

Howard v New York City Police Dept.

2023 NY Slip Op 33435(U)

October 4, 2023

Supreme Court, New York County

Docket Number: Index No. 156621/2022

Judge: Judy H. Kim

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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. JUDY H. KIM PART 05RCP

Justice

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MICHAEL HOWARD,

Petitioner,

- v -

THE NEW YORK CITY POLICE DEPARTMENT,

Respondent.

-----X

INDEX NO. 156621/2022

MOTION DATE 12/20/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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, 24, 25, 26, 27, 28, 29, 30, 31

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

Petitioner alleges that on the evening of March 16, 2022, he was in a Walgreens pharmacy in Oakland Gardens, New York and told a Walgreens employee, Rosetta Hardy, that her multicolor hairdo made her look like “Bozo the Clown” (NYSCEF Doc. No. 1 [Petition at ¶¶4, 10). Hardy responded by calling 911, “to complain that petitioner told her that she looked like Bozo the Clown and alleged that he was harassing her and her grandmother” (*Id.* at ¶12). New York City Police Department (“NYPD”) officers subsequently arrived and, after investigating, took no further action (*Id.* at ¶16).

On or about on April 7, 2022, petitioner submitted a request, pursuant to New York State’s Freedom of Information Law (Public Officers Law §84 et seq, commonly referred to as “FOIL”) for the audio of the 911 call summoning the police to the Walgreens. In response, the NYPD released a redacted SPRINT report but did not produce the 911 call audio. Petitioner submitted another FOIL request for audio of the 911 call on May 26, 2022, which request was also denied.

Petitioner's appeals of these denials were denied on the basis that "absent a notarized authorization from the 911 caller, the personally identifying information and statements made on the 911 call responsive to [petitioner's] request are exempt [because] disclosure would constitute an unwarranted invasion of personal privacy and could endanger the life or safety of the caller" (NYSCEF Doc. No. 21).

On or about August 9, 2022, petitioner commenced the instant special proceeding, seeking an order directing the production of an unredacted copy of the SPRINT report and copy of 911 call audio. On April 12, 2023, he commenced another special proceeding, under index number 100332/2023, seeking the body-worn camera footage of the officers present at the Walgreens on March 16, 2022 and his return to that Walgreens on July 13, 2022. On May 8, 2023, he commenced a third special proceeding, under index number 100416/2023, to compel the same disclosure sought herein. These actions were consolidated for discovery and trial by order of the Honorable Adam Silvera dated May 15, 2023 (NYSCEF Doc. No. 32).

Respondent now cross-moves, pursuant to CPLR §§7804(f), 3211(a)(2), and 3211(a)(7), to dismiss these proceedings on the grounds that they are moot, insofar as a diligent records search has been completed and all disclosable and responsive records located have been provided. Specifically, respondent argues that the SPRINT Report was properly redacted and the 911 call properly withheld pursuant to Public Officers Law ("POL") §§87(2)(b) and 89(2)(b), as the caller's privacy interest outweighed the public interest in this material and, additionally, pursuant to POL §82(2)(f), as the production of same would endanger the caller's life and safety.

In support of its cross-motion, respondent submits a *New York Post* article quoting Hardy as stating that petitioner had been visiting that Walgreens since 2018 and often had "outbursts" because he was "not in his right mind" and has been banned from the store (NYSCEF Doc. No.

14). Respondent also submits two documents petitioner mailed to the NYPD since he began making FOIL requests: a picture of a clown, with the names of certain Walgreens employees superimposed over that image along with text reading “BOLO [be on the lookout] for Bozo - last seen Walgreens - do not approach may be very dangerous” (NYSCEF Doc. No. 24) and a handwritten letter petitioner sent to the NYPD stating “I KNOW ROSETTA MORE THAN ROSETTA KNOWS ABOUT ROSETTA. IN THIS PAST I CALLED HER MICKEY MOUSE. IN THE PAST I CALLED HER RICK JAMES, IT WAS ALWAYS HA HA HA” (NYSCEF Doc. No. 13). Respondent adds that “[t]he 911 call audio reported that Petitioner had been harassing female employees in the store for at least a one-year period with various unpleasant outbursts while avoiding making comments to the male Walgreens associate” (NYSCEF Doc. No. 12 [Czarnecki Affirm. at ¶36]).

Respondent argues that these submissions establish a contentious history between petitioner and the Walgreens’ employees and, as such, the release of the 911 call audio would be offensive and objectionable to the 911 caller because it would provide petitioner more grounds to harass and ridicule these Walgreens’ employees. Respondent also argues that this history establishes that the release of the unredacted SPRINT report and 911 call audio to petitioner could endanger the life and safety of the Walgreens employees and is therefore barred under POL §87(2)(f), which prohibits disclosure that could endanger an individual’s life or safety.

Petitioner opposes the motion, arguing that the material submitted by respondent to establish the contentious relationship between petitioner and the Walgreens’ employees—the 911 caller’s statements and Hardy’s statements to the New York Post—is hearsay and therefore may not be considered by this Court. He adds that there are no allegations in the record that petitioner

has tried to harm any Walgreens employee, including Hardy, and that the category of disclosure sought has been approved, in far more extreme circumstances, with limited redactions.

DISCUSSION

Respondent has demonstrated that, as a matter of law, the petition should be dismissed as appropriately redacted and withheld based upon POL §§87(2)(b) and 89(2)(b).

POL §87(2)(b) provides that each agency of New York City “shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that: if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article.” POL §89(2)(b), in turn, provides that an unwarranted invasion of personal privacy includes, but shall not be limited to:

- (i) disclosure of employment, medical or credit histories or personal references of applicants for employment;
- (ii) disclosure of items involving the medical or personal records of a client or patient in a medical facility;
- (iii) sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes;
- (iv) disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it;
- (v) disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency;
- (vi) information of a personal nature contained in a workers’ compensation record, except as provided by section one hundred ten-a of the workers’ compensation law; or
- (vi) disclosure of electronic contact information, such as an email address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law.

These categories are not exhaustive, however, and where, as here, they do not apply, the Court must go on to “decide whether any invasion of privacy ... is unwarranted by balancing the privacy interests at stake against the public interest in [the] disclosure of the information” (Thomas v New York City Dept. of Educ., 103 AD3d 495, 497 [1st Dept 2013] [internal citations and quotations omitted]). “What constitutes an unwarranted invasion of personal privacy is measured by what would be offensive and objectionable to a reasonable [person] of ordinary sensibilities” (Id. at 497 [1st Dept 2013] [internal citations and quotations omitted]).

NYPD asserts that a reasonable person engaged in year-long ongoing dispute with an individual would find it offensive and objectionable for that individual receive an audio copy of her 911 call. The Court agrees. Although petitioner correctly notes that the New York Post office and 911 call relied on by the NYPD are hearsay, the facts alleged in the petition and petitioner’s own communications to the NYPD, i.e., his mailing of the “Bozo the Clown” flyer and his statement that he had previously referred to Hardy as “Mickey Mouse” and “Rick James”—two descriptions not commonly understood to be compliments to an adult woman—demonstrate that he has a contentious relationship with the Walgreens employees and Hardy in particular. Moreover, subsequent petitions filed by petitioner, consolidated with this action for discovery and trial, demonstrate that even after the events at issue here, petitioner again attempted to enter the subject Walgreens on July 13, 2022, and that police were also called on that occasion. These circumstances give rise to the clear inference that a promise of confidentiality was assumed as to the contents of the 911 call and “information imparted in confidence to the police, and in reliance on the expectation that such confidentiality will be respected” is exempt from the disclosure sought herein (See e.g., Johnson v New York City Police Dept., 257 AD2d 343, 347-48 [1st Dept 1999]).

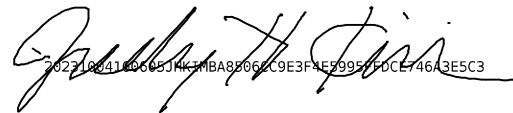
In light of the foregoing, it is

ORDERED and **ADJUDGED** that respondent’s cross-motion is granted and the petition is denied and dismissed; and it is further

ORDERED that within ten days of the date of this decision and order counsel for the respondent shall serve a copy of this decision and order, with notice of entry, upon petitioner as well as the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to enter judgment accordingly; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E filing” page on this Court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.



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HON. JUDY H. KIM, J.S.C.

10/4/2023

DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: