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

In the Matter of,	:	
CENTER ON PRIVACY & TECHNOLOGY,	:	
Petitioner,	:	
-against-	:	Index No. 154060/2017
NEW YORK CITY POLICE DEPARTMENT,	:	
Respondent.	:	
For a Judgment Pursuant to Article 78 Of the Civil Practice Law and Rules.	:	

PETITIONER'S SURREPLY IN OPPOSITION TO RESPONDENT'S ORDER TO SHOW CAUSE (Mot. Seq. No. 004)

The Center submits this memorandum to respond to new information the Department puts forward in its reply, and to highlight an ongoing problem in this dispute: the parties seem to be arguing different cases. The Department is extremely defensive about its own behavior here—understandably so, given its admitted carelessness. (Dkt. No. 153 (NYPD Reply) at 6). But this defensiveness has resulted in the Department blindly striking out with gratuitous personal attacks while failing to confront the issues or engage with the Center's position. The parties agree that the question of what impact the Department's carelessness will have is one for this Court to resolve. After all, the Center agrees with the Department that this Court should determine (1) whether the Department has any valid claims that material in the disputed records is exempt and (2) whether the Department waived any such valid withholding claims. Where the parties diverge is as to the outcomes of each of these questions.

First, the Department already has received all the relief it needs in the form of this Court's interim order. It has had multiple opportunities to make its statutorily-required showing justifying its claim that material in the withheld records falls squarely within one of FOIL's enumerated exemptions. It has failed to do so. The Department is not entitled to any further relief.

Second, even if the Department had shown that material it disclosed was exempt, the Department has waived its right to assert exemptions for documents it provided to the Center. Its most recent filing contains yet another affirmation of counsel, which only underscores that the Department failed to engage in any reasonable effort to safeguard purportedly sensitive information.

Third, the Department has offered no coherent justification for its request that this Court should issue an unconstitutional order infringing on the Center's First Amendment rights.

For these reasons, the Department's motion should be rejected. The Department's clawback request should be denied, and this Court's interim order vacated.

(1) The effect of NYPD's "inadvertent production" should be decided by this Court.

The Department repeatedly misstates the Center's position, accusing the Center of attempting to "usurp the roles of both the NYPD and the Court." (NYPD Reply at 8). The Center attempts no such thing. To the contrary, the Center agreed to—and this Court therefore ordered—the Department's requested interim relief temporarily requiring the Center to cease further review, use, or dissemination of the contested material, to preserve the status quo for the sole purpose of ensuring that this Court has an opportunity to rule on the impact of the

Department's supposed "inadvertent" production.[1] The Department concedes that all it seeks through its motion is an order directing the Center not to make use of the disputed material, "until such time as the Court has ruled on the propriety of NYPD's asserted exemptions." (*Id.* at 15). But the Department does not acknowledge that the time for this Court to rule on the "propriety of NYPD's asserted exemptions" as to the disputed records is now.

Ruling on the instant motion raises two preliminary issues: (1) whether the Department has shown that the disputed records contain exempt material and (2) whether the Department waived its exemption claims. Only if both questions are resolved in the Department's favor can this Court assess whether a permanent protective order is warranted. Yet instead of supporting its exemption claims with evidence, the Department asks this Court to grant its extraordinary request based on counsel's word alone. The Department then proposes that this Court should defer deciding the questions currently before it, and instead await some hypothetical future date on which the Department will deign to put forward the statutorily-required evidence it thus far has proved incapable of producing. The Department has had the opportunity—now many times over—to make its case. It has failed to do so. The Department's failure to meet its statutory burden here does not entitle it to further, extraordinary relief.

a. The Department failed to show that it has valid exemption claims.

As an initial matter, it must be determined whether the Department adequately has supported its exemption claims as to these records. The only basis on which the Department

[1] In fact, the Center was the first to suggest judicial review of the dispute, and raised the issue repeatedly during the parties' email correspondence. (Dkt. No. 147 (Glaberson Affirm. Ex. 5 (Jan. 3 email (proposing method for determining breadth of dispute, and suggesting that, if the parties still "have a dispute" after following the proposed procedure, that Department "can file a motion with the Court and we can submit these records for the Court to review")); (Jan. 5 email (discussing need to present records "that are in dispute to the Court for an in camera inspection to determine which of NYPD's claw-back claims, if any, are legitimate")); (Jan. 7 email ("we think it is a question for the court whether this disclosure worked to waive claims of exemption as to this material"))).

might have a legitimate claim to relief is if it shows that material within the purportedly "inadvertently disclosed" pages is exempt from disclosure. In FOIL cases, the Department has the burden to supply a particularized and specific justification for each exemption claim, supported by evidence—for instance, affidavits from officials with personal knowledge of the documents and the role the documents play in law enforcement efforts. (*See, e.g., Matter of Washington Post Co. v. New York State Ins. Dept.*, 61 NY2d 557, 567 [1984]; *Matter of Dilworth v. Westchester County Dept. of Corr*., 93 A.D.3d 722, 724 [2d Dep't 2012]) ("Conclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed")). Absent this showing, the records are public, and there is no legal basis to permit the Department to claw them back. (*See, e.g., Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 274-75 [1996]).

Although the Department submitted a lengthy reply memorandum and additional exhibits, it still has failed to provide any factual support for counsel's representations that information subject to its clawback claims is exempt under FOIL. That omission is fatal. The agency cannot claim exemption based on counsel's word alone. (*See, e.g., Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 274-75 [1996]). The Department's request for further, extraordinary relief should be denied.

b. The Department waived any exemption claims it might have had.

The new information the Department puts forward in its reply submissions only bolsters the case that the Department acted with utter disregard for this Court's orders and the Department's statutory obligations, and did not make reasonable efforts to protect information it now claims is sensitive. In the Department's reply affirmation, counsel now admits that the NYPD did not even provide for counsel to review the records for which it intended to make

exemption claims until the *day before* the Department had been ordered to turn those records over.[2] (Dkt. No. 149 (Dantowitz Reply Affirm.) ¶ 4). The Department then seeks to elicit sympathy based on the rush presented by the "impending deadline." But the Department fails to acknowledge that this was a situation of the Department's own making. (*Id.* ¶ 8). As detailed in the Center's opposition filings, the Department had years to comply with its obligations under FOIL. (*See, e.g.*, Dkt. No. 138 at 11).

Given the claimed sensitivity of the records, any reasonable agency would have planned its work to ensure that all information was subject to robust screening by NYPD personnel and counsel prior to its disclosure. A reasonable agency concerned about the sensitivity of its information would have been diligent in reviewing the documents, applied to this Court for additional time when it realized it would have trouble meeting the deadline, or used other approaches to ensure that, prior to providing the records to the Center, they were scrubbed of exempt information. The Department did none of these things. Instead, it delayed until the last minute, failed to put an appropriate procedure in place, and then—with a full appreciation of the process it had employed to screen the records—produced these records to the Center, understanding that once the Center received them, it was free to use and share them without any restriction. By doing so, the Department waived any valid exemption claims that it might have had.[3]

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[2] The two versions the Department has now put forward of its pre-disclosure review of the records seem to be in tension. The Department's initial filing implied that Corporation Counsel's review of these records had been ongoing, while the Department now admits that it made no effort to ensure counsel could review these records until the day before the Department's production deadline. (*Compare* Dkt. 131 ¶¶ 13-17 *with* Dkt. No. 149 ¶ 4). Regardless, counsel's recent revelations show that the Department's conduct here is at odds with its claims that the records disclosed to the Center on December 11, 2018, contain sensitive information.

[3] The Department also attempts to downplay its delay in alerting the Center to this purported issue; Respondent's counsel claims that he "likely did not discover that any exempt material had been inadvertently produced until December 26 or 27, 2018." (NYPD Reply at 13; Dantowitz Reply Affirm. ¶ 14-15). Counsel's self-serving assertions as to what "likely" occurred should be given no credence.

(2) The Department's requested order would be unconstitutional.

The Center pointed out in its opposition memorandum that the Department's requested order that the Center "cease further review, use and/or dissemination" of the disputed documents "*or any information obtained therefrom*," if issued by this Court, would violate the First Amendment. The Department simply ignores this issue. But the issue goes to the heart of the question now before this Court. The requested order would act as an unconstitutional prior restraint, prohibiting the Center and its staff from engaging in their First Amendment right of free speech based on information they lawfully obtained. The Department does not contest this.

Instead, in its reply, the Department focuses on the records—not on the information they contain—and yet continues to press its request for an unconstitutional gag order that would permanently muzzle the Center. In doing so, the Department makes three unsupported and nonsensical arguments, each of which fails to address the First Amendment issue.

First, the Department speculates that once the Center receives redacted copies of these records, it "should not be difficult" to identify the information as to which it permanently will be gagged. (NYPD Reply. at 14). The Department cannot articulate any basis for its speculation, and the opposite is true. As made clear in the Garvie affidavit, drawing a definitive line between information that may be discussed and information that may not be discussed will be difficult, if not impossible. (Dkt No. 139 ¶ 14). Nor does the First Amendment prohibit prior restraint only when compliance with such restraint would be "difficult." The Center came by the information it now knows lawfully, as a result of the NYPD's recklessness. The Center's ability to use or disseminate this information cannot be restricted without violating its First Amendment rights. (*See The Florida Star v. BJF*, 491 U.S. 524 [1989]; *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 [1976]).

Second, the Department argues that the Center's consent to its requested interim relief suggests that the Center acquiesced to that relief becoming permanent. That suggestion is wrong. The Center should not be penalized for attempting to work with the Department to ensure this Court has an opportunity to consider the proper outcome of this dispute. The Center has agreed to a moratorium on sharing this information for the time being, only to allow this Court to review and rule on the dispute. But the Center's agreement to the Department's requested interim relief is in no way a concession that the order the Department seeks here is warranted or constitutional. The Department's requested order is vague and overly broad, and does not withstand constitutional scrutiny. The Department makes no argument to the contrary.

Third, the Department falls back on the same, highly distinguishable FOIL cases; the Department concedes that those cases involved agencies that merely showed, but did not produce, records to requesters. (Dkt. No. 153 at 14). But just as those cases do not control whether the Department has waived exemption claims as to the records in this case, those decisions also do not support the Department's request for an unconstitutional gag order. In none of these cases did the Court go so far as to restrict the requester from engaging in free speech based on information gleaned from the records shown to him or her. This result should not be tolerated here.

By the time this Court hears argument on this motion, this Court's interim order will have been in place for nearly 3 months. The Center already has been muzzled during this period, kept from speaking about information it lawfully obtained. Every day that passes with this order in place is another day on which the Center's First Amendment rights are violated. For this reason, time is of the essence. The Center respectfully requests that this Court decide this motion in the Center's favor and lift the interim order immediately.

Conclusion

For these reasons, and for the reasons contained in the Center's opposition papers (Dkt. Nos. 138-148), the Center respectfully requests that this Court deny the Department's request for a protective order in its entirety. To the extent the Court grants any portion of the Department's request, the Center respectfully requests that this Court deny the Department's request for an order that the Center be prohibited from using or disseminating information obtained from the records in issue.

Dated: March 27, 2019

/s/

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