

Index No. 154060/2017 IAS Part 17 (Hagler, J.)

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

CENTER ON PRIVACY & TECHNOLOGY,

Petitioner,

- against -

NEW YORK CITY POLICE DEPARTMENT,

Respondent.

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

**AMENDED MEMORANDUM OF LAW IN
SUPPORT OF RESPONDENT'S MOTION FOR A
PROTECTIVE ORDER and INTERIM RELIEF**

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PRELIMINARY STATEMENT

On December 11, 2018, Respondent, the New York City Police Department (“NYPD”), produced to Respondent 173 documents consisting of nearly 2900 pages responsive to Petitioner’s request under the Freedom of Information Law (“FOIL”). Shortly thereafter, however, NYPD’s counsel discovered that eight of these documents contain material that is exempt from disclosure and that NYPD had intended to redact, but which had been inadvertently disclosed without the redactions. Although NYPD has repeatedly requested that Petitioner destroy these specific records – to be replaced by properly redacted copies Petitioner has refused, except for those documents that contain personally identifying information (SS#s and faces of non-NYPD personnel).

This brief¹ is submitted on behalf of NYPD in support of its motion for a protective order directing Petitioner to immediately (i) cease further review, use and/or dissemination of the eight documents inadvertently disclosed to it by NYPD on December 11, 2018 or any information obtained therefrom, (ii) destroy or return these records, including any copies and notes with respect thereto, and provide written confirmation of such destruction to NYPD, and (iii) notify any third-party to whom Petitioner sent such documents to destroy them and to provide written assurance thereof.

Additionally, in order to preserve the intended exemptions, NYPD also seeks interim relief prohibiting Petitioner from any further review, use and/or dissemination of these eight documents and any information obtained therefrom pending a determination of the underlying motion. Although Petitioner has largely agreed to this request, it also has

¹ This memorandum of law is intended to supersede the brief initially filed in support of NYPD’s motion for a protective order (dkt. no 129) to correct certain errors brought to my attention by Petitioner’s counsel after that brief was filed.

specifically expressed its intent to use the inadvertently disclosed records in connection with the Court's in camera review concerning these records. Thus, the requested interim relief will enlarge Petitioner's agreement to cover any in camera proceeding, and make Petitioner's voluntary commitments legally binding

STATEMENT OF FACTS

The facts on which this motion is based are set forth fully in the accompanying affidavit of Jeffrey S. Dantowitz, dated January 10, 2019 ("Dantowitz Aff."). A brief summary follows.

For many months, NYPD has been engaged in the process of locating and reviewing records responsive to Petitioner's FOIL request. The process by which those records are reviewed for responsiveness and exemptions involves attorneys from the NYPD and Office of the Corporation Counsel, each using a third-party vendor's software, Relativity. This software allows individuals to review documents, identify potential redactions, make comments, and propose and make redactions electronically.

Since earlier this year, NYPD's FOIL Litigation Supervisor has used Relativity to review thousands of records that were potentially responsive to Petitioner's FOIL Request, to determine which documents were actually responsive and to determine if any of the responsive records contained exempt material. She then "tagged" each of the responsive records inter alia to identify the applicable exemptions, if any, and to propose suggest redactions. Where she identified documents as duplicative of those already produced, she noted this in the "comments" section, and did not identify the specific redactions previously made, as it was understood that such documents would not be re-produced. Once NYPD's review was completed, the assigned attorney from the Office of the Corporation Counsel reviewed the proposed redactions and met with the NYPD attorney to resolve any areas of disagreement. The proposed redactions were

then implemented and all the responsive records were uploaded to a CD. NYPD produced that CD, containing nearly 2900 pages of responsive records, on December 11, 2018. Faced with the urgency of an impending deadline, however, the attorney from the Office of the Corporation Counsel did not conduct a page-by-page review of the documents uploaded to the CD at that time, but only conducted a spot-check to confirm that redactions had been made.

Subsequently, however, in preparing an exemption log with respect to the documents included on the CD, the attorney from Office of the Corporation Counsel discovered that certain pages did not contain the intended redactions and were mistakenly produced. On December 31, 2018, upon completing his review and preparation of the exemption log, he sent Petitioner's counsel an email stating, *inter alia*:

Please note that several documents were inadvertently disclosed or disclosed with redactions mistakenly not made. These include documents bearing Bates stamp number 2048, 2078, 2517-2578, 2601, 2731-2737, 2739-2817; 3142, and 3242. The disclosure of these documents is not intended, and should not be construed or considered, as a waiver of any of any exemptions that may apply.

Accordingly, Respondents request that you immediately (i) cease further review, use and/or dissemination of these documents or any information obtained therefrom, (ii) destroy these records, including any copies, and provide written confirmation of such destruction to me, and (iii) notify any third-party to whom you sent such documents to destroy them, and to provide written assurance thereof to you.

To the extent you are aware of the disclosure of the same or similar documents, Respondents request that you notify me immediately so that Respondents can request their return or destruction.

Upon my receipt of confirmation that such records have been destroyed, I will send you replacement copies of the responsive records, properly redacted.

Despite NYPD repeating this request in subsequent emails, Petitioner has refused to destroy or return these records, except those that contain personally identifying information

(SS#s and faces of non-NYPD personnel). Rather, Petitioner insists on retaining these records and has repeatedly expressly stated its intent to use them in connection with an in camera review concerning these documents. In support of its position, Petitioner argues that (i) NYPD somehow waived its exemptions due to its inadvertent disclosure of these records, and (ii) NYPD has not provided the basis on which it asserts these records should have been redacted.

NYPD now moves for an order directing Petitioner to comply with its request, and for interim relief to prevent Petitioner from reviewing, using and/or disseminating the eight inadvertently disclosed documents or any information derived therefrom, for any reason, pending a determination of the underlying application.

As discussed more fully below, the case law makes abundantly clear that NYPD's inadvertent disclosure does not constitute a waiver of any exemptions or of the intended redactions. Moreover, having been notified of the inadvertent disclosure, Petitioner has an ethical obligation to forebear from using those records for any purpose and to destroy or return them, as requested.

POINT I

NYPD'S INADVERTENT DISCLOSURE DID NOT CONSTITUTE A WAIVER OF ANY EXEMPTIONS AND THE COURT SHOULD ISSUE THE REQUESTED PROTECTIVE ORDER TO PROTECT NYPD'S EXEMPTIONS

NYPD'S inadvertent disclosure of exempt material on December 11, 2018 does not constitute a waiver of those exemptions nor of its right to the return or destruction of the exempt records. In the context of a FOIL disclosure, it has repeatedly been held that "when documents are inadvertently disclosed, the agency's right to claim an exemption is not waived by such disclosure." Miller v. New York State Dep't of Transp., 58 A.D.3d 981 (3d Dep't), lv.

denied, 12 N.Y.3d 712 (2009). See Mitzner v. Sobol, 173 A.D.2d 1064 (3 Dep't 1991); McGraw-Edison Co. v. Williams, 133 Misc. 2d 1053, 1055 (Sup. Ct. Albany Co. 1986). Indeed, this is the case even when many months have elapsed between the inadvertent disclosure and the subsequent assertion of an exemption regarding the same documents. See Mazzone v. New York State Dep't of Transp., 95 A.D.3d 1423, 1424-25 (3d Dep't 2012).

These cases are on point and should end the matter. Indeed, it logically follows that if NYPD has not waived its exemptions, then Petitioner – the recipient of documents containing exempt, but unredacted material – should be required to destroy or return such records and be prohibited from making any use of them. In this regard, it should be noted that NYPD would re-produce the offending pages with the exempt material redacted.

Although likely inapplicable in a FOIL context because “estoppel may not be applied to preclude a . . . municipal agency from discharging its statutory responsibility,” Matter of City of New York v. City Civ. Serv. Comm'n, 60 N.Y.2d 436 (1983), the caselaw concerning waiver in a discovery context is instructive. There, the courts have held that, the inadvertent production of documents does not effectuate a waiver if (i) the producing party had no intention of producing the document; (ii) the producing party took reasonable steps to ensure that the document was not disclosed; (iii) the producing party took prompt action to rectify the inadvertent production; and (iv) the party receiving the inadvertently produced document would not suffer prejudice by having to return the document. See Oakwood Realty Corp. v. HRH Construction Corp., 51 A.D.3d 747 (2d Dep't 2008); AFA Protective Sys., Inc. v City of New York, 13 A.D.3d 564, 565 (2d Dep't 2004); New York Times Newspaper Div. of New York Times Co. v Lehrer McGovern Bovis, Inc., 300 A.D.2d 169, 172 (1st Dep't 2002). Each of these factors weighs in favor of NYPD.

First, it is clear that NYPD did not intend to produce the unredacted documents. This is particularly true given that NYPD had redacted similar (and even identical) information, in other documents produced on December 11, 2018 and earlier. In fact, some of the inadvertently disclosed records were virtually identical to other, properly-redacted documents. Additionally, NYPD took reasonable steps to protect against the disclosure of exempt material. “Reasonable steps to prevent inadvertent disclosure of documents include having a procedure in place in order to screen for privileged documents.” Warren v. Amchem Prods., Inc., 2016 N.Y. Misc. LEXIS 2713, *38 (Sup. Ct. N.Y. Co. July 14, 2016); See Manufacturers & Traders Trust Co. v. Servotronics, Inc., 132 A.D.2d 392, 399-400 (4th Dep’t 1987) (noting the “error counsel made was in inadequately screening the material before it was delivered to defense counsel. Notwithstanding that error, however, the fact that counsel undertook a screening procedure indicates that he took some precaution to avoid disclosure of privileged material.”).

Here, too, NYPD engaged in a two-step review process of records for potential exemptions -- first by NYPD counsel and then by the Office of the Corporation Counsel. Thus, NYPD took diligent steps to screen for and assert exemptions to disclosure. The only error was in the Law Department attorney not more carefully reviewing the CD before it was delivered to Petitioner’s counsel. Given NYPD’s screening procedure, the inadvertent disclosure of only 8 documents containing exempt material (out of 173 documents that were produced that day) does not support a finding of waiver. See Stinson v. City of New York, 2014 U.S. Dist. LEXIS 145612, *5-6 (S.D.N.Y. Oct. 10, 2014) (“The Court may compel a party to return inadvertently disclosed documents if it finds that the producing party made reasonable efforts to screen out privileged documents and did not intend to produce those that were produced inadvertently.”)

Additionally, NYPD's counsel promptly notified Petitioner of the error and proposed a solution by which the subject records could be replaced, as soon as his review of the CD and preparation of the exemption log was complete. Finally, it is clear that Petitioner would suffer no prejudice whatsoever were it required to return or destroy the inadvertently disclosed records, as NYPD would return properly-redacted copies of these records and Petitioner would fully retain its ability to challenge NYPD's redactions in an in camera review. Although Petitioner would no longer know what specific material was redacted, this places it in the same position as every FOIL requestor who participates in an in camera review.

NYPD's request and proposed re-production is sensible, and seeks to place the parties in the same positions they would be in had the exempt material not been inadvertently disclosed – that is, that Petitioner would be in receipt of records redacted as NYPD deems appropriate, with only NYPD (and potentially the Court, in an in camera review) knowing what material was redacted.

Petitioner's position, in contrast, turns the normal procedure on its head. Rather than initially allowing NYPD to make redactions with Petitioner challenging those redactions in an in camera review, Petitioner would have it decide the redactions in the first instance, leaving NYPD to argue that additional redactions are required – all while allowing Petitioner to see and freely use material that NYPD claims is exempt from disclosure.

It is for this reason, too, that NYPD cannot consent to Petitioner's demand that NYPD first provide Petitioner with the corrected copies before Petitioner returns or destroys the inadvertently disclosed records. Were this to be done, Petitioner would know the precise information for which NYPD claims an exemption, and also would leave it to Petitioner's decision whether or not such exemptions were appropriate. Given that Petitioner has challenged

virtually every redaction NYPD has made (and largely unsuccessfully so, given the Court's in camera review to date), it is near certainty that Petitioner will not return or destroy the inadvertently disclosed records.

Although Petitioner complains that NYPD has not specified the exemptions applicable to the material inadvertently disclosed, it need not do so here, as this is not the proceeding by which the parties are to address the propriety of the asserted exemptions. That will come if and when Petitioner chooses to challenge the asserted exemptions and the Court conducts an in camera review. Here, instead, the only things relevant to the instant application are that NYPD asserts that exempt material was inadvertently disclosed and that Petitioner should be denied access to that material. NYPD will then re-produce these records with the exempt matter redacted, together with a log describing the bases for those exemptions, and an in camera review can then follow, at which time NYPD will be required to justify its redactions.

In fact, NYPD cannot disclose the specific bases of its asserted redactions at this time because revealing the exemption applicable to specific information would undermine the protection afforded by the exemption. For example, knowing that specific information on a specific page reveals a non-routine law enforcement technique would allow a recipient to more closely review that document to determine how to evade or defeat that technique. Similarly, knowing that certain information on a document could jeopardize NYPD's ability to safeguard its information technology assets would allow a recipient to ascertain which information on that document could be used in this manner, thus weakening NYPD's protections.

Finally, as NYPD advised in one of counsel's emails, Petitioner's counsel has an ethical obligation vis-à-vis the inadvertently disclosed records. Pursuant to Rule 4.4(b) of the New York Rules of Professional Conduct, 22 N.Y.C.R.R. § 1200.35, entitled "Respect for Rights

of Third Persons,” a lawyer who receives a document that he or she “knows or reasonably should know... was inadvertently sent shall promptly notify the sender.” Further, the Association of the Bar of the City of New York, in an opinion of its Committee on Professional and Judicial Ethics, opinion number 2003-04, 2004 WL837937, at *10 (2003) has stated, “A lawyer who receives such a communication [an inadvertent communication containing confidences or secrets] should promptly notify the sender and refrain from further reading or listening to the communication and should follow the sender’s directions regarding or return of the communication.” The New York County Lawyers Association, in an opinion of its Committee on Professional Ethics, opinion number 730, 2992 WL 31962702, at *4, has expressed a similar view: “The Committee believes that a lawyer has an ethical obligation to refrain from reviewing inadvertently disclosed privileged information.”). See also ABA Formal Op 92-368. Notably, both these opinions provide that counsel in receipt of such material is obligated to notify the sender and to return or destroy it if so requested. O’Connor v. Lewis, 2013 N.Y. Misc. LEXIS 3318, * 5 (Sup. Ct. N.Y. Co. July 19, 2013). “Counsel should be aware of their obligations in these circumstances, and promptly adhere to them in order to avoid sanctions.” Galison v. Greenberg, 5 Misc. 3d 1025A, 799 N.Y.S.2d 160 (Sup Ct. N.Y. Co. 2004). See Massey v. Anand, 2012 N.Y. Misc. LEXIS 2945, 35-36 (Sup. Ct. N.Y. Co. May 10, 2012); People v. Terry, 1 Misc. 3d 475 (County Ct. Monroe Co. 2003); American Express v. Accu-Weather, Inc., 1996 U.S. Dist. LEXIS 8840 (S.D.N.Y. June 25, 1996) (sanctioning attorney for reviewing material known to be privileged).

Here, Petitioner’s counsel should have known that the inadvertently disclosed records contain exempt material, as many of these records are substantially similar to, or virtually identical to, other records that NYPD produced with redactions, including other records produced on December 11, 2018.

Petitioner's counsel weakly responds to this argument by asserting it has an ethical obligation to zealously represent Petitioner. This argument is wholly inapposite, as an attorney's obligation to a client does not give it license to ignore or run roughshod over other ethical considerations.

Based on the foregoing, NYPD's application for a protective order should be granted.

POINT II

AN INJUNCTION IS NECESSARY TO PRESERVE NYPD'S EXEMPTIONS

NYPD also seeks interim relief prohibiting Petitioner from any further review, use and/or dissemination of the eighth inadvertently disclosed documents pending a determination of the underlying motion. Such relief is required to preserve NYPD's exemptions and prevent dissemination of exempt material.

As noted above, except for records containing personally-identifying information (which specific documents the parties have not yet agreed on), Petitioner has refused to destroy or return the inadvertently disclosed material, and has specifically expressed its intent to use such records in connection with the Court's in camera review of such records. The use of such material, however, is improper in an in camera review as the only parties who ought to know the specific information for which an exemption is claimed are the Court and the disclosing party. The reason for this is obvious: the knowledge of the specific material for which an exemption is claimed defeats the exemption and makes it entirely academic. That is, the exemption is entirely moot if the receiving party already knows what the information is.

Moreover, absent interim relief, nothing prevents Petitioner from disseminating, publicizing or otherwise making any use whatsoever of the inadvertently disclosed material.

Such free use obviously undermines the protections afforded by FOIL and its exemption, which protections should be honored until such time as the Court rules on the applicability of the asserted exemptions. Although Petitioner has voluntarily agreed that it will not review, use or disseminate the inadvertently disclosed records, the requested interim relief will enlarge that agreement to include an in camera proceeding, and also will make Petitioner's voluntary commitment obligatory and legally binding.

Accordingly, NYPD's request for interim relief should be granted.

CONCLUSION

For the foregoing reasons, NYPD respectfully requests that the Court issue a protective order directing Petitioner to immediately (i) cease further review, use and/or dissemination of the eight documents inadvertently disclosed to it by NYPD on December 11, 2018 or any information obtained therefrom, (ii) destroy or return these records, including any copies and notes with respect thereto, and provide written confirmation of such destruction to NYPD, and (iii) notify any third-party to whom Petitioner sent such documents to destroy them, and to provide written assurance thereof.

Additionally, NYPD respectfully requests that the Court award it interim relief

prohibiting Petitioner from any further review, use and/or dissemination of these documents and any information obtained therefrom pending a determination of the underlying motion.

Dated: New York, New York
January 11, 2019

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