seeks sanctions due to Respondents' request for an ex parte in camera conference and Assistant Chief Donohue's (Executive Officer of the Intelligence Bureau at NYPD) affidavit in opposition to the petition (Mot. Exh. F). Petitioner claims that the Respondents' request for an ex parte in camera conference was inappropriate and unethical. Petitioner states that Assistant Chief Donohue either committed perjury by stating there were multiple multi-media records, or that the arguments made in opposition to the petition about the risks of disclosing records were frivolous.

Pursuant to 22 N.Y.C.R.R. 130-1.1, sanctions are applied to conduct which is continued when its lack of legal or factual basis should have been apparent to counsel or the party (*Emery v. Parker*, 107 A.D. 3d 635, 968 N.Y.S. 2d 480 [N.Y.A.D. 1st Dept. 2013]). The making of a somewhat colorable argument is sufficient to avoid sanctions (*Kremen v. Bendict P. Morelli & Associates, P.C.*, 80 A.D. 3d 521, 916

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