

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

2022 NY Slip Op 30162(U)

January 21, 2022

Supreme Court, New York County

Docket Number: Index No. 155280/2019

Judge: W. Franc Perry

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. WILLIAM PERRY **PART** **23**

Justice

-----X

IN RE APPLICATION OF THE JEWISH PRESS INC.,

Petitioner,

- v -

NEW YORK CITY POLICE DEPARTMENT,

Respondent.

-----X

INDEX NO. 155280/2019

MOTION DATE 07/01/2021

MOTION SEQ. NO. 002 003 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 44, 49

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 39, 40, 41, 42, 43, 45, 46, 47, 50

were read on this motion to/for CONTEMPT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 51, 52, 53, 54, 55, 56, 57

were read on this motion to/for ATTORNEY - FEES.

In motion sequence 002, petitioner The Jewish Press Inc. seeks an order directing respondent the New York City Police Department (NYPD) to produce documents pursuant to petitioner's 2019 FOIL request, in accordance with the Appellate Division, First Department's January 12, 2021 decision and order.

In motion sequence 003, brought pursuant to Judiciary Law § 753, petitioner seeks to hold respondent in civil contempt for allegedly failing to comply with the First Department's decision and order dated January 12, 2021 and the First Department's decision and order dated March 18, 2021 (the Appellate Division orders). Pursuant to Judiciary Law § 773, petitioner is seeking damages and attorney's fees incurred as a result of respondent's failure to comply with

the Appellate Division orders. Respondent opposes the motion and states that it has complied with the Appellate Division orders.

In motion sequence 004, petitioner seeks an order awarding costs and attorneys' fees pursuant to Public Officers Law § 89 (4) (c) for substantially prevailing in the litigation.

Respondent opposes the motions.

The motions are consolidated for disposition. As set forth below, motion sequences 002 and 003 are granted, and motion sequence 004 is denied.

BACKGROUND AND FACTUAL ALLEGATIONS

On April 23, 2019, petitioner submitted a request to respondent under Public Officers Law, § 84, *et seq.*, also known as the Freedom of Information Law (FOIL), seeking accident investigation reports and video footage in connection with a cyclist accident that occurred in Brooklyn on January 6, 2019. On May 3, 2019, respondent denied the request “on the basis of Public Officers Law Section 87 (2) (b) as such information, if disclosed, would constitute an unwarranted invasion of privacy.” NYSCEF Doc. 4 at 1.

Petitioner appealed this determination. Pursuant to a letter dated May 6, 2019, petitioner was notified that its 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. [Public Officers Law Section 87 (2) (i)].” NYSCEF Doc. No. 6 at 1.

Petitioner commenced an Article 78 proceeding seeking, in pertinent part, a judgment “[v]acating, overruling and prohibiting the enforcement of the final administrative decision of May 6, 2019; and (c) Directing NYPD to provide Petitioner with immediate access to the records

specified in the Request; (d) Awarding Petitioner its costs and attorneys' fees pursuant to Public Officers Law § 89(4)(c)." NYSCEF Doc. No. 2 at 1. Respondent cross-moved to dismiss.

Pursuant to a decision and order dated August 25, 2020, this court denied the petition and dismissed the proceeding. In relevant part, the court found that the Traffic Violations Bureau (TVB) proceeding constitutes a judicial proceeding under FOIL, that respondent identified generic document description categories and that respondent adequately described the risks posed by disclosure of these categories of documents. In its submissions, respondent had noted that it had "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. 13, Lombardia affirmation, ¶ 28.

On appeal, the Appellate Division, First Department, reversed this court's determination. In the decision dated January 12, 2021, the Court held that "[t]he only FOIL exemption at issue in this case applies to records that 'are compiled for law enforcement purposes and which, if disclosed, would . . . interfere . . . judicial proceedings.'" *Matter of Jewish Press, Inc., v New York City Police Dept.*, 190 AD3d 490, 490 (1st Dept 2021) (internal quotation marks and citation omitted). The Court agreed that TVB hearings are judicial proceedings. Nonetheless, the Court found that, "under the specific facts presented here," respondent failed to meet its burden "of showing a particularized justification for withholding the records at issue pursuant to the interference exemption." *Id.* at 491. The Court concluded, in pertinent part:

"NYPD asserts that any release of documents would somehow tip the hand of the TVB's prosecuting attorney or prevent the prosecutor from testing the recollection of witnesses. Yet, NYPD concedes that these documents would be released to the motorist who would not be under any legal admonition not to release the documents to others. Additionally, the recollection of witnesses and the basis of their testimony would certainly be determined by questioning and cross examination at the hearing. Given this,

we find that NYPD's blanket denial of document release fell short of meeting its admittedly low burden."

Id. (citations omitted).

Although the Court ultimately granted the petition and denied the cross motion to dismiss, it "[found] no basis for awarding attorney's fees and costs to petitioner . . ." *Id.*

In relevant part, petitioner moved for leave to argue the issue of attorney's fees, or in the alternative, leave to appeal. Respondent cross-moved for clarification or remand. Specifically, respondent moved for,

"an order, pursuant to CPLR 2221(a), modifying this Court's January 12, 2021 decision and order to clarify whether respondent NYPD is permitted to redact portions of the records responsive to Jewish Press's FOIL request prior to disclosure on the grounds that other FOIL exemptions continue to apply; or, in the alternative (2) an order remanding this proceeding to Supreme Court and directing it to perform an in camera review of the responsive records to determine whether redactions are warranted based on other FOIL exemptions."

NYSCEF Doc. 42, notice of cross motion at 1-2.

Respondent alleged that, in its decision, the Court did not address the applicability of any other FOIL exemptions other than the judicial interference exemption. However, according to respondent, it had explained that other FOIL exemptions may continue to apply to the requested records. For instance, some of the requested records allegedly result in an unwarranted invasion of personal privacy or are exempt from disclosure "because they have been sealed pursuant to CPL 160.55." *Id.*, Young affirmation, ¶ 6. Respondent summarized that it is requesting "clarification." It stated, in relevant part:

"Did this Court intend to order the NYPD to disclose every portion of every document responsive to Jewish Press's request, even if some portions are exempt from disclosure under other FOIL exemptions besides the judicial interference exemption? Or does this Court's order allow the NYPD to redact portions of responsive records to properly comply with its FOIL obligations?"

“In the alternative, the NYPD requests an order remanding this proceeding to Supreme Court and directing it to perform an in camera review of responsive records to determine whether redactions are warranted based on other FOIL exemptions.”

Id., ¶¶ 7, 8.

In support of its cross motion, respondent’s counsel argued that she “believe[d] that the NYPD is obligated to withhold portions of the responsive records under POL 87 (2) (a), (b), and CPL 160.55.” NYSCEF Doc. No. 42, Lombardia affirmation, ¶ 6. She explained that certain records, such as photographs of people who received tickets and all official records and papers relating to these tickets, purportedly needed to be withheld as sealed records. She also alleged that disclosure of other records without redaction would result in an unwarranted invasion of privacy.

Pursuant to an order dated March 18, 2021, the Court denied both petitioner’s motion and respondent’s cross motion for clarification or for remand. *See* NYSCEF Doc. No. 42, order denying motion and cross motion.

On May 28, 2021, respondent provided petitioner with a limited version of the original FOIL request. Respondent noted that “redactions were made to this file in accordance with Criminal Procedure Law 160.50 and 160.55 relating to sealed records. Further redactions were made on pages 54 and 62 in compliance with Public Health Law Sections 2803-c and 2805-g.” NYSCEF Doc. No. 41 at 1.

Instant Action

Petitioner seeks an order holding respondent in civil contempt for failing to obey the Appellate Division orders dated January 12, 2021 and March 18, 2021. Petitioner requests that the court direct and compel respondent to produce the requested documents without limitation,

redaction or exemption, in accordance with these orders.¹ Petitioner explains that, pursuant to an order dated January 12, 2021 the Appellate Division granted the petition seeking to compel respondent to disclose the records made pursuant to the FOIL request. Next, pursuant to an order dated March 18 2021, the Appellate Division specifically denied the request in respondent's cross motion seeking clarification to assert supplemental FOIL exemptions to the production of documents and also denied the request for remand for an in camera review.

According to petitioner, respondent was aware of these orders and has intentionally failed to comply. Petitioner states that it is "the largest independent Jewish weekly newspaper in the United States," and that it "has a clear interest and a First Amendment right to seek documents from a public agency for purposes of reporting on events." NYSCEF Doc. No. 40, Aron affirmation, ¶ 32. Petitioner initially submitted the request in April 2019 and has yet to receive the documents. Petitioner avers that it has been prejudiced by respondent's failure to respond to these orders.

Pursuant to Judiciary Law § 773, petitioner is seeking costs and expenses, including attorney's fees, incurred as a result of respondent's alleged contempt. Petitioner contends, "this Order to Show Cause would not have been necessary but for [respondent's] intentional disobedience." *Id.*, ¶ 33.

In opposition, respondent argues that it has complied with the Appellate Division orders. According to respondent, although one of the decisions noted that the "NYPD's blanket denial of document release fell short of meeting its admittedly low burden," it did not compel production of all requested documents. NYSCEF Doc. No. 50, Russo affirmation in opposition, ¶ 18. Respondent alleges that redactions were properly made pursuant to privacy laws, "specifically

¹ The relief sought in motion sequence 002, namely, an order directing respondent to produce documentation in accordance with the Appellate Division orders, is also requested in motion sequence 003.

CPL Sections 160.50 and 160.55 as well as PHL Sections 2803-c and 2805-g.” *Id.*, ¶ 20.

Respondent also argues that petitioner is not entitled to attorney’s fees under POL § 89 (4) (c) or under the Judiciary Law.

DISCUSSION

At the outset, the court notes that respondent’s attempt to provide other reasons for withholding the records as requested in the initial FOIL request, is unavailing. The record indicates that respondent denied the requested records based on the judicial interference exemption at the administrative level and this was the basis of denial addressed in the underlying article 78 proceeding. It is well settled that “[j]udicial review of an administrative determination is limited to the grounds invoked by the agency and the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.” *Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 74 (2017) (internal quotation marks and citations omitted). *See Id.* (“[W]e reject the Department’s reliance on Public Officers Law § 87 (2) (e) (iv) - pertaining to non-routine criminal investigative techniques - because the Department failed to invoke that particular exemption in its denial of petitioner’s FOIL request”). As such, the court will not consider respondent’s contentions regarding additional FOIL exemptions that were not raised at the administrative level. *See e.g. Matter of Exoneration Initiative v New York City Police Dept.*, 132 AD3d 545, 546 (1st Dept 2015) (internal citations omitted) (“Though academic, respondent’s argument based on the confidentiality exemption is not properly before us, since respondent failed to cite that exemption at the administrative level”).²

² Respondent broadly alleges in an email to petitioner that “Public Health Law 2803-c and 2805-g prohibit the disclosure of an individual medical’s records.” NYSCEF Doc. No. 43 at 1. However, in addition to not raising this

Moreover, in its submission to the Appellate Division, respondent presented the possibility for additional exemptions. Counsel submitted an affirmation to the Appellate Division stating that “the traffic summonses related to the January 2019 cycling accident have been resolved and closed,” and should be exempt from disclosure. Potential privacy exemptions were also raised. Counsel asked for clarification from the Court, “stating that its recent decision and order leaves the NYPD free to apply FOIL exemptions other than the judicial interference exemption” The Appellate Division denied the motion seeking clarification. Despite the Appellate Division orders, respondent redacted the requested documents and contends that it complied with the Appellate Division orders.

Civil Contempt

Pursuant to Judiciary Law § 753 (A), the court has the authority to “punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced.” In order to prevail on a motion for civil contempt, the movant must establish: “that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, that the party charged with contempt had notice of the order and disobeyed it, and that the failure to comply with the order prejudiced the rights of a party to the litigation.” *Matter of Gallagher v Old Guard of the City of N.Y.*, 172 AD3d 609, 610 (1st Dept 2019). The movant bears the burden of proving contempt by clear and convincing evidence. *Chambers v Old Stone Hill Rd. Assoc.*, 66 AD3d 944, 946 (2d Dept 2009). “Once the movant makes the required showing, the burden shifts to the alleged contemnor to refute that showing, or

issue at the administrative level, it does not appear that the FOIL request is seeking public disclosure of a specific patient’s confidential medical records.

to offer . . . a defense such as an inability to comply with the order.” *Mezzacappa v Palladino*, 180 AD3d 664, 666 (2d Dept 2020) (internal quotation marks and citation omitted).

As set forth above, the Appellate Division specifically granted the petition, which had requested an order, in relevant part, “Vacating, overruling and prohibiting the enforcement of the final administrative decision of May 6, 2019; and . . . Directing NYPD to provide Petitioner with immediate access to the records specified in the Request.” Despite this clear language granting the relief requested in the petition as it pertains to the FOIL request, respondent cross-moved for an order of clarification or for remand to have an in camera review of the documents.

Subsequently, while conceding that the records were not exempt under the judicial interference exemption, respondent specifically asked if the Court’s order allowed the NYPD to redact portions of the instant requested records under any other FOIL exemptions. Respondent specifically stated that some of the requested records may result in an unwarranted invasion of privacy while others cannot be disclosed because they have been sealed. Respondent further asked, in the alternative, if the requested records could be remanded to the Supreme Court for an in camera review of responsive records to determine whether redactions are warranted based on other FOIL exemptions. The Court reviewed respondent’s submissions and expressly rejected the need for any clarification, changes or remand.

Accordingly, petitioner met its burden to establish that respondent was aware of, and violated, the Appellate Division orders, when respondent failed to provide petitioner with all documents requested in the underlying FOIL request. Petitioner contends that it has a clear interest and a First Amendment right to seek documents from a public agency for purposes of reporting on events, and that respondent’s failure to turn over the information has prejudiced petitioner. Respondent fails to refute the showing of contempt.

Respondent maintains that it has complied with the Appellate Division orders because even if the documents were redacted, they were provided to petitioner. However, it is well settled that substantial compliance is not a defense to contempt, nor is compliance based on respondent's own interpretation of a court order. *Peters v Sage Group Assocs.*, 238 AD2d 123, 123 (1st Dept 1997) (internal citations omitted) (“[S]ubjective good faith in noncompliance is no defense to a motion for contempt. Once the court has issued a valid order, it is not for the recipient of that order to fashion its own remedy”).

The court notes that petitioner's order to show cause also requested a finding of contempt under Judiciary Law § 750 for respondent's willful disobedience. Criminal contempt, as set forth in Judiciary Law § 750, requires a showing of willfulness and must be proven beyond a reasonable doubt. *See e.g. Matter of People v Hooks*, 64 AD3d 1075, 1077 (3d Dept 2009). However, petitioner's arguments are in support of civil contempt, which, as argued by petitioner, does not have the element of willfulness and requires a finding of clear and convincing evidence.

Judiciary Law § 773

Pursuant to Judiciary Law § 773, “[i]f an actual loss or injury has been caused to a party to an action or special proceeding, by reason of the misconduct proved against the offender . . . a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected, and paid over to the aggrieved party, under the direction of the court.” A party may recover costs, expenses and attorneys' fees directly incurred as a result of the contempt. *See Jamie v Jamie*, 19 AD3d 330, 330 (1st Dept 2005) (“where an actual loss has been caused by a contempt, the aggrieved party is entitled to recover not only the amount of such loss, but also the reasonable costs and expenses in proving such amount and the attendant contempt. . . . [W]e

overrule our prior holdings that attorneys' fees are not recoverable where actual damages are shown").

The court finds that respondent may be held in contempt without a hearing, as the affidavits submitted present "no question of fact as to what [the contemnor] accomplished [, and] the parties dispute only whether what was done did indeed comply with the [O]rder". *Matter of Spinnenweber v New York State Dept. of Env'tl. Conservation*, 160 AD2d 1138, 1140 (3d Dept 1990). Reimbursement to petitioner for its counsel fees and costs in connection with the motion is an appropriate punishment for respondent's civil contempt (see Judiciary Law § 753 [A] [1]).³

Courts have held that "[a]ttorney's fees that are documented and directly related to the contemptuous conduct are generally recoverable unless they are proven excessive or reduced by the court in a reasoned decision." *Matter of Guy v Weichel*, 173 AD3d 1027, 1028 (2d Dept 2019). Nonetheless, "[b]efore ordering one party to pay another party's attorneys' fees, the court always has the authority and responsibility to determine that the claim for fees is reasonable." *Solow Mgt. Corp. v Tanger*, 19 AD3d 225, 226 (1st Dept 2005). The court notes that petitioner did not provide any proof relative to the attorneys' fees allegedly incurred. Accordingly, counsel is directed to submit an affidavit of services, on notice to respondent's counsel, within fifteen (15) days that specifies "in detail the time spent, the hourly rate and the nature and extent of the services rendered" in connection with the contempt proceedings. *See Young Woo & Assoc. LLC*

³ Respondent argues that petitioner is not entitled to attorney's fees under Public Officers Law § 89 (4) (c). Pursuant to Public Officers Law § 89 (4) (c) (i), "[a] court may award counsel fees and costs to a litigant who has substantially prevailed in a FOIL case where the court also determines that the agency had no reasonable basis for denying access to the records sought." *Matter of Competitive Enter. Inst. v Attorney Gen. of N.Y.*, 161 AD3d 1283, 1284-1285 (3d Dept 2018) (internal quotation marks and citation omitted). *See* Public Officers Law § 89 (4) (c) (i). Petitioner did not request attorney's fees under POL § 89 (4) (c) in motion sequence 003 and its previous attempts to do so were denied by the Appellate Division.

v Kim, 2012 NY Slip Op 33437(U), *3 (Sup Ct, New York County 2012) (internal quotation marks and citations omitted), *affd* 115 AD3d 534 (1st Dept 2014).

Petitioner's motion sequence 004 seeking costs and attorneys' fees pursuant to Public Officers Law § 89 (4) (c), is denied in this court's discretion. *New York Lawyers for Pub. Interest v New York City Police Dept.*, 64 Misc 3d 671, 684-85 (Sup Ct, NY County 2019).

CONCLUSION

Petitioner's motion to compel and its motion pursuant to Judiciary Law §§ 753 and 773, to hold respondent in civil contempt, and for costs and attorney's fees incurred in connection with motion sequences 002 and 003, is granted; motion sequence 004 is denied. Accordingly, it is hereby,


ORDERED and ADJUDGED that motion sequence 002 is granted and respondent must provide petitioner with the documents requested in the underlying FOIL request dated April 23, 2019, without limitation, redaction or other exemption, consistent with the Appellate Division orders, within 20 days of service of a copy of this Order with Notice of Entry; and it is further,

ORDERED that, motion sequence 003 is granted, and respondent is in civil contempt for failing to comply with the Appellate Division orders and shall reimburse petitioner for its counsel fees and costs incurred in connection with motions 002 and 003, with the amount of such reimbursement to be determined upon receipt and review of the submission of petitioner's affidavit of services as set forth herein; and it is further,

ORDERED and ADJUDGED that the Petition is granted in accordance with this decision and order and the Clerk of the Court will be directed to enter judgment in favor of petitioner,

upon petitioner's compliance with the above provision and submission of a proposed order and judgment, to be electronically filed along with the additional submissions outlined herein; and it is further

ORDERED that motion sequence 004 is denied.

<u>1/21/2022</u> DATE	 WILLIAM PERRY, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/>		<input type="checkbox"/>	