

**Law Off. of Cyrus Joubin, Esq. v  
Manhattan Dist. Attorney's Off.**

2024 NY Slip Op 34103(U)

November 18, 2024

Supreme Court, New York County

Docket Number: Index No. 154796/2024

Judge: Lynn R. Kotler

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 08

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LAW OFFICE OF CYRUS JOUBIN, ESQ.	INDEX NO. <u>154796/2024</u>
Petitioner,	MOTION DATE <u>05/23/2024</u>
- v -	MOTION SEQ. NO. <u>001</u>
MANHATTAN DISTRICT ATTORNEY'S OFFICE,	
Respondent.	<b>DECISION + ORDER ON MOTION</b>
-----X	

HON. LYNN R. KOTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 12 were read on this motion to/for ARTICLE 78 (BODY OR OFFICER)

Upon the foregoing documents, this petition is decided as follows. Law Office of Cyrus Joubin, ESQ (“Petitioner”) moves for an order pursuant to CPLR 78 and New York Public Officers Law Article 6 §§ 84-90 (“Freedom of Information Law” or “FOIL”) to compel the Manhattan DA to produce a redacted copy of a DA Datasheet, compel the Manhattan DA to disclose electronic documents without charging a copying fee and award petitioner attorney’s fees and costs. For the reasons that follow, the petition is denied.

In its verified petition, Petitioner claims that on January 17, 2024, he served a FOIL request on the Manhattan DA, which was responded to by a Records Access Officer’s (“RAO”) determination letter granting access to 27 pages of records upon the receipt of a check or money order for \$6.75 (\$0.25 per page) in copying fees and denying access to the DA Datasheet, asserting it was protected as attorney work product. On May 9, 2024, Petitioner appealed the RAO decision, which was denied on May 21, 2024, affirming that the fee was authorized under POL §87(1)(b)(iii) and that the DA Datasheet was exempt from FOIL under both attorney work

product privilege and as intra-agency correspondence. Respondent has answered the petition and opposes the relief sought.

The court will first consider the parties' arguments about the copying fee. Petitioner argues that respondent improperly sought this fee because "[c]harging a photocopying fee for the creation of electronic / digital files unquestionably violates FOIL's fee provisions as laid out in POL §§ 87(1)(b)(iii) and 87(1)(c)."

POL § 87(1)(b)(iii)(1) states that "fees for paper copies of records shall not exceed twenty-five cents per photocopy." It further states that an agency shall not charge a fee "where an identical record has been prepared for a previous request within the past 6 months and an electronic copy is available." Petitioner argues that provision was intended to apply only to physical copies made and not electronic copies. POL § 87(1)(c) sets out costs of reproducing a record which an agency may appropriately include but is not used in the \$0.25 per page fee sought by the Manhattan DA and need not be considered.

Manhattan DA contends that POL § 87(1)(b)(iii) expressly authorizes a \$0.25 fee for reproducing physical copies of documents in electronic form when they have not been reproduced for a previous request in the past 6 months and that requiring the respondent to pay the fee before producing the records is appropriate (*See Matter of Fenstermaker v. Edgemont Union Free School Dist.*, 48 AD3d 564, 565 [2d Dept 2008]). The court agrees with the Manhattan DA, as "charging the petitioner 25¢ for each photocopy of a paper record which is not maintained in an electronic format is expressly authorized by FOIL" (*Matter of Weslowski v Vanderhoef*, 98 AD3d 1123, 1129 [2d Dept 2012]). Therefore, that portion of the petition concerning copying fees is denied.

The remainder of the petition seeks an order directing respondent to produce the DA Datasheet in redacted form, excluding any attorney work product or intra-agency communication. Petitioner maintains that redactions are appropriate and that the document should not be shielded from production in its entirety. Petitioner in the alternative argues that the DA Datasheet is not attorney work product, but rather an aggregation of unprotected facts and evidence, and therefore is not subject to the intra-agency exception either and that even if the DA Datasheet contains attorney work product or intra agency communication, that the DA Datasheet must be released in a redacted form as required by FOIL. Previously, in an interim order dated August 26, 2024, the court directed respondent to provide the DA Datasheet to the court for *in camera* review and adjourned the petition for control to October 8, 2024. The court has reviewed the DA Datasheet and finds that it is protected attorney work product.

Petitioner in large part relies on *Matter of Schenectady County Socy. for the Prevention of Cruelty to Animals, Inc. v Mills*, which states that “an agency responding to a demand under [FOIL] may not withhold a record solely because some of the information in that record may be exempt from disclosure. Where it can do so without unreasonable difficulty, the agency must redact the record to take out the exempt information” (18 NY3d 42, 45 [2011]). Further, a “blanket exemptions for particular types of documents are inimical to FOIL’s policy of open government” (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 275 [1996] [citation omitted]). However, the Manhattan DA is not asserting that all DA Datasheets are protected, but rather that this datasheet containing attorney work product is exempted.

In their verified answer, the Manhattan DA states that this DA Datasheet contained information that intake prosecutor thought was relevant to arraignment for the arraignment prosecutor. It contained the intake prosecutor’s views on what securing order to seek and

reflected the prosecutor's thoughts and analysis constituting "mental impressions, conclusions, opinions or legal theories" and therefore qualifies as attorney work product under CPLR § 3101(c) (*See Smith v. City of New York*, 49 AD3d 400, 401 [1st Dept 2008] [finding that prosecutors "mental impressions, conclusions, opinions or legal theories" are protected as attorney work product]). After conducting an *in camera* review of the DA Datasheet, this court agrees that the DA Datasheet contains protected attorney work product in the form of opinions and legal theories of the intake prosecutor.

The Manhattan DA contends that because it contains attorney work product, the DA Datasheet is protected in its entirety under POL § 87(2)(a) which states that any records that "are specifically exempted from disclosure by state or federal statute" are protected from disclosure under FOIL. CPLR § 3101 provides statutory exemption for attorney work product from production. The Manhattan DA cites *Matter of Stengel v Vance*, which affirmed orders denying FOIL requests on records that contained attorney work product (198 AD3d 434 [1st Dept 2021]). "FOIL's statutory scheme makes clear that redacted disclosure cannot be compelled where an agency has met its burden of demonstrating that records are exempt from disclosure under POL § 87(2)(a)" (*Matter of New York Civ. Liberties Union v New York City Police Dept.*, 32 NY3d 556, 568 [2018]). A record consisting of attorney work product "is specifically protected from disclosure by CPLR 3101(c)" (*Stengel*, 198 AD3d at 434).

*Stengel v. Vance, Jr.*, is distinguishable from the current case, because although a redacted DA Datasheet was provided, the District Attorney was not obligated to do so under FOIL (2020 WL 2095753 at \*2 [Sup Ct, NY County 2020]). FOIL allows for the compelled production of records that would constitute an unwarranted invasion of personal privacy if any identifying details are deleted or redacted, but "FOIL does not [] contain a similar redaction

provision applicable to Public Officers Law § 87(2)(a)” (*Matter of New York Civ. Liberties Union*, 32 NY3d at 568; *see also Matter of Judicial Watch, Inc. v City of New York*, 178 AD3d 540, 541 [1st Dept 2019] [“Redactions to records sought under FOIL are available only under the personal privacy exemption”]). Because attorney work product is exempted from disclosure under CPLR § 3101(c), the court cannot compel the production of a redacted version of the DA Datasheet (POL § 87(2)(a); *Matter of Stengel v Vance*, 192 AD3d 571 [1st Dept 2021]). For the reasons above, the motion to compel production of a redacted DA Datasheet is denied.

Fees and other Costs

Petitioner is not entitled to attorney’s fees and other litigation costs, as POL § 89 provides an award for such fees “where the petitioner has substantially prevailed in the FOIL proceeding and the agency . . . lacked a reasonable basis for denying access to the requested records” (*Matter of Madeiros v. New York State Educ. Dep’t*, 30 NY3d 67, 78 [2017] [internal quotation marks omitted]). Manhattan DA had a reasonable basis to deny access to the datasheet and are entitled to copying fees for the documents, therefore the statutory requirements for fees and costs have not been met.

**Conclusion**

Based on the foregoing, it is hereby

ADJUDGED that the petition is denied and this proceeding is dismissed.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

11/18/2024  
DATE

  
LYNN R. KOTLER, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART

OTHER