

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

PRESENT: HON. CAROL EDMEAD

PART 35

Justice

Urban Justice Center

INDEX NO. 400 988 / 2010

MOTION DATE 9/1/10

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

NYPD

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that _____

DEFERRED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representatives must appear in person at the Judgment Clerk's Desk (Room 1418).

It is hereby

ORDERED and ADJUDGED that the Article 78 petition for an order compelling the respondents New York Police Department and Raymond Kelly in his official capacity as Commissioner of the New York City Police Department to produce documents requested pursuant to New York's Freedom of Information Law (Public Officers Law, "POL" §§ 84-90), is granted solely to the extent that NYPD shall conduct a search of the second part of Category 2 documents and provide a response to the request for such documents within 90 days of the date of this Order. Oral application by petitioner Urban Justice Center to amend the FOIL request is granted and the FOIL request is to be limited to: (1) the Borough of Manhattan; and (2) the period from September 2006 through September 2008. The respondent NYPD is to submit a fact affidavit detailing the "burdensomeness" of said request, if applicable; and it is further

Dated: _____ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

ORDERED and ADJUDGED that the branch of the petition for an order compelling the respondents to produce documents requested pursuant to New York's Freedom of Information Law (Public Officers Law, "POL" §§ 84-90) in Category 1 is denied and dismissed; and it is further

ORDERED and ADJUDGED that the petition as against respondent Raymond Kelly, in his official capacity as Commissioner of the New York City Police Department, is hereby dismissed pursuant to CPLR §3211 (a)(8) for lack of personal jurisdiction; and it is further

ORDERED and ADJUDGED that the branch of the petition seeking attorneys' fees and costs related to this action is denied and dismissed; and it is further

ORDERED that petitioner shall serve a copy of this order with notice of entry upon respondents within 20 days of entry.

This constitutes the Order and Judgment of the Court.

Dated 9.1.10 ENTER: [Signature] J.S.C.
HON. CAROL EDMEAD

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1410).

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
In re Matter of

URBAN JUSTICE CENTER,

Index No. 400988/2010

Petitioner,

-against-

NEW YORK POLICE DEPARTMENT,
and RAYMOND KELLY, in his official capacity
Commissioner of the New York City Police
Department,

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1418).

Respondents.

For a Judgment Pursuant to Article 78
of New York Civil Practice Law and Rules

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Petitioner Urban Justice Center ("UJC") commenced this Article 78 proceeding against the respondents New York Police Department ("NYPD") and Raymond Kelly ("Kelly" or the "Commissioner") (collectively, "respondents") to compel the production of records relating to raids on certain bondage, dominance, sadism and masochism ("BDSM") establishments, pursuant to New York's Freedom of Information Law ("FOIL") (Public Officers Law, "POL" §§ 84-90), and for attorneys' fees and costs related to this action.

Background Facts

UJC is a New York not-for-profit legal and social services corporation. One of its divisions, Sex Workers Project, is engaged in protecting the rights of people referred to as "sex workers," people profiled as "sex workers" and victims of human trafficking. On September 29,

2008, UJC made a FOIL request to NYPD for certain documents relating to raids conducted between April and September of 2008 by NYPD on BDSM establishments.

UJC's request sought the production of records that fell into two distinct categories: (1) training manuals as to arrests for prostitution (Category 1) and (2) memos and manuals of policies and investigation records of bondage and domination establishments (Category 2).

On October 9, 2009, in response to the portion of the request for Category 1 documents, NYPD produced a document entitled "Patrol Guide, Procedure No.: 208-44, Prostitution" (the "Guide") (exhibit 3 to Verified Answer), while withholding other located responsive records under two claimed exemptions, pursuant to New York Public Officer Law ("POL") §87 (2)(e)(iv) (disclosure would impede law enforcement process) and POL §87 (2)(f) (disclosure could endanger the life or safety of any person). As to the portion of the request for Category 2 documents, for investigation of BDSM establishments or persons, NYPD denied the request on the basis that it could not locate the requested records because they were not "reasonably described" by UJC (exhibit B to petition).

On November 6, 2009, UJC appealed NYPD's determination on several grounds: (1) that NYPD did not justify the invoked exemptions as required by FOIL, (2) the exemptions do not apply and (3) the prostitution arrests-related records and the records of BDSM investigations "do exist and must be disclosed." On December 28, 2009, the Records Access Appeals Officer Jonathan David (the "Appeals Officer") denied UJC's appeal (exhibit G to petition). As a result, on or about April 15, 2010, UJC filed this petition, pursuant to CPLR §7806, seeking an order compelling NYPD and Kelly to comply with the disclosure of the records sought in the FOIL request and awarding attorney's fees and costs pursuant to POL §89.

UJC's Petition

UJC's main contentions are that: (1) with respect to Category 1 records, the exemptions §87(2)(e)(iv)¹ and §87(2)(f)² do not apply; (2) NYPD has not adequately articulated the justification for these exemptions and (3) additional records exist and must be disclosed.

UJC argues that NYPD asserted the exemptions by merely reciting the statute without providing "particularized and specific justification" for the exemptions, as required by the statute. NYPD did not explain how and why disclosure of these instructional and training materials would impede the enforcement process or endanger individual police officers.

The exemptions do not apply because disclosure of the training manual for prostitution arrests will not impede the enforcement process as it is simply "instructing the police officers how to correctly apply the law."³ Prostitution arrests during the NYPD's raids of the BDSM establishments "raise the question of whether the NYPD [. . .] considers [bondage and domination] to be included in the category of 'sexual conduct' within the meaning of the statute," and sexual workers "have a right to know what the NYPD considers to be prostitution." UJC further argues that prostitution arrests in the form of "sting" operations, raids using the undercovers and street "sweeps," are commonly known to the public, and thus, are "routine" techniques. While some portions of the Guide may be exempt as non-routine investigative

¹ Section 87 (2)(e)(iv) exempts from disclosure "records that are compiled for law enforcement purposes and which, if disclosed, would [. . .] reveal criminal investigative techniques and procedures."

² Section 87 (2)(f) permits an agency to deny access to records that "if disclosed, could endanger the life or safety of any person."

³ UJC claims that New York prostitution laws are vague in that, for example, while criminalizing "engaging in sexual conduct for a fee," they fail to define "sexual conduct." Neither is there uniformity in the court decisions interpreting these laws. Moreover, such records would clarify whether "bondage and domination" are also considered to be "sexual conduct."

techniques, other documents, which merely clarify laws and routine procedures, should be disclosed.

UJC seeks "only general, procedural, policy-oriented documents," and not any individuals' names or locations. And, the risk of danger, if any, that police officers could be identified may be avoided by redacting the names or other identifying details.

Finally, UJC argues that BDSM-related investigation records "do exist" since the media widely covered the raids targeting BDSM establishments leading to arrests and closures of some of them. And, "these raids were impossible to carry out without any instructions or guides for police officers, or any other written records." UJC points out that "these media reports provide the requisite "demonstrable factual basis" to rebut the NYPD's position that no such records exist.

Lastly, UJC seeks attorney's fees under FOIL §89(4)(c).

NYPD's Opposition

NYPD contends that the petition should be dismissed as moot as it has fully complied with its obligations under FOIL by performing a diligent search and disclosing all non-exempt responsive records; it has certified that no other records were located as a result of the diligent search, and Category 2 records were not "reasonably described" for NYPD to conduct a diligent search of those records.

First, NYPD contends that its search yielded⁴ a total of ten pages of responsive records:

⁴ The court notes that NYPD appears to assert this claim with respect to both categories of records, stating that it conducted the search of prostitution-related records and investigation records of domination establishments and persons.

(1) one page which consists of Patrol Guide Procedure No. 208-44: Prostitution, which was disclosed to UJC, and (2) nine pages consisting of a portion of the Organized Crime Control Bureau manual (the "Manual"), which are, however, exempt pursuant to POL, but NYPD agreed to make these nine pages available to the court for an in camera inspection.

Second, NYPD contends that Category 1 records are exempt under POL §87 (e)(iv) because disclosure of the undercover training manual would reveal criminal investigative techniques which are not "routine" and release of such records would thwart the investigations or impede prosecution.

Further, NYPD contends that the Category 1 records are also exempt pursuant to POL §87 (2)(f) since "a strong possibility exists" that disclosure of such records would endanger the life or safety of the undercover police officers conducting the enforcement operations. Namely, revealing "specific practices, language, equipment used by undercover police officers would make them more identifiable, and therefore, at greater risk for danger or violence."

As to the request for Category 2 documents, NYPD asserts that UJC did not provide a reasonable description of the records as required by POL §89 (3) to enable NYPD to initiate a search (Verified Answer, ¶24). According to the affidavit of Deputy Chief Brian Conroy, the Commanding Officer of the Vice Enforcement Division ("VED") of the NYPD,⁵ who supervised the search of the records sought by UJC, the VED database cannot be searched for the phrase "investigations of establishments or persons who provide domination for a fee," as it is stated in UJC's FOIL request. Such phrase does not correspond to any data in the VED's database or the

⁵ VED is a division within the Organized Crime Control Bureau of the NYPD, responsible for investigating and enforcing laws related to public morals, such as prostitution, and apprehending those who violate such laws (Brian Conroy Affidavit).

manner in which the investigatory case folders are filed [in the ordinary course of business]." Instead, in order to obtain additional information of a case investigation [of the BDSM], a case file, generally filed by a case number, has to be retrieved from the unit located in any of the five boroughs which investigated the complaint. The database does not have the capability to perform a key word search (for example, cannot search for the word "domination," or, for a category "establishments or persons who provide domination for a fee"). Thus, in the absence of such searchable criteria as the location of an incident, a complaint number, a precinct of occurrence or an incident date, the search could not be performed (Brian Conroy Affidavit).

NYPD maintains that, once it certified that it could not retrieve the Category 2 documents due to insufficient description, NYPD is not obligated under FOIL to request additional information.

NYPD also argues that the court lacks personal jurisdiction over Kelly since Kelly was never served with a notice of petition or the petition, as required by CPLR §7804 (c), CPLR §403 (c) or CPLR §308. UJC only served NYPD by delivering papers to the New York City Office of the Corporation Counsel. That Kelly is aware of this proceeding and presents his jurisdictional objections, does not waive his jurisdictional defense.

Finally, NYPD contends that attorney's fees and costs pursuant to POL §89(4)(c) are unwarranted since UJC cannot establish that it "substantially prevailed," and UJC waived the litigation costs pursuant to CPLR §1101(e), when UJC's counsel certified that it is a not-for-profit organization, unable to pay its costs, and is acting *pro se*.

Reply

UJC contends that NYPD has not performed a diligent search of either categories of the requested documents. With respect to the first category, UJC argues that, in view of numerous arrests for prostitution, "it is inconceivable" that only ten pages of documents are in NYPD's possession.

Next, UJC argues that not all of the records in the Category 1 of the request are exempt under §87 (2)(e)(iv). Given the vagueness of the prostitution laws, the disclosure of such documents would help individuals comply with the law. In addition, it would alleviate the potential danger to the public health since, as part of its practice during prostitution arrests, NYPD collects condoms as evidence from sexual workers. Not all prostitution arrests are carried out by undercover officers, thus, the disclosure will have no detrimental effect on NYPD's undercover operations.

Further, UJC reiterates that it does not seek to reveal the identities of the officers; disclosure of the information would not be used by convicted felons or terrorists, but sex workers or those at risk of being arrested for prostitution; as such, the disclosure would not endanger life or safety of any person.

And, with respect to the second category of records, UJC argues that NYPD has not established that the requested records do not exist. UJC does not seek case specific information, "but broader policy-related records related to these types of cases." The 2008 raids must have occurred as a result of some new initiative by NYPD decision-makers, and UJC finds it "inconceivable that these raids were carried out without a single page of instruction or other writing."

Finally, UJC argues that the news reports attached to its petition contain ample information to serve as the criteria which NYPD has claimed to be necessary in order to perform a more effective search.

Discussion

Lack of Personal Jurisdiction Over Kelly

As an initial matter, the Court notes that UJC does not dispute this court's lack of personal jurisdiction over Kelly. In any event, the Court determines that personal delivery of the notice of petition and the petition to the Office of the Corporation Counsel as service upon NYPD was ineffective to obtain jurisdiction over Kelly.

In order to obtain personal jurisdiction over a party, strict compliance with the service requirements is necessary (*Persaud v Teaneck Nursing Center, Inc.*, 290 AD2d 350, 351 [1st Dept 2002]) and, "the [petitioner] has the burden of proving [. . .] that service was properly made" (*Persaud* at 351, citing *McCray v Petrini*, 212 AD2d 676 [2d Dept 1995]).

"The service of process upon [the Corporation Counsel] without personal service upon the [Police] Commissioner or an agent specifically designated to receive process on his behalf [is] inadequate to gain personal jurisdiction over the Commissioner (CPLR §7804 (c) [In an Article 78 proceeding, a notice of petition must be served on any adverse party]; *Schachter v Sobol*, 213 AD2d 551, 623 NYS2d 914 [2d Dept 1995]).

UJC has not served the notice or the petition upon the Commissioner and, absent any indication as to whether the New York City Corporation Counsel acts as an agent for service of process for the Commissioner in his official capacity, the delivery of papers to the New York City Office of the Corporation Counsel is insufficient as to the Commissioner. Therefore, UJC

has not complied with the statutory requirement of serving each respondent herein.

Moreover, "official-capacity suits," as here, "generally represent only another way of pleading an action against an entity of which an officer is an agent" (*see Jackson v County of Nassau*, 2009 WL 393640 [EDNY 2009], *citing Monell v Dept. of Social Servs.*, 436 US 658, 691 n 55, 98 SCt 2018 [1978]). Indeed, the instant petition appears to be completely devoid of any specific factual allegations against Kelly, whom UJC seems to have added as respondent only because of his title in the NYPD. Thus, the portion of the petition as against Kelly is dismissed.

Standard of Review for Foil Request

The usual standard of review in Article 78 proceedings, i.e., that the agency's determination will not be set aside unless arbitrary or capricious or without rational basis, is not applicable (*New York Committee for Occupational Safety and Health v Bloomberg*, 72 AD3d 153, 892 NYS2d 377 [1st Dept 2010]). Rather, the agency resisting disclosure must prove entitlement to one of the exceptions (*id.*; *Laureano v Grimes*, 179 AD2d 602, 603-04 [1st Dept 1992]). FOIL is based upon the policy that agency records are presumptively available to members of the public, unless the agency establishes that the records fall within the enumerated exemptions of POL §87 (2) (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 275, 653 NYS2d 54 [1996]; *Pinks v Turnbull*, 13 Misc 3d 1204, 824 NYS2d 758 [Sup Ct New York County 2006]).

Thus, the burden rests on the agency to demonstrate the applicability of an exemption (*New York State Rifle & Pistol Assn, Inc. v Kelly*, 55 AD3d 222 [1st Dept 2008]; *Data Tree, LLC v Romaine*, 9 NY3d 454, 849 NYS2d 489 [2007]; *DJL Rest. Corp. v Dept of Buildings of the*

City of New York, 273 AD2d 167, 710 NYS2d 564 [1st Dept 2000] citing *Gould v New York City Police Dept*, 89 NY2d 267, 275, 653 NYS2d 54). The agency "must show that the requested information 'falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access'" (*Data Tree*, at 462-463, quoting *Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 505 NYS2d 576 [1986]). Affidavits merely repeating the statutory phrasing of an exemption are insufficient to establish the requirement of particularity (*id.*, citing *Brown v Town of Amherst*, 195 AD2d 979, 600 NYS2d 601).

In the instant proceeding, UJC's request seeks the production of records that fall into two distinct categories:

(1) Copies of any memos, manuals, instructions, policies, and curriculum used to train and instruct police officers on arresting persons for the crime of prostitution (Category 1); and

(2) Copies of specific memos, manuals, instructions, policies, procedures, meetings, minutes, reports, or any other written documents concerning the investigation of establishments or persons who provide domination (otherwise known as sado-masochism, bondage, submission, kink, and fetish) for a fee, either in an establishment or independently, dated or generated in the last two years (Category 2).

Category 1 documents were produced, except as to those documents allegedly protected from disclosure under the POL exemptions discussed *infra* at page 17. However, NYPD denied the request as to Category 2 documents on the ground that they were not reasonably described as required by POL § 89(3)(a) for NYPD to perform the search.

Diligent Search: POL §89 (3)(a)

"When an agency is unable to locate documents properly requested under POL§89(3), the

statute requires the agency to certify that it does not have possession of [a requested] record or that such record cannot be found after diligent search. The statute does not specify the manner in which an agency must certify that documents cannot be located" (*Rattley v New York City Police Dept.*, 96 NY2d 873, NYS2d 768 [2001], citing *Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 653 NYS2d 54 [1996][internal quotations omitted]; *Alicea v New York City Police Dept.*, 287 AD2d 286, 731 NYS2d 19 [1st Dept 2001]; *Rivette v District Attorney of Rensselaer County*, 272 AD2d 648, 709 NYS2d 631[3d Dept 2000]).

Once the agency certifies to the court that it had provided the petitioner with all responsive documents in its possession, the petitioner is required to "articulate a demonstrable factual basis to support its contention that the requested documents exist and are within the agency's control" (Gould, at 279).

In *Rattley*, the Court of Appeals reversed the Appellate Division's finding that the police department did not sufficiently certify conducting a diligent search for the missing records on the ground that the Department attorney's affirmation was made without direct knowledge of the alleged search effort, and that both the affirmation and the form letter from the Police Department lacked requisite detail of whether the Police Department had actually conducted a diligent search. The Court of Appeals held that neither a detailed description of the search nor a personal statement from the person who actually conducted the search was required (*Rattley*, at 875).

Similarly, in *Rivette*, where the Police Department supplied petitioner with one item in its possession and notified him that no other record responsive to his request was in its possession, reiterating this position in an affidavit submitted in support of dismissal of the petition, the court

held that the petitioner received an adequate response to his FOIL request by the agency.

A. Category 1 (i.e., Training Manuals for Prostitution Arrests)

Applying the above principles, the court finds that NYPD satisfied the certification requirement under POL §89(3)(a) with respect to Category 1 records (*Rivette; Vandenburg v Wagner*, 270 AD2d 672, 704 NYS2d 739 [3d Dept 2000]). By the letters of RAO James Russo and the Appeals Officer Jonathan David, NYPD averred that it had conducted a diligent search, locating 10 pages of responsive records and producing the document entitled a Patrol Guide, subject to the alleged exemptions. NYPD reiterated this position in the affidavit of Deputy Chief Brian Conroy, submitted in support of dismissal of the petition, and in its counsel's statement in the memorandum of law. Under the Court of Appeals standard, this is sufficient to certify that a diligent search was conducted.

While the court is not unconcerned with the factual data presented by UJC in regards to the large number of prostitution arrests in New York City between 2005 and 2008⁶, UJC's argument that more than ten pages of responsive documents in Category 1 exist because prostitution investigations and arrests are "a significant part of the daily operations of the NYPD," and that "it is inconceivable that only ten pages [of responsive records] are in the Department's possession," is simply insufficient to support a finding that further documents responsive to the Category 1 of the request are in NYPD's possession (*see New York Environmental Law and Justice Project v City of New York*, 286 AD2d 307, 730 NYS2d 285 [1st

⁶ UJC provided data obtained from another not-for-profit organization, "Connect to Protect," that between 2005 and 2008, up to 618 arrests of females and up to 652 arrests of males occurred in a single precinct, and that UJC's Sex Workers Project serves approximately one hundred clients per year, a majority of whom have experienced an arrest.

Dept 2001] [notwithstanding petitioner's [unfounded] claims to the contrary, there was no demonstrable basis to support a finding that further documents responsive to petitioner's request were in [the agency's] possession]; see *Sorce v Noll*, 250 AD2d 770, 672 NYS2d 778 [2d Dept 1998]). The number of arrests performed do not bear any relation to the guidelines under which such arrests were performed. In other words, be it 10 or 1000, the number of persons violating the law as such law is expressed in NYPD guidelines or instructions does not reflect any greater or lesser number of guidelines or instructions. Thus, the court concludes that NYPD adequately established the non-existence of additional responsive records in Category 1.

B. Category 2 (Policies and Procedures for BDSM Investigations)

As to whether UJC properly described the documents in its FOIL request, POL §89 (3)(a) places the burden on the petitioner to "reasonably describe" the documents requested so that a search can be made by the agency by supplying the information required to retrieve the requested documents (*Matter of Farbman & Sons v New York City Health & Hosps. Corp.*, 62 NY2d 75 [1984]; *Asian Am. Legal Defense & Educ. Fund v N.Y. City Police Dept.*, 56 AD3d 321 [1st Dept 2008]; *Lebron v Smith*, 40 AD3d 515, 837 NYS2d 74 [1st Dept 2007]; *Timmons v Records Access Officer*, 271 AD2d 320, 706 NYS2d 640 [1st Dept 2000]).

In *Matter of Farbman & Sons v New York City Health & Hosps. Corp.* (62 NY2d 75 [1984]), the Court of Appeals held that demands under FOIL need not meet the stringent requirement under CPLR 3120 that documents be "specifically designated" (*id.*, at 82-83). The Court recognized that the requirement of POL §89 (3) that documents be "reasonably described" was to enable the agency to locate the records in question (*id.*, at 83). Thus, the agency has to establish that "the descriptions were insufficient for purposes of locating and identifying the

documents sought" (*Matter of Konigsberg v Coughlin*, 68 NY2d 245, 249 [1986], citing *Farbman*; *Matter of Johnson Newspaper Corp. v Stainkamp*, 94 AD2d 825, 826 [3d Dept 1983], mod on other grounds 61 NY2d 958 [1984]).

In *Asian Am. Legal Defense & Educ. Fund v N.Y. City Police Dept.* (*supra*), the Asian-American Legal Defense and Education Fund's FOIL request was properly denied, as NYPD certified that despite its reasonable efforts, documents pertaining to immigration-related arrests and its communications with federal immigration agencies were not retrievable from its databases.

Here, NYPD asserts that a search of the second part of Category 2 documents ("for meetings minutes, reports, or any written documents concerning the investigations of establishments or persons who provide domination [. . .] for a fee") could not be performed since the description of the records provided by UJC was inadequate because its computer database does not have a key word search capability (*i.e.*, "domination"), and instead, can be searched by the location of an incident, a complaint number, a precinct of occurrence or an incident date or a case number.

In applying the standard articulated in *Farbman*, the court finds that, on its face, the second portion of UJC's request for Category 2 records does not appear to reasonably describe the records so as to enable the retrieval by NYPD of the responsive documents. Nonetheless, UJC showed "a demonstrable factual basis to support its contention that the requested documents [of Category 2] exist" (*Wagstaffe v David*, 26 Misc 3d 1229(A), 2010 WL 723754 [Sup Ct, New York County 2010], citing *Matter of Gould*, 89 NY2d at 279). UJC's submissions in support of its petition include newspaper articles about raids on BDSM establishments and arrests of BDSM

establishments' employees during the spring and fall of 2008 in the area of Manhattan, providing sufficient factual basis for this court to direct that NYPD perform a search of the second part of Category 2 records, to wit: meetings, minutes, reports, or any other written documents concerning the investigation of BDSM establishments as detailed below.

In *Johnson Newspaper Corp., supra*, cited in *Farbman*, the FOIL request for "all arrest records of persons arrested for speeding by the State Police" was denied as too broad to comply with, requesting a specific identification of the records sought and details which would assist in the retrieval. Petitioner, who unknowingly misidentified the document containing the information sought, later supplemented and clarified his request in a letter to the Appeals Committee and during the oral argument on the petition. The court found that the information sought was sufficiently identified in the correspondence between the petitioner and the State Police, and as such, the description was sufficiently detailed to enable the respondent agency to locate the records in question (*Matter of Johnson Newspaper Corp.*, 94 AD2d 825, 826).

Similarly, here, the information sought by UJC, is sufficiently identified in the media reports, which indeed, supply a lot of details: names of the arrested, locations of the BDSM establishments and dates of the raids and/or arrests at issue, providing NYPD with the search criteria it claims to be necessary for locating and identifying the documents sought.

While this information was not included in UJC's FOIL request or appeal, NYPD nonetheless is not opposed to UJC making a new, more specific request (see NYPD's Memorandum of Law, fn 2). At oral argument, in light of the court's discussion and directive for a search of the second part of Category 2 records, UJC sought to amend the FOIL request to include: a specific category of time and location to possibly facilitate NYPD's ability to

meaningfully respond. The application was granted and the FOIL request is to be limited to (1) the Borough of Manhattan; and (2) the period from September 2006 through September 2008. Considering that UJC's original request was made in September 2008, followed by a year-long exchange of correspondence between the parties, and, since UJC's petition, together with the attached media reports provides sufficient information to enable NYPD to locate the second part of Category 2 records within the Borough of Manhattan, this court directs that NYPD conduct a diligent search for the second part Category 2 documents in accordance with the amended FOIL request and produce the responsive documents, reserving all rights.

At the oral argument, NYPD posited that the FOIL searches discussed above might prove to be burdensome. The court directed NYPD to submit a fact affidavit detailing the "burdensomeness" of said request, if applicable.

Exempted Documents

The remaining issues concern Category 1 documents, *i.e.*, the nine pages from the Manual, withheld on the grounds that disclosure of such documents compiled for law enforcement purposes (1) would reveal non-routine criminal investigative techniques and procedures (POL §87 (e)(iv)), and (2) could endanger the life and safety of any person (POL §87 (f)).

FOIL imposes a broad duty of disclosure on government agencies (*Matter of Hanig v State of New York Dept of Motor Vehicles*, 79 NY2d 106 [1992]). All government records are thus presumptively open for public inspection and copying unless they fall within the enumerated categories of exemptions which permit agencies to withhold certain records (*id.*). The Legislature and the Court of Appeals have nevertheless recognized "a legitimate need on the part

of the government to keep some matters confidential" (*Matter of Fink v Lefkowitz*, 47 NY2d 567, 571 [1979]). "To be sure, the balance is presumptively struck in favor of disclosure, but in [ten] specific, narrowly constructed instances where the governmental agency convincingly demonstrates its need, disclosure will not be ordered" (POL §87 (2); *Fink, supra*, at 571). Exemptions from disclosure are to be narrowly construed, with the burden resting on the agency to justify the applicability of the exemption upon which it relies (*Johnson, citing Matter of Citizens for Alternatives to Animal Labs v Board of Trustees of State Univ. of N.Y.*, 92 NY2d, *supra*, at 362; *Matter of Hanig*, 79 NY2d 106). "[T]o invoke one of the exemptions of section 87(2) [of POL], the agency must articulate 'particularized and specific justification' for not disclosing the requested documents" (*Brown v New York City Police Dept.*, 264 AD2d 558, 694 NYS2d 385 [1st Dept 1999], *citing Gould* at 275; *Matter of Capital Newspapers v Burns*, 67 NY2d 562, 566; *see also, Church of Scientology v State of New York*, 46 NY2d 906, 907-908 [1979]).

If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*Gould; see, Matter of Xerox Corp. v Town of Webster*, 65 NY2d 131, 133, 490 NYS2d 488; *Matter of Farbman & Sons v New York City Health & Hosps. Corp.*, 62 NY2d, at 83, 476 NYS2d 69 [1984]).

POL §87 (2)(e)(iv): Impede the Law Enforcement

Under POL §87(2)(e)(iv), the NYPD's files are exempt from disclosure if the disclosure of such files would reveal non-routine criminal investigative techniques or procedures. "The

purpose of the exemption provided by Public Officers Law §87 (2) (e) (iv) is to prevent violators of the law from being apprised of non-routine procedures by which law enforcement officials gather information" (*Matter of Fink v Lefkowitz*, 47 NY2d 567, 572, 419 NYS2d 467[1977]).

In *Fink*, the Court distinguished agency records compiled for law enforcement purposes, which illustrate investigative techniques, from the documents which articulate the agency's understanding of the rules and regulations it is empowered to enforce. The Court stated that records which "merely clarify procedural or substantive law must be disclosed" since such information in the hands of the public does not impede effective law enforcement (*Fink*, at 572). "Indicative, but not necessarily dispositive, of whether the investigative techniques are non-routine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by [law enforcement] personnel" (*id.*, at 572).

Applying the above principles and, after *in camera* review of the withheld documents, the Court determines that Category 1 documents withheld by NYPD are clearly protected from disclosure pursuant to POL §87 (e)(iv). The nine pages of the submitted documents represent a portion of the confidential Organized Crime Control Bureau ("OCCB") Manual of the Vice Enforcement Division. These documents depict specific investigative techniques which are not routine within the meaning of POL §87(2)(e)(iv) (*see Fink; De Oliveira v Wagner*, 274 AD2d 904, 711 NYS2d 592 [3d Dept 2000]; *De Zimm v Connelie*, 102 AD2d 668, 479 NYS2d 871[3d Dept 1984]). In particular, the first section (pages 1 and 2) of the manual, entitled "Prostitution, " discusses step-by-step procedures used by undercover NYPD officers to identify, engage and arrest the suspect violators of the prostitution laws. It also refers to transmittal devices used

during the undercover operations as well as the counter-surveillance devices used by violators to avoid detection. Disclosure of this information, quoting the *Fink* court, would "furnish the safecracker with the combination to the safe" (*Fink*, at 573), as it would alert the potential violators of the prostitution laws to the unique factors and methods the undercover police officers are likely to use to communicate with the other members of the team.

Likewise, pages 3, 4, 5 and 6, comprising a section on the specific to the prostitution world terminology, taught to the undercover officers, and pages 7, 8 and 9, entitled "Escort Operations," provide a highly detailed, step-by-step illustration of the investigatory process. In this court's opinion, none of these procedures are routine.

Contrary to UJC's contention, undercover operations, even though widely used and time-tested, are nevertheless non-routine. Indeed, detailed specialized methods of conducting an investigation into the activities of a specialized area of criminal enforcement in which, as here, voluntary compliance with the law has been less than exemplary, have been held "non-routine" (*Fink*, at 573; *Matter of Spencer v New York State Police*, 187 AD2d 919, 591 NYS2d 207 [3d Dept 1992]; *De Zimm v Connelle*, 102 AD2d 668, 479 NYS2d 871 [3d Dept 1984][portions of the administrative police manual with respect to specific rules for eavesdropping procedure using electronic surveillance and monitoring devices during criminal investigations were exempt under POL §87(2)(e)(iv)]. Similar to undercover techniques and procedures, *i.e.*, the situations in which "the very function to be performed presumes secrecy as to the manner of its performance," federal courts held that the mechanics of an F.B.I. "stakeout" arrangement be properly excluded from disclosure under the federal Freedom of Information Act (5 USC 552 (a)(2)(c); *Cox v U.S. Dept. of Justice*, 576 F2d 1302 [CA Mo 1978], citing *Hawkes v Internal Revenue Service*, 467

F2d 787, 795 [6th Cir 1972]).

Contrary to UJC's argument that the Manual merely "clarifies the law" encouraging "knowledgeable and voluntary compliance," the manual at issue here, relates to the investigation process of illegal prostitution activity and therefore contains neither the material that would encourage compliance with the prostitution law, nor does it clarify whether bondage and domination are considered 'sexual conduct' within the meaning of the New York prostitution laws.

In *Cox*, where petitioner sought disclosure of the portions of the Drug Enforcement Manual, the court explained that, unlike the Internal Revenue Manual [*Hawkes v Internal Revenue Service*, 467 F2d 787 (6th Cir 1972)], or the manual for training OSHA compliance officers [*Stokes v Brennan*, 476 F2d 699 (5th Cir 1973)], which dealt with the administrative regulation of conduct that usually is lawful, "the DEA Agents Manual related entirely to illegal drug transactions and therefore, probably contain[ed] little material that would encourage 'knowledgeable and voluntary compliance with the law'" (*Cox v U.S. Dept. of Justice*, 576 F2d 1302).

Similarly, the manual at issue here, relates to illegal prostitution activity and therefore contains little material that would encourage "knowledgeable and voluntary compliance with the law" by potential violators. To the contrary, NYPD has established that disclosing these nine pages of the Manual would raise a substantial likelihood that persons engaged in prostitution-related activity would be alert to these techniques and would deliberately tailor their conduct so as to avoid detection or prosecution, thus, seriously compromising NYPD's future undercover investigations.

And, contrary to UJC's contention, NYPD has met its burden of invoking the exemptions, sufficiently articulating "particularized and specific justification" for such exemptions (*Brown, citing Gould, supra*).

Accordingly, NYPD's exemption from production of the nine pages of the Manual on this ground was proper pursuant to POL §87 (2)(e)(iv).

POL §87 (2)(f): Endanger the Life or Safety of Police Officers

This court finds that NYPD has substantially met its burden of establishing that the submitted nine pages of the Manual are also exempt under (POL §87 (2)(f)) as their disclosure could endanger the life or safety of persons and "pose the very risk of harm covered by the exemption" (*Boddi v Goord*, 251 AD2d 799 [3d Dept 1998], *citing Matter of Partee v Bartlett*, 241 AD2d 605, lv denied 90 NY2d 81[3d 1997]; *Matter of Stronza v Hoke*, 148 AD2d 900, lv denied 74 NY2d 611 [3d Dept 1989])

Similar types of training manuals have been held by the courts to contain certain information, disclosure of which could endanger the life or safety of persons (*Matter of Connolly v New York Guard*, 175 AD2d 372 [3d Dept 1991])[disclosure of the documents pertaining to mobilization plans of the New York Guard and its annual training exercises, containing the information on methods used to communicate with Guard members in the event of mobilization, procedures used to assemble and disperse Guard members, identification code words and methods and procedures relating to security, intelligence and counterintelligence, could endanger the life and safety of Guard members or others]; *Boddi, supra* [Correctional Services Employee Manual, pertaining to the supervision and security of inmates, if revealed, could endanger the safety and security of the [employees of] the correction facility]; *Ruberti, Girvin & Ferlazzo*,

P.C. v New York State Div. of State Police, 641 NYS2d 411[3d Dept 1996] [disclosure of the troop, zone, and station assignments of police officers could endanger the life and safety of those officers]).

Furthermore, even redacted materials have been held to be exempt both as potentially endangering life and safety of the police officers, and as impeding future police investigations. In *In re the City of New York* (607 F3d 923 [2d Cir 2010]) petitioners, protesters arrested during 2004 Republican National Convention in New York City, sought disclosure of the confidential undercover police reports detailing the investigation of potential security threats in the months leading to the convention. The court held that even the redacted documents contained information that could disclose the identity of an NYPD undercover officer, which could present a risk to the safety and effectiveness of that officer and would likely provide additional information about how the NYPD infiltrates organizations, thereby impeding future investigations.

Here, the court finds that the highly discreet nature of the information contained in the nine pages of the Manual, instructing an undercover police officer on the specific behavior in a highly specific environment of the world of prostitution, if publicly known, could allow potential perpetrators to discern the factors and signals which could identify the officer as an undercover, thereby posing a risk of danger to his or her life or safety, or even the life or safety of "sex workers." Notwithstanding that UJC does not seek any names or locations in its Category 1 request, "[p]ulling any individual 'thread' of an undercover operation may unravel the entire 'fabric' that could lead to identifying an undercover officer" (*In re the City of New York*, 607 F3d 923, *supra*). Thus, the materials withheld fall squarely within the ambit of this exemption.

Contrary to UJC's contention, the court finds that NYPD sufficiently articulated justification for POL §87 (2)(f) exemption by explaining that revealing the specific practices, language and equipment used by undercover police officers would make them easily identifiable and therefore, at greater risk for danger or violence. As pointed out in *Matter of Stronza v Hoke* (*supra*), "it is not required to prove that a danger to a person's life or safety will occur if the information is made public. Rather, there need only be a possibility that such information would endanger the lives or safety of individuals" (*Stronza*, at 901). NYPD clearly showed that such possibility exists.

Therefore, Category 1 documents are properly exempt from disclosure. The petition to compel respondents to produce documents requested pursuant to FOIL is granted solely as to Category 2 documents and denied as to Category 1 records as noted above.

Attorneys' Fees

Pursuant to POL §89(4)(c), the court may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, when: (1) the agency had no reasonable basis for denying access; or (2) the agency failed to respond to a request or appeal within the statutory time (*see Beechwood Restorative Care Center v Signor*, 11 AD3d 987, 784 NYS2d 750 [4th Dept 2004], lv to appeal granted 4 NY3d 703, 792 NYS2d 1, *affd* 5 NY3d 435) [a party may recover reasonable attorney fees under POL 89(4)(c) where (1) it has "substantially prevailed," (2) the record sought was "of clearly significant interest to general public," and (3) "the agency lacked reasonable basis in law for withholding record"). However, even if a party meets those requirements, award of attorney fees remains discretionary with

Supreme Court (*id.*).

Here, the NYPD had a reasonable basis for denying access to the records at issue, and petitioner did not substantially prevail in this proceeding, notwithstanding this court's directing that a limited category of documents be produced. Therefore, UJC's request for attorneys' fees is denied as unwarranted.

Conclusion

Based on the foregoing, it is hereby

ORDERED and ADJUDGED that the Article 78 petition for an order compelling the respondents New York Police Department and Raymond Kelly in his official capacity as Commissioner of the New York City Police Department to produce documents requested pursuant to New York's Freedom of Information Law (Public Officers Law, "POL" §§ 84-90), is granted solely to the extent that NYPD shall conduct a search of the second part of Category 2 documents and provide a response to the request for such documents within 90 days of the date of this Order. Oral application by petitioner Urban Justice Center to amend the FOIL request is granted and the FOIL request is to be limited to: (1) the Borough of Manhattan; and (2) the period from September 2006 through September 2008. The respondent NYPD is to submit a fact affidavit detailing the "burdensomeness" of said request, if applicable; and it is further

ORDERED and ADJUDGED that the branch of the petition for an order compelling the respondents to produce documents requested pursuant to New York's Freedom of Information Law (Public Officers Law, "POL" §§ 84-90) in Category 1 is denied and dismissed; and it is further

ORDERED and ADJUDGED that the petition as against respondent Raymond Kelly, in his official capacity as Commissioner of the New York City Police Department, is hereby dismissed pursuant to CPLR §3211 (a)(8) for lack of personal jurisdiction; and it is further

ORDERED and ADJUDGED that the branch of the petition seeking attorneys' fees and costs related to this action is denied and dismissed; and it is further

ORDERED that petitioner shall serve a copy of this order with notice of entry upon respondents within 20 days of entry.

This constitutes the Order and Judgment of the Court.

Dated: September 1, 2010



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1418).