FSUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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CENTER ON PRIVACY & TECHNOLOGY,

Petitioner,

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

- against -

NEW YORK CITY POLICE DEPARTMENT,

Respondent.

Mot. Seq. 004

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.
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REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF NYPD'S MOTION FOR A PROTECTIVE ORDER

Preliminary Statement

This reply brief is submitted by NYPD in further support of its motion for an order directing Petitioner to destroy or return certain records that were inadvertently disclosed, so that NYPD may re-produce such records with exempt material redacted.

As discussed more fully below, rather than focusing on the issues presented in NYPD's motion, Petitioner instead seeks to re-direct the Court's attention to other unrelated matters and to re-characterize the relief that NYPD actually seeks. Contrary to Petitioner's belief that NYPD seeks to clawback the inadvertently-disclosed documents for all time, NYPD instead seeks to recover those documents, and re-produce them with the applicable exemptions, subject to the Court's *in camera* review. Far from the radical and drastic remedy suggested by Petitioner, this commonsense approach merely seeks to place the parties in the same positon they would have been in had the material not been inadvertently disclosed – that is, with NYPD having disclosed records redacted pursuant to certain exemptions, with the propriety of those redactions subject to the Court's continuing *in camera* review.

Rather than subjecting NYPD's claimed exemptions to judicial scrutiny, Petitioner would have the Court find that NYPD is estopped from asserting its statutory rights, and direct disclosure based solely on Petitioner's self-serving assertion that the material does not fall within any exemption. Petitioner's desire to avoid an *in camera* review of these records is not surprising, however, given that the Court has upheld the overwhelming majority of the exemptions asserted by NYPD it has reviewed to date.

As NYPD's inadvertent disclosure does not effect a waiver, NYPD's motion should be granted, and Petitioner directed to return or destroy the identified records, subject to NYPD's re-disclosure and the Court's *in camera* review.

ARGUMENT

POINT I

NYPD'S INADVERTENT DISCLOSURE DID NOT CONSTITUTE A WAIVER OF ANY EXEMPTIONS

A. The Applicable Case Law Supports NYPD's Position

In its moving brief (dkt. no. 134, at 5-6), NYPD cited several cases directly on point, all holding that an agency does not waive its right to claim an exemption when it inadvertently discloses records pursuant to a FOIL request. *See Mazzone v. New York State Dep't of Transp.*, 95 A.D.3d 1423, 1424-25 (3d Dep't 2012); *Miller v. New York State Dep't of Transp.*, 58 A.D.3d 981, 983 (3d Dep't), *lv. denied*, 12 N.Y.3d 712 (2009); *Mitzner v. Sobol*, 173 A.D.2d 1064 (3d Dep't 1991); *McGraw-Edison Co. v. Williams*, 133 Misc. 2d 1053, 1055 (Sup. Ct. Albany Co. 1986).[1]

[1] In the absence of any ruling from the Court of Appeals or the First Department, this Court is bound by the rulings of other Appellate Divisions. *See D'Alessandro v Carro*, 123 A.D.3d 1, 6 (1st Dep't 2014) ("where the issue has not been addressed within the Department, Supreme Court is bound by the doctrine of stare decisis to apply precedent established in another Department,

Notably, Petitioner has cited no contrary caselaw in opposition. Rather than accept the absolute nature of the cases' pronouncement, Petitioner instead seeks to distinguish these cases based on contrived distinctions based on whether or not the records were actually produced to the requestor or merely shown, and the duration of the disclosure. Opp. Br. at 10. These distinctions are unsupported and specious and should be rejected. In fact and contrary to Petitioner's contention, none of the rulings in these cases rests on the basis that the subject documents were shown only briefly to the requestor and remained in the agency's possession and control.

In *Mazzone v. New York State Dep't of Transp.*, 95 A.D.3d 1423, 1424-25 (3d Dep't 2012), the agency had disclosed certain records to the petitioner but, months later, refused to make copies of certain of them, citing FOIL exemptions. In ruling that the agency had not waived any exemptions, the court relied exclusively on the agency's assertion that its earlier disclosure was inadvertent. In contrast to Petitioner's characterization, the Court gave no weight whatsoever to the fact that the subject documents had not actually been provided to the requestor, to the duration of the disclosure or to the time between the agency's initial disclosure and its subsequent assertion of an exemption. Rather, the Court held simply and without qualification, that "when documents are inadvertently disclosed, the agency's right to claim an exemption is not waived by such disclosure." *Id.*, 95 A.D.3d at 1424-25. Notably, the Court also found that the agency -- like NYPD seeks to do here -- could satisfy its burden of demonstrating the

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either until a contrary rule is established by the Appellate Division in its own Department or by the Court of Appeals"); *Nachbaur v. American Transit Insurance Co.,* 300 A.D. 2d 74, 76 (1st Dep't 2002) (in the absence of a contrary decision by the First Department, ruling of the Second Department is "'controlling'" authority that plaintiff's attorney was obligated to bring to the attention of this Court").

applicability of the claimed exemption through an *in camera* review. 95 A.D.3d at 1425.[2]

Similarly, in *McGraw-Edison Co. v. Williams*, 133 Misc. 2d 1053, 1055 (Sup. Ct. Albany Co. 1986), there is no indication that the FOIL requestor was shown the subject record only "briefly." Moreover, in that case, the Court fully rejected the view that "inadvertent production of the preliminary draft pursuant to petitioner's initial FOIL request operated as a waiver of any privilege which may have attached to the document." Moreover, although noting the broad interpretation to be afforded to FOIL and its presumption of availability, the Court found that "the Legislature has reserved the statutory discretion to refuse disclosure of agency records which fall within one of the specifically enumerated exemptions." *Id.* at 1054-55.

Not only do the factors described by Petitioner play no role whatsoever in the Court's decisions, Petitioner's argument actually strengthens NYPD's position. In *Miller*, the Court rejected the FOIL requestor's argument that the agency had waived its right to assert any exemptions because it previously had represented that all the responsive documents were available for inspection and copying. Rather than simply basing its holding on the agency's statement of intent to provide all the records, the Appellate Division went further, noting that "Even when documents are inadvertently disclosed, the agency's right to claim an exemption is not waived by such disclosure." *Miller*, 58 A.D.3d at 983.

Courts disfavor waivers that estop government agencies from exercising their statutory authority, as "estoppel may not be applied to preclude a . . . municipal agency from

[2] Similarly, in *Capital Newspapers, Div. of Hearst Corp. v. Whalen*, 126 Misc. 2d 710 (Sup. Ct. Albany Co, 1984), *modified on other ground*, 113 A.D.2d 217 (3d Dep't 1985), *rev'd*, 69 N.Y.2d 246 (1987) (reinstating opinion of lower court), the subject agency had initially consented to the FOIL requestor having unrestricted access to requested records and allowed it to make copies of some of those records, but subsequently rescinded that consent. The Court held that there had been no waiver, but required the agency to submit the purportedly exempt records to the Court for *in camera* review.

discharging its statutory responsibility." *Matter of City of New York v City Civ. Serv. Comm'n*, 60 N.Y.2d 436, 449 (1983), *cited in Matter of New York Civ. Liberties Union v. New York City Police Dep't*, 148 A.D.3d 642, 644 (1st Dep't 2014). Rather, as the Court in *McGraw-Edison* explained, an agency's waiver of a FOIL exemption must be done with the requisite intent -- *i.e.*, that it be done "intelligently and voluntarily," as any lesser standard "would create the possibility for disclosure of sensitive or potentially harmful information without recourse." *McGraw-Edison*, 133 Misc. 2d at 1055 (quoting *Matter of Abramovich v. Board of Educ.*, 62 A.D.2d 252, 254 (2d Dep't 1978)).

Here, it is clear that NYPD's inadvertent disclosure was not done "intelligently and voluntarily." As explained in the Amended Affirmation of Jeffrey S. Dantowitz, dated January 10, 2019 ("Dantowitz Aff.") (dkt. no. 131) at ¶¶ 12-17 and the Reply Affirmation of Jeffrey S. Dantowitz dated March 15, 2019 ("Dantowitz Reply Aff.") at ¶ 3, NYPD carefully reviewed all the subject documents, and indicated applicable redactions and exemptions to these documents in the Relativity program. The Law Department attorney also reviewed each of the proposed redactions, but did not carefully review the records once they had been transferred onto the CD to be produced to Petitioner. Dantowitz Aff. at ¶¶15, 17; Dantowitz Reply Aff. at ¶¶ 4-8. Under these circumstances, it is indisputable that NYPD intended to assert exemptions and to redact the documents. That a few documents were inadvertently produced without the intended redactions, while careless, was neither an intelligent nor voluntary disclosure. Indeed, to find otherwise and accept Petitioner's argument here, similar to that rejected by the Court in *McGraw-Edison*, "would mandate disclosure . . . perhaps with substantial consequence, in an instance where it may be statutorily unjustified." *McGraw-Edison*, 133 Misc. 2d at 1055.

The cases cited by NYPD are on point and dispositive of the issue here -- NYPD'S inadvertent disclosure of certain exempt material on December 11, 2018 does not constitute a waiver of those exemptions. Such a finding, however, would be entirely meaningless if Petitioner, as the recipient of protected material, were permitted to retain copies of the documents at issue. Contrary to Petitioner's suggestion, this would not deprive Petitioner of the subject records. Rather, as NYPD previously stated, it would re-produce these records to Petitioner with the exempt material redacted. Those redactions would then be subject to the Court's ongoing *in camera* review.[3]

As NYPD noted in its Moving Brief (dkt. no 134, at 8), this proposal is sensible, and seeks to place the parties in the same positions they would have been in had NYPD not inadvertently disclosed exempt material -- 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. Moreover, as Petitioner already has agreed to not review these records or use them for any purpose, there is no prejudice to Petitioner were it required to destroy or return them, and have them replaced by redacted versions, consistent with the exemptions NYPD asserted in connection with other records.

In its Opposition papers, Petitioner asserts that it has reviewed all the records produced on December 11, 2018, and "did not notice anything that was clearly exempt or

[3] Petitioner's professed ignorance of the exemptions NYPD would assert is disingenuous, as it knows full-well that NYPD has consistently and routinely asserted the "nonroutine techniques" and IT security exemptions. Additionally, with its production on December 11, 2018, NYPD advised Petitioner that records being produced that day "were redacted primarily pursuant to" the nonroutine techniques exemption, with a "smaller number" of redactions made based on the IT security and personal privacy exemptions. Dantowitz Reply Aff. at ¶ 9. That Petitioner does not yet know the precise nature of the exemptions asserted in connection with each intended redaction is utterly immaterial, as Petitioner has challenged *every* redaction NYPD has asserted, other than for privacy reasons. Once NYPD re-produces the records at issue here, it will provide a log indicating the basis for each of the asserted exemptions.

sensitive," and that none of the information NYPD seeks to protect here "would create any danger of any individuals modifying their behave or to avoid detection or prosecution." Garvie Aff. (dkt. no. 139) at ¶¶ 7, 13. Petitioner's self-serving declarations concerning the applicability of various FOIL exemptions and the harms from disclosure of these documents should be rejected. First, it is not for *Petitioner* to decide whether or not a FOIL exemption may apply. Rather, that determination belongs in the first instance to NYPD. If Petitioner wishes to challenge any asserted exemption -- as it has with *every* exemption asserted by NYPD -- it knows full well that it can do so and that the Court will review the documents *in camera*. It is then for the Court, not Petitioner, to decide, the propriety of the exemption.

Petitioner, however, seeks to usurp the roles of both NYPD and the Court. Rather than allowing NYPD to make redactions in the first instance, Petitioner would reserve for itself the task of deciding which exemptions are available, leaving NYPD to argue that additional redactions are required. Petitioner's attempt to substitute itself for the Court in deciding the propriety of the asserted exemptions here is particularly egregious, as it ignores the undeniable fact that the Court has upheld the vast majority of the exemptions it has reviewed to date. *See* Transcripts of court conferences held on July 10, 2018 (annexed to the Dantowitz Reply Affirmation as C) and on and January 16, 2019 (dkt. no. 145).

In addition, Petitioner's assertion that in reviewing the records provided on December 11, 2018, it "did not notice anything that was clearly exempt or sensitive," is clearly suspect. First, as Ms. Garvie subsequently acknowledges, these records contain personally-identifying information, including a social security number, individuals' faces and phone numbers and addresses of individuals subject to police investigations -- information which she agrees should be destroyed or redacted. Garvie Aff. at ¶ 13.

Second, many of the inadvertently-disclosed records are identical to those previously produced by NYPD with redactions. For example, as Petitioner was informed, the inadvertently-produced records with Bates stamp numbers 2731-2817 are identical (except for 1 page, number 2738) to pages contained within the document numbered 447-614, which NYPD produced on April 16, 2018. As that earlier-produced document was heavily redacted, Petitioner clearly knew that NYPD believed it contained exempt matter. It is indeed ironic that Petitioner so fiercely criticizes NYPD for not being consistent in redacting records it produced over the course of ten months, when it purportedly failed to notice anything that was sensitive or exempt in the inadvertently-disclosed records, even though "it was well-aware" of their contents. Opp. Br. (dkt. no. 138) at 8.[4]

Finally, accepting P's position here would undoubtedly have consequences reaching far-beyond the inadvertently-disclosed records. If the Court finds that NYPD waived the intended redactions to the inadvertently-disclosed records, there is no doubt that Petitioner will argue that NYPD has thereby waived its right to make these same redactions on other records it produced, and that NYPD must therefore unredact these other records to reveal the material that has been inadvertently disclosed. As admonished by the Court in *McGraw-Edison*, such a finding would thus "mandate disclosure . . . with substantial consequence, in an instance where it may be statutorily unjustified." *McGraw-Edison*, 133 Misc. 2d at 1055.

[4] Alternatively, Petitioner's statement that it "did not notice anything that was clearly exempt or sensitive" is simply an expression of its own rejection of the legitimacy of *all* exemptions asserted by NYPD.

B. **NYPD's Inconsistent Redactions**

Realizing that it cannot prevail based on the applicable caselaw, Petitioner attempts to distract this Court and divert its attention with extraneous matters, through its extensive discussion of how NYPD has been inconsistent in its redactions. Not only is such argument entirely irrelevant to this motion, it fails to account for changed circumstances over the course of NYPD's productions.

For example, in her affirmation (dkt. no. 142), Ms. Glaberson notes that document Bates stamp number 2641 reveals material redacted in document numbers 598, 600 and 602. Glaberson Aff. at ¶ 13). However, Petitioner fails to understand that Bates stamp numbers 598, 600 and 602 were produced on April 16, 2018, before it was *subsequently* discovered that NYPD had revealed the identified information at the Global Summit attended by Ms. Garvie. Thus, NYPD adapted its approach and took this information into account when making later redactions, such as to those documents produced on December 11, 2018, including document Bates stamp numbered 2641.

Ms. Glaberson also identifies two other sets of documents with inconsistent redactions. Glaberson Aff. at ¶ 12. As she acknowledges, these documents are not at issue here. Moreover, these records are taken from PowerPoint presentations that already are the subject of the Court-ordered "meet and confer" and will be addressed by the parties at that time.

Petitioner's strategy of bringing these matters to the Court's attention in the first instance, rather than to NYPD, is at best unprofessional and unnecessarily involves the Court in a continuing game of "gotcha." Indeed, although Petitioner professes that it is "well aware" of the contents of the records produced by NYPD, at no time did Petitioner alert NYPD of any irregularities or inconsistencies in its production before raising these matters with the Court.

Rather, Petitioner waited until the court conference on January 16, 2019 to alert NYPD that there were inconsistencies in the redactions made to the PowerPoint slides and (with one exception) waited until its filing on March 8, 2019 to alert NYPD of other inconsistencies.[5] While NYPD is willing to acknowledge these inconsistencies and accept the consequences, Petitioner's conduct in first raising these issues with the Court, rather than with NYPD, is highly questionable.

C. **Inadvertent Disclosure in the Discovery Context**

As noted in NYPD's Moving brief, the caselaw cited above -- dealing specifically with the inadvertent disclosure of records in the FOIL context and holding that such disclosure does not waive the agency's right to claim exemptions -- is dispositive of the legal issues presented by this motion. Although NYPD included in its brief a discussion of waiver in the discovery context, this was clearly by way of analogy only. Indeed, NYPD specifically noted that such analysis is "likely inapplicable in a FOIL context." Moving Br. (dkt. no. 134) at 5. Wholly unable to refute the applicable FOIL rulings that compel a finding in NYPD's favor and the return of the inadvertently-disclosed documents, Petitioner instead concentrates its attack on the discovery cases. Yet, even if these cases were applicable, they warrant a finding in NYPD's favor.

As the parties agree, the inadvertent production of documents in the discovery content does not effect 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

[5] Petitioner anemically attempts to use these inconsistencies to justify its ethical failing in not notifying NYPD of the inadvertently-disclosed records (or any other inconsistencies in NYPD's productions), arguing that it could not have known that these disclosures were inadvertent (Opp. Br. at 15 and footnote 5). This argument is easily rejected, as it is based on the wholly unfounded assumption that NYPD intended to reveal material it had previously redacted. Indeed, the rules of ethics recognize that the disclosing party may not be aware of the inadvertent disclosure and, thus, squarely places a responsibility on the receiving party to not make assumptions, but to ascertain whether the disclosure was intended.

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* Moving Br. at 6; Opp. Br. at 11. 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 amply demonstrated by the fact that NYPD had redacted similar (and even identical) information, in other documents produced on December 11, 2018 and earlier. Additionally, as described in the Dantowitz Affirmation and above, NYPD fully intended to redact these records, and, in fact, attempted to do so using the Relativity. *Cf. Dipace v. Goord*, 218 F.R.D. 399, 406-07 (S.D.N.Y. 2003) (no waiver unless disclosure was "authorized by the governmental agency and voluntary") (citing cases).

Petitioner does not even attempt to refute this first prong, and instead substitutes a requirement that NYPD demonstrate that the requested material contains exempt matter. Not only is this not part of the applicable analysis, but such a showing is not required at this stage, and should await the Court's *in camera* review.

Petitioner next argues that NYPD failed to take reasonable steps to prevent disclosure. This is false, and belied by the process undertaken by NYPD and counsel to review the responsive records. Significantly, NYPD did not wait until after its production to review the records and identify applicable exemptions. Rather, these exemptions and redactions were identified during NYPD's review and prior to production, but were not finalized due to an error that was not discovered until later. "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). *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").

Thus, the only error was in the Law Department attorney not more carefully reviewing the CD before it was delivered to Petitioner's counsel. This, however, does not warrant a finding of waiver, as NYPD's screening procedure constitutes a reasonable step to prevent inadvertent disclosure. *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").

In its Opposition papers, Petitioner emphasizes NYPD's counsel's delay in notifying Petitioner of the inadvertent disclosure. As the caselaw clearly provides, however, the length of the delay is measured from the date NYPD learned of the inadvertent disclosure, not the date of disclosure itself. *Prescient Partners, L.P. v. Fieldcrest Cannon*, 1997 U.S. Dist. LEXIS 18818, * 16 (S.D.N.Y 1997). *See also In re Natural Gas Commodity Litig.*, 229 F.R.D. 82, 87-88 (S.D.N.Y 2005) and cases cited therein. Here, NYPD's counsel likely did not discover that any exempt material had been inadvertently produced until December 26 or 27, 2018. *See* Dantowitz Reply Affirmation at ¶¶ 14-15. At most, this constitutes only a two or three business day delay before counsel notified Petitioner of the inadvertent production. Such a short delay does not warrant a finding of waiver.

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 those 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.

Petitioner's assertions of prejudice are specious and exaggerated. While Petitioner argues that it cannot "excise from their minds" information to which it already has been exposed, it is ludicrous for Petitioner to suggest that it has a specific memory of all the material included in the inadvertently-disclosed records. Petitioner makes a similar point when it argues that the requested relief is vague and overbroad, as it would prohibit Petitioner from using and disseminating any of the *information* to be redacted. Yet, if Petitioner can recall all the information in the records disclosed on December 11, 2018, as it claims, then identifying the subject information should not be difficult. Petitioner's objection is also dubious given that it agreed to this relief when it consented to the interim relief set forth in the Order to Show Cause (dkt. no. 137). Moreover, Petitioner's argument is entirely inconsistent with the cases discussed above which find that there has been no waiver from an inadvertent disclosure even where the records have only been shown, and not produced, to the requesting party.

Petitioner asserts that an order allowing NYPD to clawback the subject records would handicap Petitioner in its efforts to achieve its mission (Opp. Br. at 13). This argument is again based either on the false contention that NYPD seeks to deprive Petitioner of responsive records altogether, or that Petitioner is somehow entitled to material that may be exempt, without

judicial review. Yet, as repeatedly noted, NYPD intends to re-produce the records at issue, make the intended redactions, and then submit those redactions for the Court's *in camera* review.[6]

D. NYPD Should Be Permitted to Exercise its Statutory Authority

NYPD acknowledges FOIL's assumption of access. Such access is not without limits, however, and must yield in the presence of statutorily-authorized exemptions. Where, as here, there has been an inadvertent disclosure of material for which a FOIL exemption is claimed, the controlling caselaw makes clear that such disclosure does not constitute a waiver. To find otherwise would impermissibly estop the agency from exercising it statutory responsibilities.

A finding in NYPD's favor is meaningless and ineffectual, however, in the absence of an order directing Petitioner to destroy or return the subject records and to not make use of this material, at least until such time as the Court has ruled on the propriety of NYPD's asserted exemptions.

[6] Petitioner also argues that NYPD's production on December 11, 2018 violated some court order. Not only does this argument not support a finding of waiver, but it is patently false. As Petitioner knows, on October 28, 2018, the Court directed NYPD to complete its production by December 4, 2018, a date that counsel agreed to extend by one week, to December 11, 2018. NYPD met this deadline, and has certified on the record that it has now completed the required production. (Transcript from conference held on January 16, 2019, dkt. no. 145, at 4:7-21)

CONCLUSION

For the reasons set forth above and in the other papers submitted in support of the Order to Show Cause, NYPD respectfully requests that the Court grant its motion for the requested protective order, and award it such other and further relief as this Court deems just and proper.

Dated: New York, New York
March 15, 2019

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