

<b>Matter of City of New York v Homeaway.com, Inc.</b>
2020 NY Slip Op 31212(U)
May 6, 2020
Supreme Court, New York County
Docket Number: 450758/2019
Judge: James E. d'Auguste
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 55

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In the Matter of the Application of

THE CITY OF NEW YORK,

Petitioner,

**DECISION AND ORDER**

-against-

Index No. 450758/2019

Mot. Seq. No. 001

HOMEAWAY.COM, INC.,

Respondent.

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**Hon. James E. d’Auguste**

In the above-captioned special proceeding, petitioner the City of New York (“City”) moves, by order to show cause, for an order, pursuant to CPLR 2308(b) and New York Judiciary Law (“Judiciary Law”) Section 2-b(3), (1) finding that a subpoena *duces tecum* issued by the New York City Mayor’s Office of Special Enforcement (“OSE”) on or about February 19, 2019 seeking records from respondent HomeAway.com, Inc. (“HomeAway”) regarding illegal transient occupancy and advertising activity in the City of New York (the “Subpoena”) was authorized; (2) directing HomeAway to comply with the Subpoena; and (3) imposing costs and penalties, pursuant to CPLR 2308(b). HomeAway cross-moves for an order, pursuant to CPLR 2304, quashing or modifying the Subpoena. For the reasons stated herein, the City’s motion is granted to the extent of compelling HomeAway to produce the specific records relating to the property identification numbers in Rider Attachment A to the Subpoena and is otherwise denied, and HomeAway’s cross-motion is granted in part.

**Background**

The basis for the City’s petition is that the City, acting through OSE, issued the instant Subpoena “as part of the City’s ongoing efforts to investigate and combat illegal transient rental

of permanent dwellings in New York, undertaken to preserve the availability of housing for permanent residents, prevent safety risks to the City's occupants and guests, and mitigate harm to the social fabric of the City's neighborhoods" (the "Investigation"). NYSCEF Doc. No. 11, at 1.<sup>1</sup> The Subpoena sought "basic and highly relevant information about facially illegal transient (less than 30 day) occupancy and related illegal advertising activity occurring on Home[A]way's online rental marketing platform." NYSCEF Doc. No. 11, at 1.<sup>2</sup> The Subpoena was issued in accordance with OSE's investigative authority granted by, *inter alia*, the New York State

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<sup>1</sup> OSE is a city agency created under Mayoral Executive Order No. 96 of 2006 ("Executive Order No. 96"), to "address issues and combat adverse conditions that can impact quality of life, including those that threaten public safety, community livability and property values, and can lead to serious crime." NYSCEF Doc. No. 1, ¶ 15 (quoting Executive Order No. 96, at 1). The City contends that, as supported by the text of Executive Order No. 96, the above adverse conditions have "historically been associated with [*inter alia*] apartment buildings that have been illegally converted into hotels." *Id.* (alteration in original) (quoting Executive Order No. 96, at 1). Executive Order No. 96 was later supplemented by Mayoral Executive Order No. 22 in 2016 to direct OSE to enforce "provisions of the Multiple Dwelling Law and the New York City Administrative Code prohibiting the advertisement of certain unlawful occupancies." *Id.*, ¶ 16 (quoting Mayoral Executive Order No. 22, § 1).

<sup>2</sup> Chapter 396 of the Laws of 2016 prohibits the advertising of "class A" multiple dwelling units for the occupancy or use of a term shorter than thirty (30) days. Chapter 396 of the Laws of 2016 is codified, in relevant part, as Section 121 of the New York Multiple Dwelling Law ("MDL") and Section 27-287.1 of the Administrative Code of the City of New York ("Administrative Code" or "Admin. Code"). Both provisions state that "[i]t shall be unlawful to advertise occupancy or use of dwelling units in a class A multiple dwelling for occupancy that would violate subdivision eight of Section four of the multiple dwelling law defining a 'class A' multiple dwelling as a multiple dwelling that is occupied for permanent residence purposes." Admin. Code § 27-287.1(1); *see also* MDL § 121(1) (same).

For completeness, a "class A" multiple dwelling is statutorily defined, with certain permitted uses not relevant herein, as the following:

A "class A" multiple dwelling is a multiple dwelling that is occupied for permanent residence purposes. This class shall include tenements, flat houses, maisonette apartments, apartment houses, apartment hotels, bachelor apartments, studio apartments, duplex apartments, kitchenette apartments, garden-type maisonette dwelling projects, and all other multiple dwellings except class B multiple dwellings. A class A multiple dwelling shall only be used for permanent residence purposes. For the purposes of this definition, "permanent residence purposes" shall consist of occupancy of a dwelling unit by the same natural person or family for thirty consecutive days or more and a person or family so occupying a dwelling unit shall be referred to herein as the permanent occupants of such dwelling unit.

MDL § 4.8(a).

Legislature in 2016, MDL Section 303(1-a), and New York Real Property Actions and Proceedings Law (“RPAPL”) Section 715(5). *See id.* at 1-2.

HomeAway is a corporation authorized to do business in New York that operates—through itself and its affiliates and subsidiaries—that lists apartments for individuals to book as accommodations. *Id.* at 4. HomeAway operates under several different names, aside from www.homeaway.com, which includes VRBO (also known as Vacation Rental by Owner) through www.vrbo.com. NYSCEF Doc. No. 1, ¶ 23. The City alleges that HomeAway has been used to advertise approximately 2,500 listings for “class A” multiple dwellings within New York City during the time period of January 1, 2018 through the present, which is the time frame specified in the Subpoena. *Id.*, ¶ 24; NYSCEF Doc. No. 3, at 4, ¶ 1. The City asserts that HomeAway receives a portion of the fees paid on reservations transacted through its service or subscription fees that it receives for listing advertisements, HomeAway provides a range of services including displaying advertisements, payment processing and handling, dispute resolution, and other services typically associated with reservation services. NYSCEF Doc. No. 11, at 4. The City submits that rather than comply with the Subpoena, HomeAway has refused to conduct a search of its records and has failed to provide even basic transaction or business records concerning any alleged illegal transient rental of permanent dwellings in New York.

OSE’s Investigation has resulted in thousands of administrative summonses, dozens of criminal summonses for the violation of orders issued by the respective New York City Fire and Department of Buildings Commissioners, and a series of nuisance abatement and other related civil litigation before this Court. Having received at least three thousand complaints since January 1, 2018 alone, OSE incorporated into its Investigation a proactive examination of illegal transient occupancy on a large-scale basis. Through its Investigation, OSE identified

approximately 870 HomeAway or VRBO rental listings that “appeared to fit a narrowly crafted criteria of facially suspect listings that would indicate illegal conduct by Home[A]way’s users barred by New York law.” NYSCEF Doc. No. 1, ¶ 37. Thereafter, OSE issued the Subpoena seeking specific information about those 870 identified listings and directing HomeAway to search its records for responsive materials that fit the “narrowly crafted criteria” that OSE created.

The Subpoena seeks records regarding approximately 870 identified property listings on both the HomeAway website and its related VRBO website for a rental period of less than thirty (30) days since January 1, 2018. The Subpoena specifically seeks documents pertaining to these listings by their unique “Property ID.” According to the Subpoena,

[t]he term “Property ID” includes all HomeAway property ID numbers and, where applicable, unit numbers, including but not limited to the specified property identification numbers in Rider Attachment A, that:

- a. have booking or reservation activity occurring in New York City since January 1, 2018;
- b. offer a minimum stay of fewer than 30 consecutive days; and
- c. offer or advertise occupancy of either:
  - i. the entirety of a unit, regardless of type; or
  - ii. a maximum occupancy of three or more occupants; or
  - iii. a total maximum occupancy of three or more occupants when combined with other listings by the same owner or manager at the same location.

NYSCEF Doc. No. 3, at 3, ¶ 6(a)-(c)(i), (ii), (iii).

Where a specific Property ID is not listed in Rider Attachment A, the Subpoena instructs HomeAway to “search all files, records, computers, phones, hard drives, data storage, and/or other archiving systems that might reasonably expected to contain any of the documents, email, and/or data requested in the following document requests.” *Id.* at 4, ¶ 2. Further, with respect to each Property ID, as defined in the Subpoena, whether it is specifically listed in Rider Attachment A or not, the Subpoena calls for the following documents to be produced:

- a. the property ID number, and where applicable, the unit number;
- b. the physical address associated with such Property ID, including the street name, street number, apartment or unit number, borough or county, and zip code;
- c. the individualized name and identification number of the Owner and any Manager of the property;
- d. the full name, home address, phone number, email address, and any other contact information of the Owner and Manager of such property;
- e. a statement as to whether such property listing offers (i) the entirety of a swelling unit or housing accommodations in a building or (ii) part of such unit or housing accommodations;
- f. the total number of days between January 1, 2018 and the date on the face of this subpoena that the accommodations offered in the property listing were rented;
- g. the total number of individual bookings completed, the duration of which comprise the total in item (f);
- h. the total amount of rent received from a guest by HomeAway between January 1, 2018 and the date on the face of this subpoena that HomeAway transmitted to an Owner or Manager; and
- i. the account name, consistently de-identified account number, and payout address for the account used by such Owner or Manager to receive payments.

*Id.* at 6-7, ¶ 1(a)-(i).

The City contends that the Subpoena seeks records reasonably related to OSE's Investigation for the public purpose of preventing illegal transient rentals from taking place because such rentals deceive guests and create imminently hazardous building conditions. Further, the City contends that OSE's decision to issue the Subpoena as part of its powers to investigate illegal transient occupancy businesses on an industry-wide basis, as opposed to partaking in more individualized investigations is a non-justiciable strategic and tactical choice. The City also claims that the Subpoena does not violate the Fourth Amendment, despite asking for a voluminous number of documents, because the records requested are relevant to the Investigation and HomeAway is in the best position to identify the responsive records in its possession.

On several occasions, HomeAway's counsel conferred with counsel for the City in an attempt to ascertain the City's basis for the Subpoena and to address HomeAway's concerns regarding the Subpoena's scope and respective burdens it would impose. HomeAway offered to provide information on the specific listings identified in Rider Attachment A to the Subpoena, unless the listing contained no indicia of allegedly illegal activity; however, the City apparently rejected HomeAway's offer and, instead, demanded that HomeAway search its platform with the Subpoena's stated search criteria and produce records for all listings covered by the Subpoena.<sup>3</sup> The City did not provide any additional information that would reveal why it was interested in the properties identified in the Subpoena or to narrow the Subpoena's scope. To date, HomeAway has neither produced any materials in response to the Subpoena nor provided written objections to the Subpoena.

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<sup>3</sup> OSE had already identified approximately one-third of HomeAway's listings in New York City as responsive to the Subpoena. NYSCEF Doc. No. 1, ¶ 40.

HomeAway’s counsel attests that it “sampled and reviewed several of the properties listed on Attachment A to the Subpoena, including by examining the title of the listing, photos, features, locations, and written descriptions” in an attempt “to assess whether the Subpoena’s ‘Property ID’ search demands could be effectuated by any individual review of each listing.” NYSCEF Doc. No. 22, ¶ 5. Based upon that review, HomeAway discovered that several of the Property IDs identified in the Subpoena were not located in New York City, though the listings made reference to New York City, and that “many of the Property IDs corresponded to inactive or deleted listings, for which no information was available.” *Id.*, ¶ 6. Further, for Property IDs listed in the Subpoena that were still on the HomeAway website, it was difficult for HomeAway to ascertain, without an intensive examination, “whether the listing would be responsive to the City’s search criteria or would suggest any violation of New York’s short-term rental laws” if the listing even provided sufficient information to make this determination. *Id.*, ¶ 7.

HomeAway objected to the Subpoena on the grounds that its definition of “Property ID” requires HomeAway to search for other HomeAway listings that, *inter alia*, “have booking or reservation activity in New York City since January 1, 2018” and that “offer or advertise” either “the entirety of a unit, regardless of type” or “a maximum occupancy of three or more occupants,” which goes beyond the specific approximately 870 Property IDs actually listed in the Subpoena. HomeAway also objected to the Subpoena on the grounds that it violates the Fourth Amendment of the United States Constitution; Article 1, Section 12 of the New York State Constitution; and New York Law.<sup>4</sup> Further, HomeAway objected to the Subpoena on the

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<sup>4</sup> HomeAway also objected to the Subpoena on the grounds that it violates and is preempted by the United States Stored Communications Act, located at 18 U.S.C. § 2701 *et seq.* (“SCA”). HomeAway asserts that it is subject to the SCA as an electronic communications service or remote computing service, which is only permitted to divulge the most basic subscriber information—specifically: customer names and addresses; “records of session times and durations;” “length of service (including start date) and types of service utilized;” subscriber numbers, and means and source of payment that the customer used to pay the service provider (18 U.S.C. § 2703(c)(2)(A)-(F))—subject to an authorized subpoena (*id.* § 2702(a)-(c)). HomeAway objected to the Subpoena on the ground that it “seeks

grounds that its requests are unduly burdensome and that even in conducting a listing-by-listing analysis, it is difficult to conclude whether many of the properties are responsive to the search criteria set forth therein. Additionally, HomeAway asserted that the City does not provide a sufficient justification for the scope of the demands set forth in the Subpoena.

In its opposition and cross-motion, HomeAway elaborates on the issue that the Subpoena's definition of the term "Property ID" creates. First, the Subpoena attaches a list of approximately 870 "property identification numbers" that it defines as falling within the definition of "Property ID." Second, the Subpoena then defines "Property ID" to include all HomeAway listings that (a) "have booking or reservation activity occurring in New York City since January 1, 2018" to date; (b) "offer a minimum stay of fewer than 30 consecutive days; and" (c) "offer or advertise occupancy of either: (i) the entirety of a unit, regardless of type; or (ii) a maximum occupancy of three or more occupants; or (iii) a total maximum occupancy of three or more occupants when combined with other listings by the same owner or manager at the same location." NYSCEF Doc. No. 3, at 3, ¶ 6(a)-(c)(i), (ii), (iii). HomeAway argues this would require it to search all of its New York City listings by criteria that HomeAway does not track,

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personal and sensitive information about how customers have used their homes, including the total number of nights a unit was rented, the amounts that were charged, whether customers decided to rent their entire units or only a portion, and information about accounts that customers used to receive their payments"—none of which falls into the "limited subset" of records that may be obtained through a subpoena under the SCA. NYSCEF Doc. No. 21, at 25. HomeAway further objected to the Subpoena because the requested information is not "transactional [or] public facing records" covered by the SCA. *Id.* Instead, HomeAway asserts that none of the information requested, specifically the "full name, home address, phone number, email address, and any other contact information of the Owner and Manager," is unavailable to the public (*id.*) and, accordingly, the City's attempts to "squeeze" the Subpoena's information requests into the category of "basic subscriber information" are "inconsistent with the plain language and meaning of the statute, and thus are improper" (*id.* at 29). HomeAway further objects to the Subpoena on the grounds that its privacy policy cannot replace or act as a substitute for the City's obligation under the SCA to obtain the consent of specific HomeAway users for the entity to disclose his or her information. *Id.* at 28. However, this argument was already rejected by the Hon. Paul A. Engelmayer in *Airbnb, Inc. v. City of New York*, 373 F. Supp. 3d 467, 497 (S.D.N.Y. 2019): "both Airbnb and HomeAway already condition use of their services on hosts accepting privacy policies that, among other things, notify hosts that the information they provide may be disclosed to governmental authorities." In this instance there is legal process, which includes a judge's review of the Subpoena.

such as advertised maximum occupancy and advertised whole versus partial units, to determine which units would be responsive to the City's Subpoena.

HomeAway also contends that the Subpoena would require the production of records for listings and rentals that are not unlawful, such as a property that is advertised as available for rent in its entirety or a property that is advertised to accommodate more than three people, as well as records related to one and two-family dwellings. Further, HomeAway maintains that "certain provisions of the Multiple Dwelling Law suggest that it is permissible to advertise or book short-term rentals for three or more occupants." NYSCEF Doc. No. 21, at 10 (citing MDL § 248(1)). HomeAway also reiterates some of the arguments its counsel previously made to the City in attempting to narrow the scope of the Subpoena's demands, such as the fact that some of the listings are for properties outside of New York City and beyond OSE's jurisdiction. Finally, HomeAway argues that because its listings are publicly available, OSE could review the listings, identify those listings that it believes may reflect allegedly illegal transient occupancies, and issue targeted subpoenas for those specific listings.

The City, however, contends that—despite HomeAway's arguments that the City does not provide a sufficient justification for OSE to issue such a broad Subpoena—this is an administrative Subpoena lawfully issued pursuant to OSE's expansive investigatory subpoena powers. The City further contends that it has provided this Court with adequate factual and investigative basis to establish the records sought are relevant an authorized investigation.

### **Discussion**

A government agency must have "authority, relevancy, and some basis for inquisitorial action" to issue a subpoena *duces tecum*. *A'Hearn v. Comm. on Unlawful Practice of Law*, 23 N.Y.2d 916, 918 (1969). The City, through OSE, has the power to issue subpoenas, such as the

Subpoena at issue herein, when investigating allegations of illegal transient occupancies pursuant to MDL Sections 303(1-a) and 121(4). Specifically, MDL Section 303(1-a) states that “[f]or the purpose of enforcing the provisions of this chapter, the department shall have the power to subpoena witnesses, administer oaths and take testimony, compel the production of books, papers, records and documents and to hold public or private hearings” (footnote omitted). MDL Section 121(4) specifically confers enforcement powers, such as the subpoena power stated in MDL Section 303(1-a), upon OSE in prohibiting advertising that promotes the use of dwelling units in a “class A” multiple dwelling for purposes other than permanent residence. The RPAPL also confers a similar subpoena power upon OSE:

[f]or the purposes of a proceeding under this Section, an enforcement agency of the state or of a subdivision thereof, which may commence a proceeding under this Section, may subpoena witnesses, compel their attendance, examine them under oath before himself or a court and require that any books, records, documents or papers relevant or material to the inquiry be turned over to him for inspection, examination or audit, pursuant to the civil practice law and rules.

RPAPL § 715(5).

Once the administrative authority to issue a subpoena has been established, “[a]n application to quash a subpoena should be granted only where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is utterly irrelevant to any proper inquiry.” *Kapon v. Koch*, 23 N.Y.3d 32, 38 (2014) (quoting *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 331-32 (1988)) (internal quotation marks and alterations omitted); *see also Reuters Ltd. v. Dow Jones Telerate, Inc.*, 231 A.D.2d 337, 341 (1st Dep’t 1997) (same); *Roemer v. Cuomo*, 67 A.D.3d 1169, 1170 (3d Dep’t 2009) (stating that the same is true with respect to an agency’s investigative subpoena). “[I]f an administrative inquiry is within the authority of the requesting agency, and the demand for documents is not too indefinite, and

the information is reasonably relevant, then the subpoena duces tecum will be sustained.” *Nicholson v. State Comm’n on Judicial Conduct*, 67 A.D.2d 649, 650 (1st Dep’t 1979) (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)); see *Nicholson v. State Comm’n on Judicial Conduct*, 50 N.Y.2d, 610-11 (1980) (“[A] motion to quash or to compel compliance raises only the issues of the authority of the investigating body and whether the inquiry falls within the scope of that authority.”). Further, “[s]ufficient authenticating detail may be found in the complaint itself or can be “independently supplied” for such a subpoena to issue. *Levin v. Murawski*, 59 N.Y.2d 35, 41-42 (1983). However, “[i]t is ancient law that no agency of government may conduct an unlimited and general inquisition into the affairs of persons within its jurisdiction solely on the prospect of possible violations of law being discovered, especially with respect to subpoenas duces tecum.” *A’Hearn*, 23 N.Y.2d at 918.

This Court notes that HomeAway is not challenging OSE’s authority to issue the Subpoena or the City’s authority to investigate legitimate violations of the MDL or the Administrative Code, including the rental or advertisement of “class A” dwelling units for illegal transient use or occupancy. Instead, HomeAway is contesting the scope of the Subpoena and is concerned with the privacy rights of its users. While this Court recognizes the broad power that OSE has to issue administrative subpoenas, that subpoena power is neither plenary nor absolute. Based upon the strong safety and other public policy interests detailed by the City, HomeAway is hereby ordered to comply with the Subpoena to the extent that it must produce the requested records and information therein for the “specified property identification numbers in Rider Attachment A.” NYSCEF Doc. No. 3, at 3, ¶ 6; *id.* at 8-10 (Rider Attachment A). HomeAway is not otherwise required to search its records, as specified in paragraph 2 of the “Instructions”

(*id.* at 4, ¶ 2), for any other listings that may comport with the City’s criteria as set forth in the definition for “Property ID” (*id.* at 3, ¶ 6(a)-(c)).

It is apparent from the papers and proceedings in this litigation that the City has the requisite authority, relevancy, and basis for the inquisitorial action in the instant matter as related to the listings associated with the approximately 870 specific property identification numbers in Rider Attachment A. *Id.* at 8-10. With respect to these listings, the City, based upon OSE’s Investigation, has identified particular properties that it alleges are in violation of several provisions of the MDL and Administrative Code that prohibit transient use or occupancy of the units therein for a period of less than thirty (30) days. HomeAway’s production of the information requested with respect to said listings will provide the City with relevant and material information regarding the illegal advertising of the “class A” properties therein for transient use. Additionally, some of the subpoenaed material may specifically relate to issues being litigated in several other enforcement actions. *See* NYSCEF Doc. No. 14 (listing two related pending cases). Moreover, this subpoenaed material is relevant because it may relate to buildings that the City is currently investigating in good faith and has already found certain potential violations. *See* NYSCEF Doc. Nos. 1, ¶¶ 35, 36 (explaining OSE’s enforcement efforts and listing nuisance abatement actions filed in this Court); 7 (OSE’s 2016 annual report summarizing complaint and summons activity related to illegal transient use); 8 (same); 9 (Affidavit of OSE Executive Director Christian Klossner detailing OSE’s investigative and legal efforts to abate illegal transient activity). Further, the type of transactional records that the City now seeks have previously been deemed relevant in other similar actions as part of OSE’s enforcement power to abate short-term illegal tenancies in “class A” permanent residences. *See, e.g., City of New York v. Airbnb, Inc.*, 2019 WL 2142299, at \*6 (Sup. Ct. N.Y. County May 16,

2019), *vacated in part on reargument* by 2020 WL 1818443 (Mar. 17, 2020); *City of New York v. NYC Midtown LLC*, 2018 N.Y. Misc. LEXIS 1800, at \*16 (Sup. Ct. N.Y. County May 7, 2018); *NYC Hosts v. Airbnb, Inc.*, 2018 N.Y. Misc. LEXIS 1832 (Sup. Ct. N.Y. County May 15, 2018) (denying application for a temporary restraining order to prevent Airbnb, Inc.’s compliance with an OSE subpoena); *City of New York v. Impact Virtual Tours, LLC*, 2017 WL 3440407, at \*1 (Sup. Ct. N.Y. County Aug. 7, 2017) (Schechter, J.); *New York City Mayor’s Office of Special Enforcement v. Rahman Inc.*, 2017 WL 6761988, at \*1 (Sup. Ct. N.Y. County Dec. 6, 2017) (Mandelbaum, J.). As such, HomeAway will produce the subpoenaed materials related to the specified property identification numbers in Rider Attachment A to the Subpoena. The parties will submit a confidentiality order to be issued in this matter, if they have not already done so, to address any privacy concerns related to the production of user information raised in this application.<sup>5</sup>

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<sup>5</sup> In *Airbnb, Inc. v. Schneiderman*, 44 Misc. 3d 351 (Sup. Ct. Albany County 2014), though the Supreme Court ultimately quashed the subpoena on the grounds that it was overbroad with respect to requesting certain tax and other information not at issue here, the court found that it was not unduly burdensome to require Airbnb, Inc. to provide personal user information such as “the host’s name, address of accommodation, dates of stay, rates, method of payment and total revenue from the rental.” 44 Misc. 3d at 359. The Court notes that HomeAway’s privacy policy puts users on notice that their personal information may be disclosed, consistent with the court’s decision in *Airbnb, Inc. v. Schneiderman*, *supra*, where the same information was requested. *See* 44 Misc. 3d at 361-62 (“Initially, [Airbnb, Inc.] has failed to demonstrate that the requested information is confidential, particularly where [Airbnb, Inc.’s] privacy policy provides that [it] will disclose any information in its sole discretion that it believes is necessary to respond to, inter alia, subpoenas.”). HomeAway’s privacy policy, under the heading “How we use your personal data,” states, in relevant part, as follows: “You agree that we may use your personal data for the following purposes: . . . To prevent, investigate or prosecute activity we think may be potentially illegal, unlawful or harmful.” NYSCEF Doc. No. 10, at 3. Under the heading “We May Disclose Your Personal Data,” HomeAway’s privacy policy further states, in relevant part, as follows:

We may disclose your personal data to enforce our policies, or where we are permitted (or believe in good faith that we are required) to do so by applicable law, such as in response to a request by a law enforcement or governmental authority, or in connection with actual or proposed litigation, or to protect our property, people and other rights or interests. We may also share your personal data with: . . . Any legal or governmental entity pursuant to a subpoena or other legal request.

*Id.* at 4.

However, this Court will not compel HomeAway to comply with the broad search requested by the City in paragraph 2 of the “Instructions” listed in the Subpoena. In reviewing the scope of a subpoena *duces tecum* on a motion to quash, the Court of Appeals has stated that in particular circumstances, “the more appropriate action to take . . . is to modify the subpoena to eliminate those portions which request information unrelated to the subject matters under investigation.” *New York State Comm’n on Judicial Conduct v. Doe*, 61 N.Y.2d 56, 62 (1984) (limiting a demand requesting “all writings” relating to financial status where the subpoena went beyond the scope of the investigation and “compliance with this demand would require [the defendant] to produce virtually all of his financial records since 1974, including those relating to transactions having no relation to the matters presently under investigation”). This is in accordance with a court’s powers under CPLR 2304 to quash or modify a subpoena when the conditions stated therein are unreasonable. While it is true that “[a] broader view of relevance may be applied when the subpoena is issued by an administrative or legislative investigatory body since the relevance of such an ‘office subpoena’ depends on the authorized breadth of the investigation itself,” as is the case here, “this broadly stated standard, while consistent with a policy favoring the production of information, should not serve as an excuse for a court to . . . permit the subpoena power to be used as a tool of harassment or for the proverbial ‘fishing expedition’ to ascertain the existence of evidence.” *Reuters Ltd.*, 231 A.D.2d at 342. Working within this framework, this Court must balance the City’s investigative and law enforcement needs, with respect to public policy, against the burden placed on the producing party and the specificity of the request when limiting or modifying an administrative subpoena issued by OSE in these circumstances. *See* CPLR 2304, 3103.

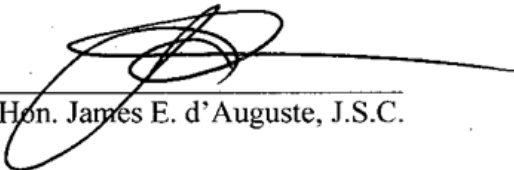
The Subpoena instructs HomeAway to “search all files, records, computers, phones, hard drives, data storage, and/or other archiving systems that might reasonably be expected to contain any of the documents, email, and/or data requested in the following document requests” (NYSCEF Doc. No. 3, at 4, ¶ 2) for listings that contain the following criteria as specified in the definition of “Property ID”: listings that (a) “have booking or reservation activity occurring in New York City since January 1, 2018” to date; (b) “offer a minimum stay of fewer than 30 consecutive days; and” (c) “offer or advertise occupancy of either: (i) the entirety of a unit, regardless of type; or (ii) a maximum occupancy of three or more occupants; or (iii) a total maximum occupancy of three or more occupants when combined with other listings by the same owner or manager at the same location” (*id.* at 3, ¶ 6(a)-(c)(i), (ii), (iii)). Based upon the sample search performed by HomeAway’s counsel, its compliance with the above instruction, as set forth in this paragraph, would likely result in disclosure of records pertaining to listings that never resulted in an illegal transient use or occupancy, including listings for properties that were not advertised or rented in an unlawful manner and listings for properties located outside of New York City. Further, HomeAway would have to individually review each listing produced by such a search because it does not categorize or track all of the metrics that are included in the definition of “Property ID.” Thus, the instruction, and resulting search, while not only overbroad, burdensome, and oppressive, is tantamount to the type of impermissible fishing expedition that this Court is tasked to prevent. *See Reuters Ltd.*, 231 A.D.2d at 344; *N.Y.C. Dep’t of Investigation v. Passannante*, 148 A.D.2d 101 (1st Dep’t 1989) (“[C]ontinued fishing in otherwise apparently calm waters in the mere hope that some lead or indicia of possible wrongdoing will be uncovered is not what we believe [was] intended.” (citation omitted) (quoting *Horn Constr. Co. v. Fraiman*, 34 A.D.2d 131, 133 (1st Dep’t 1970))).

“While ‘[relevancy], and not quantity, is the test of the validity of a subpoena,’ and a subpoena will not be denied enforcement merely because it seeks a large number of documents,” the Subpoena at issue here does not call for any specific files of the company “or for documents regarding limited or specifically defined subjects [without] requir[ing] at least [a] preliminary review of all files” of listings that match the City’s criteria set forth in the definition of “Property ID.” *Id.* (first alteration in original) (citations omitted) (quoting *Am. Dental Coop., Inc. v. Attorney General of N.Y.*, 127 A.D.2d 274, 282-83 (1st Dep’t 1987)). Additionally, the City has not made a factual showing that any of the properties or individuals connected to the listings that this search could potentially produce are targets of the Investigation. Accordingly, HomeAway is not required to comply with Instruction number 2 as stated in the Subpoena.

### Conclusion

Based upon the foregoing, the City’s motion is granted to the extent of compelling HomeAway to produce the specific records relating to the property identification numbers in Rider Attachment A to the Subpoena and is otherwise denied, and HomeAway’s cross-motion is granted in part to the extent set forth herein. The parties are directed to submit a confidentiality order to Part 55. This constitutes the decision and order of this Court.

Dated: May 6, 2020



Hon. James E. d’Auguste, J.S.C.