

**Jewish Press, Inc. v Metropolitan Transp. Auth. of  
N.Y.**

2022 NY Slip Op 31063(U)

April 4, 2022

Supreme Court, New York County

Docket Number: Index No. 453667/2021

Judge: Carol R. Edmead

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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. CAROL EDMEAD PART 35**

*Justice*

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THE JEWISH PRES, INC.

Petitioner,

- v -

METROPOLITAN TRANSPORTATION AUTHORITY OF  
NEW YORK,

Respondent.

-----X

INDEX NO. 453667/2021

MOTION DATE 02/02/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27 were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

ORDERED AND ADJUDGED that the motion, pursuant to CPLR 3211 (a) (5), of the respondent Metropolitan Transportation Authority to dismiss this proceeding filed in the Supreme Court, Kings County (NYSCEF doc No. 11) is granted solely to the extent that the portion of the petition that alleges that petitioner The Jewish Press is entitled to a hearing pursuant to CPLR 409 & 410 is denied and petitioner's request for that relief is dismissed, but otherwise denied; and it is further

ORDERED AND ADJUDGED that the motion, pursuant to CPLR 3211 (a) (1), of the respondent Metropolitan Transportation Authority to dismiss the petition as amended (Motion Seq. 002) is denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that respondent Metropolitan Transit Authority shall file its opposition to the remaining elements of the petition (Motion Seq. 001) within 30 days, and petitioner shall file a

reply 10 days thereafter, at which point Motion Seq. 001 shall be deemed fully submitted and resolved by written decision; and it is further

ORDERED that counsel for petitioner shall, within 10 days, serve a copy of this order, along with notice of entry, on all parties.

#### MEMORANDUM DECISION

In this Article 78 proceeding, petitioner The Jewish Press, Inc. (TJP) seeks to compel the respondent Metropolitan Transportation Authority (MTA) to comply with a request for documents pursuant to the Freedom of Information Law (“FOIL”; a/k/a Public Officers Law [POL] § 84 *et seq.*) (Motion Seq. 001).

Respondent MTA moves to dismiss TJP’s petition (NYSCEF doc No. 11). The MTA also moves separately to dismiss an amended petition that TJP sought to serve and file without first obtaining leave of the court (Motion Seq. 002).

#### FACTS

On July 15, 2019, TJP submitted a FOIL request of the MTA for “any records associated with ads that have been rejected over the last 10 years . . . [i]ncluding but not limited to correspondence and copies of the actual ad[s].” *See* verified petition, ¶ 8; exhibit 1. At that time, both the courts and other government offices had severely restricted their operations as a result of the Covid-19 national pandemic. The email correspondence that TJP annexed to its petition shows that it made numerous inquiries about the FOIL request during the pandemic, and that the

MTA responded with several requests for additional time to finalize its production.<sup>1</sup> *Id.*, exhibit 1. The MTA's FOIL Team eventually produced a number of redacted documents electronically via email hyperlink on April 20, 2021 under the subject heading "rejected advertisements." *Id.*, exhibit 1. In a letter dated April 27, 2021, TJP requested an administrative appeal of what it termed the MTA's "denial" of its FOIL request on the grounds that: 1) the agency's reliance on the intra/inter agency exemption and/or attorney client privilege in making the redactions was "misplaced"; and 2) five cited articles in the New York Post indicate that "the documents we received were not complete." *Id.*, exhibit 2. On May 20, 2021, the MTA's Deputy General Counsel issued a decision disposing of TJP's administrative appeal that upheld the MTA FOIL Team's redactions for the reasons stated in the April 20, 2021 production, and further found as follows:

"Additionally, you assert in your appeal letter that, 'based on various legal filings and news reports it seems like the documents we received were not complete,' followed by five website links to New York Post articles purported to be examples showing that the MTA FOIL Team's production did not include records regarding these issues. While I am informed that the MTA FOIL Team performed a diligent search and, as stated above, properly withheld records under FOIL, for this specific portion of your appeal I am remanding this issue to the MTA FOIL Team so that the MTA FOIL Team can conduct an additional search for any relevant records related to the articles linked-to by the appellant, and that if any such records are found, and not subject to a FOIL exemption, they should be produced with appropriate redactions within 30 business days of the date of this letter. If no such producible records are found as a result of this additional diligent search, then the MTA FOIL Team should provide a certification regarding the diligent search.

"Your appeal is therefore partially denied and partially granted, and this FOIL appeal will now be closed."

*Id.*, exhibit 6. The MTA then requested an additional 20 days to produce the last material and eventually did so electronically on July 16, 2021. *Id.*, exhibit 4. The final production: 1) stated that a diligent search did not yield any responsive documents in connection with three of the

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<sup>1</sup> One email exchange indicates that TJP purportedly submitted a "constructive denial appeal" to the MTA on September 24, 2019 which it evidently abandoned by acceding to the MTA's request for more time to conduct its records search. *See* verified petition, exhibit 1.

New York Post articles; 2) turned over certain documents that were referenced in the fourth New York post article; and 3) found that the fifth New York Post article was inapposite since it did not reference any MTA advertising. *Id.*, exhibit 4.

TJP commenced this Article 78 proceeding to challenge the MTA's May 20, 2021 final FOIL decision on September 17, 2021 in the Supreme Court, Kings County (Motion Seq. 001). *See* verified petition, RJI. Rather than file an answer, the MTA submitted a motion to dismiss TJP's petition on October 22, 2021. *See* notice of motion (NYSCEF doc No. 11).

On October 25, 2021, the parties stipulated to transfer the venue of this proceeding to New York County (NYSCEF doc No. 14). On or about January 5, 2022, TJP filed an amended notice of petition. *See* NYSCEF Document Number 22. On January 20, 2022, the MTA filed a motion to dismiss it on the ground that TJP had not sought leave of the court to serve and file it (Motion Seq. 002).

The MTA's first motion to dismiss was not formally re-filed in New York County after this matter was transferred. Therefore, the Court addresses the arguments under the MTA's first motion in this instant decision resolving Motion Seq. 002.

#### DISCUSSION

Pursuant to the FOIL, government records are presumptively available to the public unless they are statutorily exempted and/or privileged under POL § 87 (2). *See e.g., Matter of New York Times Co. v City of New York Off. of the Mayor*, 194 AD3d 157, 163 (1<sup>st</sup> Dept 2021); *Matter of Rauh v de Blasio*, 161 AD3d 120, 125 (1<sup>st</sup> Dept 2018). TJP's petition alleges that the MTA's redactions to its April 20, 2021 production were not justified by any of the statute's exemptions and/or privileges. *See* verified petition, ¶¶ 46-55. The MTA's motion responds that

the court need not consider TJP's arguments because its petition was untimely. *See* respondent's mem of law at 5-8. After reviewing the documentary evidence, however, the court disagrees.

Article 78 proceedings are governed by a four-month statute of limitations which begins to run "after the determination to be reviewed becomes final and binding upon the petitioner . . . or after the respondent [agency's] refusal, upon the demand of the petitioner . . . to perform its duty." CPLR 217 (1); *see also Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 (2005). Here, the MTA's May 20, 2021 decision was clearly a "final and binding" determination which specifically "closed" TJP's administrative FOIL appeal. *See* verified petition, exhibit 6. TJP commenced this proceeding on September 17, 2021; i.e., 120 days thereafter - the final day permitted by the four-month limitations period set forth in CPLR 217 (1). *Id.*, RJL. The MTA's assertion that its April 20, 2021 production contained the agency's "final and binding" decision on TJP's FOIL request is belied by the text of the email itself, which clearly states that:

*"If you wish to file an appeal regarding this determination, you may do so within thirty (30) days from this correspondence by sending a written appeal to:*

*"Chief Safety Officer, Patrick Warren,*

*"MTA Headquarters, 2 Broadway,*

*"New York, NY 10004"*

*Id.*, exhibit 1 (emphasis added). Therefore, the court rejects the MTA's timeliness argument as unfounded, and turns to the allegations in the petition.

The Court of Appeals recently reiterated the rules that:

*"On a motion to dismiss a complaint pursuant to CPLR 3211, we must liberally construe the pleading and "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Leon v Martinez, 84 NY2d 83, 87-88 [1994]; Connaughton v Chipotle Mexican Grill, Inc., 29 NY3d 137, 141 [2017]). When . . . a defendant moves for dismissal of a cause of action under CPLR 3211 (a) (1), their documentary evidence must "utterly refute[ ] the plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]). Dismissal under CPLR 3211 (a) (7) "is*

warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery’ (*Connaughton*, 29 NY3d at 142).” *Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 37 NY3d 169, 175 (2021). Here, TJP’s Article 78 petition claims that the MTA’s FOIL production was inadequate because it: 1) improperly applied the “inter- and intra-agency” exemption set forth in POL § 87 (2) (g) (i-iv); 2) improperly relied on the privilege for “attorney-client communications” that is set forth in POL § 87 (2) (a); and 3) independent evidence demonstrates that further responsive documents exist which the MTA did not produce, and TJP is therefore entitled to a hearing on that issue. *See* verified petition, ¶¶ 46-55. The MTA moves to dismiss these claims on several grounds. *See* respondent’s mem of law at 8-10; respondent’s reply mem at 2-4. The court will consider each allegation in turn.

With respect to the “inter- and intra-agency” exemption, TJP notes that POL § 87 (2) (g) allows an agency to deny access to records (or portions thereof) that:

“(g) are inter-agency or intra-agency materials which are not:

“i. statistical or factual tabulations or data;

“ii. instructions to staff that affect the public;

“iii. final agency policy or determinations; [or]

“iv. external audits, including but not limited to audits performed by the comptroller and the federal government; . . .”

POL § 87. TJP’s petition asserts that the MTA improperly redacted its FOIL response without explaining how (or if) the redactions involved any of the foregoing types of statutorily exempt material. *See* verified petition, ¶ 50; petitioner’s mem of law at 8-11. The MTA does not deny that it failed to provide any individual explanations for its redactions, but instead asserts that “[t]o the extent that [TJP] is contesting the individual redactions . . ., such an argument is inappropriate in response to a motion to dismiss,” and “if this Court denies the motion . . ., the MTA will defend its redactions on substantive grounds in its response to the Petition.” *See* respondent’s reply mem at 2-3. This reply essentially constitutes an admission that the MTA

failed to raise any argument to support its motion to dismiss this portion of the petition. Further, regardless of the MTA's admission, the court finds that TJP's petition has adequately pled that the MTA violated the FOIL by improperly applying the "inter- and intra-agency" disclosure exemption set forth in POL § 87 (2) (g). Therefore, the court denies so much of the MTA's motion as seeks to dismiss the portion of TJP's petition that asserts a violation of that statute.<sup>2</sup>

TJP next notes that POL § 87 (2) (a) and CPLR 4503 (a) together recognize that materials which contain "attorney-client communications" are privileged against FOIL disclosure. *See* petitioner's mem of law at 11-12. Its petition alleges that the MTA improperly asserted this privilege to justify some of its redactions without explaining which redacted material it applied to. *See* verified petition, ¶ 50. The court notes that the MTA's moving and reply papers are devoid of any discussion (or mention) of the "attorney-client communications" privilege whatsoever. This unexplained omission is fatal to the MTA's motion to dismiss the portion of TJP's petition that asserts a violation of POL § 87 (2) (a). Therefore, the court denies so much of the MTA's motion as seeks to dismiss the portion of the petition alleging a violation of that statute.

TJP's third allegation<sup>3</sup> is that independent evidence indicates that further responsive documents exist which the MTA did not produce, and that a hearing on this issue is therefore

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<sup>2</sup> As a side issue, TJP also asserts that any "redactions related to communications between the MTA and [its outside consultant] . . . are not exempt because they are not deliberative in nature, and [the outside consultant] is not a governmental agency that would be subject to the intra agency exemption." *See* petitioner's mem of law (motion sequence number 001) at 11. The MTA responds that, pursuant to the Appellate Division, First Department holding in *Matter of Rauh v de Blasio* (161 AD3d 120 ), communications between a government agency and an outside consultant it retains are potentially covered by the inter- or intra' agency exemption. *See* respondent's reply mem (motion sequence number 001) at 2-3. However, this dispute over a point of law does not constitute an argument by the MTA that any of its redactions were justified by POL § 87 (2) (g). Instead, it is non-dispositive and the court declines to pursue it.

<sup>3</sup> The court notes that TJP did not raise any argument to support this allegation in its original memorandum of law, and only did so in its opposition papers. *See* petitioner's mem of law in opposition (motion sequence number 001) at 5-6 (pages not numbered). This was improper. *See e.g. Alrobaia v Park Lane Mosholu Corp.*, 74 AD3d 403 (1<sup>st</sup> Dept 2010). The court also notes that the petition's prayer for relief did not include a request for a hearing on the existence of possibly undisclosed responsive documents. *See* verified petition at 9-10 (pages not numbered).

required by CPLR 409 & 410. *See* petitioner’s mem of law in opposition at 5-6 (pages not numbered). TJP’s FOIL appeal specifically identified five articles published in the New York Post between 2014 and 2019 as the sources of that independent evidence. *See* verified petition, exhibit 2. The MTA argues that the “diligent search” that it conducted in connection with its May 20, 2021 final decision was a legally adequate response which rendered TJP’s document demand moot. *See* respondent’s reply mem at 3-4. The court finds that both parties’ arguments are based on oversimplified interpretations of the law.

New York State law recognizes that a petitioner’s “unsupported speculation” that undisclosed documents may exist is insufficient to support a challenge to the failure to release information in the face of an agency’s contrary certification. *See e.g., New York Civ. Liberties Union v Suffolk County Police Dept.*, 67 Misc 3d 1222(A), 2020 NY Slip Op 50608(U), \*19 (Sup Ct, Suffolk County 2020), citing *Matter of Corbin v Ward*, 160 AD2d 596 (1<sup>st</sup> Dept 1990). However, settled appellate precedent also holds that if a FOIL petitioner “can ‘articulate a demonstrable factual basis to support [the] contention that the requested documents existed and were within the [agency’s] control,’” a reviewing court should hold a hearing on the sufficiency of the agency’s response. *See Matter of Oddone v Suffolk County Police Dept.*, 96 AD3d 758, 761 (2d Dept 2012), quoting *Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 275 (1996). Here, TJP’s April 27, 2021 FOIL appeal letter “articulated a factual basis” to support its allegation that the MTA had failed to disclose all responsive material relating to rejected ads by referring to five New York Post articles which mentioned certain rejected ads that were not

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However, the body of the petition did mention certain New York Post articles that purportedly indicated the existence of potentially undisclosed responsive FOIL material. *Id.*, ¶¶ 39-45. Because the law requires a court to liberally construe a petition and to accept all of the facts alleged therein as true (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 37 NY3d at 175), the court believes that it must consider TJP’s third allegation, even though it was improperly raised.

accounted for in the MTA's April 20, 2021 FOIL response. *See* verified petition, exhibit 2.

However, the MTA Deputy General Counsel's May 20, 2021 decision remanded the issue of consideration of those articles to the MTA's Foil Team for further review, and the FOIL Team's July 16, 2021 production: 1) stated that a further diligent search did not yield any responsive documents in connection with three of the New York Post articles; 2) turned over certain documents that were referenced in the fourth New York post article; and 3) found that the fifth New York Post article was inapposite since it did not refer to any MTA advertising. *Id.*, exhibits 4, 6. This second diligent search and partial production was a sufficient response to render moot the concerns that TJP articulated based on the New York Post articles. *See e.g. Matter of Edmond v Suffolk County*, 197 AD3d 1297, 1298-1299 (2d Dept 2021), quoting *Matter of DeFreitas v New York State Police Crime Lab*, 141 AD3d 1043, 1044 (3d Dept 2016) ("Where a petitioner receives an adequate response to a FOIL request during the pendency of his or her CPLR article 78 proceeding, the proceeding should be dismissed as moot because a determination will not affect the rights of the parties"). The MTA's responses also constitute documentary evidence that disproves the petition's allegation that additional undisclosed responsive material may exist. Because TJP's third allegation is thus "unsupported speculation" without an articulated factual basis, the law does not entitle TJP to a hearing on the sufficiency of the MTA's FOIL response. *Matter of Corbin v Ward*, 160 AD2d at 596. Consequently, TJP is not entitled to the relief it seeks as a matter of law. Therefore, the court grants so much of the MTA's motion as requests the dismissal of TJP's assertion that it is entitled to a hearing on the issue of undisclosed but potentially responsive FOIL documents.<sup>4</sup>

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<sup>4</sup> The court makes this grant even though TJP's petition did *not* specifically include such a request in the prayer for relief and TJP only asserted it in its opposition papers. *See* verified petition at 11-12; petitioner's mem of law in opposition (motion sequence number 001) at 5-6 (pages not numbered).

The final argument in TJP's memorandum of law asserts that it is entitled to attorney's fees and costs. *See* petitioner's mem of law at 12-14. TJP correctly notes that POL § 89 (4) (c) (ii) provides for mandatory awards of attorney's fees and court costs in cases where: (a) a petitioner has "substantially prevailed" on a FOIL request; and (b) the court finds that the respondent agency "had no reasonable basis for denying access" to the requested records. *See e.g., Matter of Jaskaran v City of New York*, 200 AD3d 418 (1<sup>st</sup> Dept 2021). However, the two applications now before the court only involve pre-answer motions. As the court has not yet adjudicated the merits of TJP's petition, TJP has not yet made either of the showings required by POL § 89 (4) (c) (ii). Therefore, the court declines to consider TJP's attorney's fees argument since it is clearly premature.

Motion Seq. 002 concerns what the MTA describes as the "amended pleading" that TJP filed on or about January 5, 2022. *See* amended verified petition. The MTA asserts that this "amended pleading" should be dismissed without consideration because TJP did not obtain leave from the court before filing or serving it. *See* respondent's mem of law (motion sequence number 002) at 1-2. The MTA cites the portion of CPLR 7804 (d) which provides that, in an Article 78 proceeding, "[t]he court may permit such other pleadings as are authorized in an action upon such terms as it may specify." Recent Appellate Division case law interpreting this provision holds that "it [is] incumbent upon [a] petitioner to obtain the court's permission to file the amended petition and, having failed to do so, Supreme Court [is] not bound to consider it." *Matter of Hendricks v Annucci*, 179 AD3d 1232, 1234 (3d Dept 2020). Here, however, TJP avers that that "the petition was never amended," and notes that the document it filed on January 5, 2022 was simply an "amended notice of petition" which it was procedurally obligated to file in this court after the parties stipulated to transfer this matter from Kings County to New York

County. *See* NYSCEF Document Number 22; petitioner’s mem of law in opposition (motion sequence number 002) at 2. The MTA does not contest this allegation in its reply papers. The court finds that the “amended pleading” the MTA complains is clearly *not* an improperly amended or new petition, and therefore concludes that the MTA’s argument is inapposite.<sup>5</sup> Therefore, the court denies motion sequence number 002 as unfounded.

#### DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED AND ADJUDGED that the motion, pursuant to CPLR 3211 (a) (5), of the respondent Metropolitan Transportation Authority to dismiss this proceeding filed in the Supreme Court, Kings County (NYSCEF doc No. 11) is granted solely to the extent that the portion of the petition that alleges that petitioner The Jewish Press is entitled to a hearing pursuant to CPLR 409 & 410 is denied and petitioner’s request for that relief is dismissed, but otherwise denied; and it is further

ORDERED AND ADJUDGED that the motion, pursuant to CPLR 3211 (a) (1), of the respondent Metropolitan Transportation Authority to dismiss the petition as amended (Motion Seq. 002) is denied; and it is further

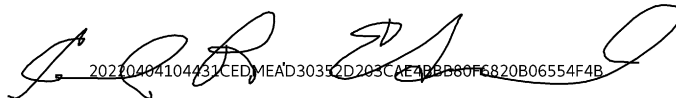
ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that respondent Metropolitan Transit Authority shall file its opposition to the remaining elements of the petition (Motion Seq. 001) within 30 days, and petitioner shall file a reply 10 days thereafter, at which point Motion Seq. 001 shall be deemed fully submitted and resolved by written decision; and it is further

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<sup>5</sup> The court also notes that the MTA appears to have abandoned its argument in its reply papers.

ORDERED that counsel for petitioner shall, within 10 days, serve a copy of this order, along with notice of entry, on all parties.

  
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CAROL EDMED, J.S.C.

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APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	
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