

E.W. Scripps Co. v New York City Police Dept.
2019 NY Slip Op 32626(U)
September 5, 2019
Supreme Court, New York County
Docket Number: 155038/2018
Judge: W. Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. W. FRANC PERRY

PART

IAS MOTION 23EFM

Justice

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THE E.W. SCRIPPS COMPANY,

INDEX NO. 155038/2018MOTION DATE May 2, 2019

Petitioner,

MOTION SEQ. NO. 001

- v -

NEW YORK CITY POLICE DEPARTMENT, JAMES
O'NEILL

**DECISION + ORDER ON
MOTION**

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion for

ARTICLE 78 (BODY OR OFFICER)

In this special proceeding, brought pursuant to CPLR Article 78 and N.Y. Public Officers Law ("POL") § 84, *et seq.*, also known as the Freedom of Information Law ("FOIL"), petitioner, The E.W. Scripps Company ("Scripps" and/or petitioner), seeks from respondents, New York City Police Department and James O'Neil ("NYPD" and/or respondent), incident level data, in electronic form, related to the Part I offenses NYPD reports to the Federal Bureau of Investigation ("FBI") as part of the federal Uniform Crime Reporting ("UCR") program. At oral argument, it was confirmed that NYPD had produced all incident level data underlying the summary reports for all seven federally defined UCR crimes from 2014 through 2018, and the only issues remaining involve whether the NYPD must disclose the actual incident numbers rather than the anonymized complaint identifier it utilizes relative to crime statistic data, and the issue of attorney's fees sought by petitioner. (NYSCEF D0c. No. 53, pp. 4-5, L. 11-25).

BACKGROUND

According to the Petition, on September 7, 2017, Scripps requested that the NYPD provide the underlying, incident level data that supports the summary crime reports it regularly provides to the FBI for its UCR program. (NYSCEF Doc. No. 1, ¶¶ 18-19, 25, Exs. B, I). Scripps is seeking this information as part of a nationwide report on the ways that police departments and other law enforcement agencies report crime rates and resolution rates. According to Mark Greenblatt, a Senior National Investigative Correspondent at Scripps Washington Bureau, the “project's chief aim is to analyze the rate at which law enforcement agencies successfully address reported crimes and how many of these crimes police departments really ‘solve’.” (NYSCEF Doc. No. 46, ¶6). Scripps requested similar information from police departments and law enforcement agencies across the country and in conjunction with ProPublica and Reveal, published data based on the records released by those police jurisdictions. (NYSCEF Doc. Nos. 46 and 47). Scripps alleges that due to the pendency of this litigation, it was unable to include NYPD information in its report, however, Scripps avers that it intends to review and report on the NYPD's statistics when received.

In its answer respondent alleges that NYPD's response to FOIL request 2017-PL-11937, attached an excel spreadsheet containing responsive data for 315,191 complaint report entries, comprising 6,705 pages of data; specifically, the “excel spreadsheet produced by NYPD contains the following responsive information, for the New York State Penal Law (“NYS PL”) seven major offenses, for the period of January 1, 2014 to June 30, 2018: anonymized complaint identifier, record creation date, year, incident date, offense description, clearance description (where applicable), borough, and arrest date (where applicable)”. (NYSCEF Doc. No. 23, ¶53;

NYSEF Doc. Nos. 37, 38). Respondent maintains that it has fully complied with its statutory obligation, that petitioner's FOIL request is moot and academic, in part, as all responsive data sets have now been disclosed to petitioner and that the remainder of the Petition must be dismissed for failure to state a cause of action.

Petitioner maintains that it has made dozens of similar data requests from other agencies nationally and has received the requested data without objection from other jurisdictions. Specifically, at oral argument Scripps indicated that it has received information from approximately 60 to 65 different law enforcement agencies and only one has included an anonymized complaint identifier, arguing that there are no privacy concerns to justify exemption of the actual incident number. (NYSCEF Doc. No. 53, p. 6).

Petitioner acknowledged that respondent has agreed to maintain a list of the anonymized complaint numbers disclosed and the equivalent actual incident numbers, to allow for follow-up requests to be easily identified and reviewed, however petitioner argues that this extra step will create unnecessary delay and allows for the possibility of errors in providing the requested information as petitioner must rely on the NYPD tracking its anonymous numbers. In response, NYPD argues that the actual incident numbers are protected from disclosure pursuant to the privacy exemptions set forth in POL §§87(2)(b) and 89(2)(b), and pursuant to POL §87(2)(a) which exempts disclosure of information protected by statutes related to sealed records and information related to sex crimes. Specifically, respondent maintains that the disclosure of actual incident numbers is not required as such disclosure risks exposing personal and private information protected by statute and because FOIL's intent to allow public access to the agency's records is met by disclosing the information in an anonymized way.

STANDARD OF REVIEW/ANALYSIS

This court is called upon to determine whether the NYPD is required, pursuant to a FOIL request, to disclose the actual incident number assigned to a complaint, instead of the anonymized complaint identifier, to protect the privacy interests of potential crime victims, witnesses and people who have been arrested. Based on this record, the court finds that disclosure of the actual incident numbers is not required as respondent has demonstrated a particularized privacy justification for denying access.

It is well settled that all records of a public agency, including police records, are presumptively open for public inspection and copying, and that the burden rests at all times on the government agency to justify any denial of access to records requested under FOIL (see *New York State Rifle and Pistol Assoc. v Kelly*, 55 AD3d 222, 224, 863 N.Y.S.2d 439 [1st Dept. 2008]; *New York Civil Liberties Union v. New York City Police Department*, 20 Misc.3d 1108[A], 866 N.Y.S.2d 93, 2008 NY Slip Op 51279[U] [2008]); (see also, *Gould v New York City Police Dep't*, 89 N.Y.2d 267, 274, 675 N.E.2d 808, 653 N.Y.S.2d 54 [1996] (FOIL was enacted "[t]o promote open government and public accountability"); (Public Officers Law § 84; *Matter of Abdur-Rashid v New York City Police Dept.*, 31 NY3d 217, 224, 76 N.Y.S.3d 460, 100 N.E.3d 799 [2018])).

In furtherance of FOIL's legislative policy favoring disclosure, "[e]xemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" (*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d at 566; see *Matter of Gould v New York City Police Dept.*, 89 NY2d at 275; *Matter of Prisoners' Legal Servs. of N.Y. v New*

York State Dept. of Correctional Servs., 73 NY2d 26, 30, 535 N.E.2d 243, 538 N.Y.S.2d 190 [1988]; *Matter of Markowitz v. Serio*, 11 N.Y.3d 43, 51, 893 N.E.2d 110, 862 N.Y.S.2d 833 [2008]).

As noted, the parties have resolved all but two issues that form the basis of the Petition here, leaving only the issue of whether the NYPD's refusal to disclose actual incident numbers, falls squarely within the FOIL exemptions relied on by respondent, POL §87(2)(a), §87(2)(b) and §89(2)(b).

Pursuant to Public Officers Law § 87(2)(b), an agency "may deny access to records" where disclosure "would constitute an unwarranted invasion of personal privacy under the provisions of [the statute]." If a FOIL request is denied, the agency "must show that the requested information falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access." (*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566, 505 NYS2d 576, 578, 496 NE2d 665, 667 [1986]). The law defines an "unwarranted invasion of personal privacy" with a nonexclusive list of examples (see Public Officers Law § 89 [2][b][i]-[vi]). Explicitly exempt from mandatory disclosure are records that "if disclosed would constitute an unwarranted invasion of personal privacy" (Public Officers Law § 87 [2] [b]).

"[W]here none of the [enumerated exemptions under Public Officers Law § 89 (2) (b) are] applicable, a court 'must decide whether any invasion of privacy . . . is "unwarranted" by balancing the privacy interests at stake against the public interest in disclosure of the information' " (*Matter of Harbatkin v New York City Dept. of Records & Info. Servs.*, 19 NY3d 373, 380, 971 NE2d 350, 948 NYS2d 220 [2012], quoting, *Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d 477, 485, 829 NE2d 266, 796 NYS2d 302 [2005]).

Here, respondent contends that the privacy exemptions noted above, and section 87(2)(a) which prohibits disclosure of information protected by statute, exempts from disclosure the actual incident numbers utilized by the NYPD relative to the voluminous crime statistic data collected, that is both reported to the FBI and published on the NYPD's open data portal. Specifically, respondent contends that using anonymized numbers protects the privacy of individuals who have witnessed crime or been victim of crimes. (NYSCEF Doc. No. 53, p.8).

Additionally, respondent argues that the sealed records law, NY CLS CPL § 160.50, prohibits law enforcement agencies from disclosing information related to arrests that have been sealed and that the data already produced is fully responsive to petitioner's FOIL request as it allows Scripps to achieve its purpose and analyze the way in which the NYPD reports crime rates and resolution rates. (Id., p. 9). Finally, respondent represents that any follow-up requests for the data already produced under the anonymized complaint number will be easy to access and review and therefore, as the actual incident numbers are exempt from disclosure and a process exists for follow-up requests, the Petition should be dismissed.

In response, Scripps maintains that the privacy exception does not apply and that there is no statute or case law that specifically exempts from disclosure actual case complaint numbers or identifiers. Accordingly, respondent concludes that since the legislature has not specifically exempted complaint identification numbers from FOIL disclosure, this court should follow the "trend across the country" demonstrated by the 60 plus law enforcement agencies that have produced original complaint numbers. (NYSCEF Doc. No. 53, p. 12).

To promote open government and public accountability, FOIL imposes a broad duty on government agencies to make their records available to the public (see Public Officers Law § 84). The statute is based on the policy that "the public is vested with an inherent right to know

and that official secrecy is anathematic to our form of government" (*Matter of Fink v Lefkowitz*, 47 NY2d 567, 571, 393 NE2d 463, 419 NYS2d 467 [1979]). All records are presumptively available for public inspection and copying, unless the agency satisfies its burden of demonstrating that "the material requested falls squarely within the ambit of one of [the] statutory exemptions" (*Fink*, 47 NY2d at 571). "While FOIL exemptions are to be narrowly read, they must of course be given their natural and obvious meaning where such interpretation is consistent with the legislative intent and with the general purpose and manifest policy underlying FOIL" (*Matter of Hanig v State of N.Y. Dept. of Motor Vehs.*, 79 NY2d 106, 110, 588 NE2d 750, 580 NYS2d 715 [1992] [internal quotation marks and citation omitted]). Indeed, the legislature expressly exempted certain agency records from public access, recognizing that there is sometimes "a legitimate need on the part of government to keep some matters confidential" (*Fink*, 47 NY2d at 571).

Based on this record, the court concludes that respondent has met its burden of articulating a particular and specific justification for denying the petitioner's FOIL request; specifically, withholding disclosure of actual incident numbers is intended to safeguard the privacy interests of individuals who have witnessed crimes or been victim of crimes and to protect the public from being stigmatized by the fact that an arrest was made, in the event the information is traced to a sealed record. (See *Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462, 849 NYS2d 489, 494, 880 NE2d 10, 15 [2007] [If a FOIL request is denied, the agency "must show that the requested information 'falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access.'" Id. at 462-463, quoting *Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566, 505 NYS2d 576, 578, 496 NE2d 665, 667 [1986].)

We turn now to petitioner's request for attorney's fees. Pursuant to Public Officers Law § 89(4)(c), the court "may award counsel fees in a FOIL proceeding where a litigant 'has substantially prevailed', the record sought was 'of clearly significant interest to general public,' and when the agency 'had no reasonable basis for denying access' to the records or documents in question" (*Matter of Maddux v New York State Police*, 64 AD3d 1069, 1070, 883 N.Y.S.2d 365 [2009], lv denied 13 N.Y.3d 712, 919 N.E.2d 719, 891 N.Y.S.2d 304 [2009], quoting Public Officers Law § 89 [4] [c]; see also *Beechwood Restorative Care Center v Signor*, 11 AD3d 987, 784 NYS2d 750 [4th Dept 2004], lv to appeal granted 4 N.Y.3d 703, 825 N.E.2d 133, 792 N.Y.S.2d 1, affd 5 NY3d 435, 842 N.E.2d 466, 808 N.Y.S.2d 568) [a party may recover reasonable attorney fees under POL 89(4)(c) where (1) it has "substantially prevailed," (2) the record sought was "of clearly significant interest to general public," and (3) "the agency lacked reasonable basis in law for withholding record"]).

Even in cases where documents are ultimately required to be disclosed, the agency may be found to have had a reasonable basis for initially denying access (see, e.g., *Norton v Town of Islip*, 17 AD3d 468, 793 N.Y.S.2d 133 [2d Dept 2005]; *Hopkins v City of Buffalo*, 107 AD2d 1028, 486 N.Y.S.2d 514 [4th Dept 1985]; *Niagara Environmental Action v City of Niagara Falls*, 100 AD2d 742, 473 N.Y.S.2d 653 [4th Dept 1984]; *New York Times Co. v City of New York Fire Dept.*, 195 Misc 2d 119, 127-28, 754 N.Y.S.2d 517 [2003] [holding that a reasonable legal basis for withholding portions of records precluded an award of attorney's fees]). Notably, "even when these statutory prerequisites are met, the decision to grant or deny counsel fees still lies within the discretion of the court" (*Matter of Henry Schein, Inc., v Eristoff*, 35 AD3d 1124, 1126, 827 NYS2d 718 [2006]; see *Matter of Todd v Craig*, 266 AD2d 626, 627, 697 NYS2d 722 [1999], lv denied 94 NY2d 760, 727 NE2d 577, 706 NYS2d 80 [2000]).

Based on the record, respondent did comply with FOIL's broad requirements and worked with petitioner in order to produce records responsive to the requests for data sets and the raw data utilized by the NYPD to report to the FBI under the UCR program, specifically for the number of cases it determines are "unfounded", or if it was "exceptionally cleared". Moreover, based on the parties' representation to the court, both in their submissions and at oral argument, the parties did resolve all but one of the requests for information, resulting in the NYPD producing to petitioner all incident level data underlying the summary reports for all seven federally denied UCR crimes from 2014 through 2018. Based on the record and in the exercise of this court's discretion, petitioner's request for attorney's fees is denied. Accordingly, it is hereby,

ADJUDGED that the application is denied and the petition is dismissed, with costs and disbursements to respondent; and it is further

ADJUDGED that respondent, recovers from petitioner, costs and disbursements in the amount as taxed by the Clerk, and that respondent have execution therefor; and it is further

ORDERED and ADJUDGED, that petitioner's request for attorney's fees and costs is denied.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

9/ 5/2019

DATE



W. FRANC PERRY, J.S.C.

CHECK ONE:

☒	CASE DISPOSED	☐	NON-FINAL DISPOSITION
☐	GRANTED	☒	DENIED
☐	SETTLE ORDER	☐	GRANTED IN PART
☐	INCLUDES TRANSFER/REASSIGN	☐	SUBMIT ORDER
		☐	FIDUCIARY APPOINTMENT

☐ OTHER

APPLICATION:

CHECK IF APPROPRIATE:

☐ REFERENCE