

**Matter of Jewish Press, Inc. v New York City Police Dept.**

2020 NY Slip Op 32766(U)

August 25, 2020

Supreme Court, New York County

Docket Number: 155280/2019

Judge: W. Franc Perry

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This opinion is uncorrected and not selected for official publication.

**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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**INDEX NO. 155280/2019**

IN RE APPLICATION OF THE JEWISH PRESS INC.,

**MOTION DATE 02/27/2020**

Plaintiff,

**MOTION SEQ. NO. 001**

- v -

NEW YORK CITY POLICE DEPARTMENT,

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

In this Article 78 proceeding, Petitioner Jewish Press, Inc. (“Petitioner”) seeks to compel the New York City Police Department (“Respondent” or “NYPD”) to disclose material relating to a cyclist accident that Petitioner initially requested pursuant to the Freedom of Information Law (“FOIL”). Respondent opposes the motion and cross-moves to dismiss.

**BACKGROUND**

On April 23, 2019, Petitioner requested from Respondent video surveillance footage, notes, and witness statements associated with a January 6, 2019 cyclist accident that occurred on Avenue I between East 2nd and 3rd Streets in Brooklyn, New York. Respondent denied the request on May 3, 2019, stating that, pursuant to Public Officers Law (“POL”) § 87 [2] [b], disclosure would constitute an unwarranted invasion of personal privacy.

Petitioner immediately responded, stating that it was appealing the denial and that Respondent failed to explain why the parts of the record that would constitute an unwarranted invasion of personal privacy could not be redacted. Three days later, on May 6, 2019, the appeal was denied “because the disclosure of the requested records would interfere with judicial

proceedings, specifically, the pending adjudication of traffic summons(es) issued as a result of the incident referred to in your request.” (NYSCEF Doc No. 6, citing POL § 87 [2] [e] [i].)

Petitioner then commenced this Article 78 proceeding with the filing of the Verified Petition. Petitioner seeks a judgment declaring that the NYPD unlawfully withheld the requested documents, vacating the final administrative decision of May 6, 2019, and awarding attorneys’ fees pursuant to POL § 89 [4] [c].

Respondent cross-moves to dismiss, arguing that a declaratory judgment is unavailable in FOIL proceedings; that the records sought by Petitioner are exempted because disclosure would interfere with an ongoing judicial proceeding pursuant to PLO § 87 [2] [e] [i]; the request does not reasonably describe the records; and that Petitioner is not entitled to attorneys’ fees.

### DISCUSSION

The policy underlying FOIL “is to promote open government and public accountability by imposing upon governmental agencies a broad duty to make their records available to the public.” (*Matter of Johnson v New York City Police Dept.*, 257 AD2d 343, 346 [1st Dept 1999]; *see also Matter of Abdur-Rashid v New York City Police Dept.*, 31 NY3d 217, 224-25 [2018] [internal quotation marks and citation omitted] [“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”].)

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 [1st Dept 2008]; *New York Civil Liberties Union v New York City Police Dept.*, 20 Misc3d 1108[A] [Sup Ct, NY County 2008] *see*

also, *Gould v New York City Police Dept.*, 89 NY2d 267, 274 [1996] [FOIL was enacted "[t]o promote open government and public accountability"].)

As set forth in the statute, FOIL involves a three-step process. After an agency initially receives a FOIL request, it must release the records or deny the request in writing. (POL § 89 [3] [a].) There is no requirement to specify the reasons for the denial. In the second step, upon receiving an appeal of an initial denial, the designated person in the agency must “fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought.” (POL § 89 [4] [a].) If the appeal is denied, the last step is the article 78 proceeding. “In the event that access to any record is denied pursuant to the provisions of subdivision two of section eighty-seven of this article, the agency involved shall have the burden of proving that such record falls within the provisions of such subdivision two.” (POL § 89 [4] [b].)

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 562, 566 [1986].)

Initially, Petitioner’s request for a declaratory judgment that NYPD acted unlawfully in withholding the requested documents is denied. In order to seek declaratory relief, Petitioner was “required to serve a summons in addition to the notice of petition, and a combined petition/complaint.” (*Matter of New York Times Co. v City of New York Police Dept.*, 103 AD3d 405, 407 [1st Dept 2013]; see also *Doe v City of Schenectady*, 84 AD3d 1455 [3d Dept 2011] [filing of combined petition/complaint allowed petitioner to seek declaratory relief]; *Newton v*

*Town of Middleton*, 31 AD3d 1004 [3d Dept 2006] [same].) Here, Petitioner served only a Verified Petition.

Respondent initially argued that the requested material was exempt from disclosure pursuant to POL § 87 [2] [e] [i], because disclosure would have interfered with a judicial proceeding; namely, the Department of Motor Vehicles' Traffic Violations Bureau ("TVB") proceeding involving the incident referenced in Petitioner's request. However, Respondent filed a letter on October 22, 2019, indicating that the two summonses pending before the Traffic Violations Bureau were closed. (NYSCEF Doc No. 22.) In its reply, Respondent argues that although the exemption contained in POL § 87 [2] [e] [i] no longer applies, *Matter of Leshner v Hynes*, 19 NY3D 57 [2012] requires that the court determine if the exemption applied at the time it was invoked by Respondent, and, if it were properly invoked, the court must direct Petitioner to file a new FOIL request so that a FOIL records officer may determine in the first instance if an additional exemption applies.

The judicial interference exemption in POL § 87 [2] [e] [i] applies if a qualifying court proceeding existed, and if a respondent identifies (1) "generic document description categories, as opposed to document-by-document descriptions," and thereafter (2) "describes the generic risks posed by disclosure of these categories of documents." (*Crown Castle NG East LLC v The Town of Hempstead*, 2017 WL 6389958, \*3 [Sup Ct, Nassau County 2017], citing *Matter of Leshner*, 19 NY3d at 67-68.)

First, Petitioner argues that the Traffic Violations Bureau proceeding does not constitute a judicial proceeding under the statute. (NYSCEF Doc No. 8 at 7-8.) In support, Petitioner cites to a provision of the New York State Constitution, which defines the judiciary system as "the court

of appeals, the supreme court including the appellate divisions thereof, the court of claims, the county court, the surrogate's court and the family court." (NY State Constitution, § 6 [1] [a].)

This argument fails. "FOIL's Interference Exemption protects all types of judicial proceedings from the interference that would result from the premature disclosure of law enforcement records. The exemption does not specify a particular type of judicial proceeding or any particular phase within a judicial proceeding." (*Matter of Campbell v New York City Police Dept.*, 2012 WL 255023 [Sup Ct, NY County 2012].) The Traffic Violations Bureau is "made up of those administrative law judges" (15 NYCRR § 121.3) and was formed "in response to court procedures which were too cumbersome to handle[.]" (15 NYCRR § 121.1.) The Traffic Violations Bureau operates in a "judicial or quasi-judicial capacity" (*People v Russo*, 149 AD2d 255, 261 [2d Dept 1989]) and "the Legislature, in enacting FOIL intended the phrase 'courts of the state' to have its commonly understood meaning -- tribunals adjudicating rights and status[.]" (*Matter of Quirk v Evans*, 116 Misc2d 554, 557 [Sup Ct, NY County 1982]; *see also Morris v County of Nassau*, 158 AD3d 630, 632 [2d Dept 2018] [holding that Traffic and Parking Violations Agency was indisputably "part of the judiciary" in FOIL proceeding].) Accordingly, the Traffic Violations Bureau proceeding constitutes a judicial proceeding under the FOIL.

Next, the court must determine if Respondent has clearly identified generic document description categories. Respondent states that it "has located the video footage, police accident report, complaint follow-up reports (containing the requested witness statements), complaint report, summonses and other records detailing the NYPD's investigation and findings into the cyclist and vehicle collision during the Incident." (NYSCEF Doc No. 11.) Accordingly, the court finds that Respondent has met its burden in identifying document categories.

Last, Respondent has adequately described the risks posed by disclosure of these categories of documents. Respondent states that “the release of the details of the investigation into the incident would tip the hand of the TVB's prosecuting officer and release statements of witnesses such that the veracity of such statements could not be subsequently verified as independent recall versus review of the records prematurely released in a FOIL disclosure.” (*Id.* at 11-12.) Accordingly, Respondent has fulfilled its burden under POL § 89 [4] [b] and articulated a specific factual basis for why the interference exemption under POL § 87 [2] [e] [i] applied at the time it was initially invoked by Respondent.

We turn now to Petitioner's request for attorneys' fees. Pursuant to POL § 89 [4] [c], the court "may award counsel fees in a FOIL proceeding where a litigant 'has substantially prevailed' 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 [3d Dept 2009].) 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 [2d Dept 2005]; *Hopkins v City of Buffalo*, 107 AD2d 1028 [4th Dept 1985]; *Niagara Environmental Action v City of Niagara Falls*, 100 AD2d 742 [4th Dept 1984].) 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, [3d 2006].)

The court finds that Petitioner is not entitled to attorneys' fees because Petitioner did not substantially prevail in this action. Accordingly, it is hereby

ORDERED that the Petition is denied; and it is further

ORDERED that the Cross-Petition to dismiss the Petition is granted and the proceeding is dismissed.

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.

08/25/20  
DATE

  
W. FRANC PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED   
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: