Matter of New York Times Co. v District Attorney of Kings County
2018 NY Slip Op 33642(U)
May 16, 2018
Supreme Court, Kings County
Docket Number: 3321/17
Judge: Dawn M. Jimenez-Salta

At an IAS Term, Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 16th day of May, 2018.

P R E S E N T:

HON. DAWN JIMENEZ-SALTA,
Justice.

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In the Matter of the Application of
THE NEW YORK TIMES COMPANY,

Petitioner,

DECISION/ORDER

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

Index No. 3321/17

Mot. Seq. No. 1

- against -

THE DISTRICT ATTORNEY OF KINGS COUNTY,

Respondent.

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Recitation, as required by *CPLR 2219 (a)*, of the papers considered in the review of:

1) Notice of Petition and Verified Petition, Dated December 15, 2017, of Petitioner The New York Times Company ("Petitioner") for a Judgment, Pursuant to CPLR article 78 and Public Officers Law article 6, Declaring that Certain Records of Respondent The District Attorney of Kings County ("Respondent") Are Subject to Disclosure, Declaring that Certain Redactions Are Impermissible, Allowing Petitioner to Inspect and Obtain Copies of Those Records, and Awarding Petitioner Attorney's Fees and Litigation Costs, together with the accompanying Affirmation and Memorandum of Law.

2) Respondent's Affirmation in Opposition to Petition, Dated January 24, 2018, and accompanying Memorandum of Law.

3) Petitioner's Reply Memorandum of Law, Dated January 30, 2018.

Papers Considered:	Numbered:
Notice of Petition, Petition, and Memorandum of Law	Petitioner 1-4
Affirmation in Opposition to Petition and Memorandum of Law	Respondent 5-6
Reply Memorandum of Law	Petitioner 7

Background

This is a special proceeding under CPLR article 78 to compel the production of certain documents pursuant to Public Officers Law ("POL") article 6, also known as the Freedom of Information Law ("FOIL"). Petitioner publishes The New York Times, a daily newspaper of wide and extensive circulation. Respondent is a government agency subject to the requirements of the POL. One of Respondent's specialized sections is the Conviction Review Unit ("CRU") which, according to Respondent's Web site, is "tasked with looking into old, questionable convictions."[1] CRU prepared memoranda ("memos") on 24 individuals whose convictions were vacated in 18 criminal cases (collectively, the "Exonerated Individuals"). One of the Exonerated Individuals is Jabbar Washington ("Washington").[2] Washington provided Petitioner with a waiver and release of his memo.

Following Petitioner's FOIL request, as supplemented, for the memos on the Exonerated Individuals, including Washington, Respondent provided Petitioner with the memo on Washington only (the "Washington memo") and in a redacted form. Respondent, citing various provisions of the POL and the Criminal Procedure Law ("CPL"), declined to provide Petitioner with the memos on the other Exonerated Individuals. It also declined to provide Petitioner with an unredacted version of the Washington memo.

Disclosure Of The Memos On
The Exonerated Individuals Other Than Washington

POL 87 (2) (a) excepts from disclosure "access to records or portions thereof that . . . are specifically exempted from disclosure by state . . . statute." CPL 160.50 (1) (c) provides, in relevant part, that "[u]pon the termination of a criminal action or proceeding against a person in favor of such person. . . , the record of such action or proceeding shall be sealed; namely, that "all official records and papers, including judgments and orders of a court but not including published court decisions or opinions or records and briefs on appeal, relating to the arrest or prosecution . . . on file with . . . prosecutor's office shall be sealed and not made available to any person. . . ." Once sealed pursuant to the statute, records may be unsealed only in the certain specified circumstances set forth in CPL 160.50 (1) (d), as follows: "such records shall be made available to the person accused or to such person's designated agent. . . ."

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[1] *See* http://brooklynda.org/conviction-review-unit (accessed May 14, 2018).

[2] The verb "exonerate" is defined, in relevant part, as "[t]o clear of all blame; to officially declare (a person) to be free of guilt" (Black's Law Dictionary [10th ed 2014], exonerate). Although Washington was "exonerated" in the sense that Respondent determined that his conviction had been improperly obtained, he was not "exonerated" in the sense that he was not determined to have been actually innocent. Rather, Respondent moved to vacate Washington's conviction and dismiss his indictment in light of its anticipated inability on retrial to prove his guilt beyond a reasonable doubt. *See* Washington Memo at 27 ("Improprieties engaged in by the prosecutors, judge and defense counsel worked collectively to so grossly corrupt the fact finding process that Washington was substantially denied a fair trial. For these reasons, *although likely guilty and provably so on the basis of his confession alone*, the CRU recommends Jabbar Washington's conviction be vacated.") (emphasis added).

CPL 160.50 was enacted to protect an accused person from the adverse effects of a criminal record when the ultimate result of the charge was exoneration (*see Matter of Journal Publ. Co. v Office of Special Prosecutor*, 131 Misc 2d 417, 421 [Sup Ct, NY County 1986]; *Ciraulo v Dillon*, 108 Misc 2d 751, 753 [Sup Ct, Nassau County 1981]). "Consistent with the statute's remedial purpose, is its intended application to any criminal action or proceeding terminated in favor of the person accused" (*Matter of Hynes v Karassik*, 47 NY2d 659, 663 [1979], *rearg denied* 48 NY2d 656 [1979], *motion to amend remittitur denied* 48 NY2d 657 [1979]). "The broad definition thus encompasses an expansive class of dispositions, including acquittal and various specified dismissals and vacaturs, regardless of whether premised on grounds unrelated to guilt or innocence" (*id.*). Where the individual who is the subject of a confidential memo (such as Washington) provides a designation in accordance with CPL 160.50 (1) (d), Supreme Court must honor his/her designee's request for disclosure (*see Matter of Levitov v Cowhey*, 270 AD2d 269, 270 [2d Dept 2000]). Without a requisite designation, however, a newspaper is not one of the enumerated entities which may gain access to documents that are sealed under CPL 160.50 (1) (c) (*see People v McLoughlin*, 122 Misc 2d 891, 893 [App Term, NY County 1983], *affd for reasons stated below* 104 AD2d 320 [1st Dept 1984], *appeal dismissed* 65 NY2d 687 [1985], *motion to amend remittitur denied* 65 NY2d 924 [1985]). Although courts retain inherent discretionary power to release sealed records, that power is to be exercised only in "extraordinary circumstances" when the interests of justice so require (*see Matter of Hynes*, 47 NY2d at 664). The requesting party must make a "compelling demonstration" before a court may invoke its discretionary power to permit the unsealing of criminal records (*see Matter of Anonymous*, 164 AD2d 225, 226 [1st Dept 1990] [internal quotation marks omitted], *lv denied* 77 NY2d 804 [1991]). This inherent power may not be exercised here because Petitioner has failed to demonstrate that other avenues of investigation were exhausted or thwarted; for example, by obtaining the designations from the other Exonerated Individuals (*see People v Cruz*, 1 Misc 3d 908[A], 2004 NY Slip Op 50004[U], *8 [Sup Ct, Bronx County 2004]; *see also Matter of Anonymous*, 95 AD2d 763 [2d Dept 1983]; *People v McLoughlin*, 122 Misc 2d at 893). Accordingly, Respondent lawfully denied Petitioner access to the memos on those Exonerated Individuals for whom, unlike Washington, Petitioner failed to provide Respondent with a designation.

Disclosure Of The Unredacted Washington Memo

Respondent, in providing the Washington memo to Petitioner, redacted information falling into three categories: (1) the nondisclosed names and statements of non-testifying witnesses; (2) the grand jury materials; and (3) the so-called deliberative portions of the Washington memo.

Nondisclosed Names And Statements Of Non-Testifying Witnesses

POL 87 (2) (e) (iii) bars "access to records or portions thereof that . . . are compiled for law enforcement purposes and which, if disclosed, would . . . identify a confidential source or disclose confidential information relating to a criminal investigation." Based on the law *then in effect in the Second Department*, Respondent correctly relied on this subdivision in redacting the applicable portions of the Washington memo (*see Matter of Friedman v Rice*, 134 AD3d 826, 828 [2d Dept 2015], *revd* 30 NY3d 461 [2017]). After the conclusion of the

administrative review but before the inception of this proceeding, the Court of Appeals in *Matter of Friedman v Rice* overturned the blanket proscription, previously in effect in the Second Department, against disclosure of names and statements of non-testifying witnesses. In *Matter of Friedman v Rice*, the Court of Appeals held (at page 473) that "sources and information may be withheld [under POL 87 (2) (e) (iii)], *only upon a specific showing of an express promise of confidentiality to the source, or a finding that, under the circumstances of the particular case, the confidentiality of the source or information can be reasonably inferred*" (emphasis added). Inasmuch as Respondent lacked an opportunity at the administrative level to apply the Court of Appeals' subsequently enunciated test, it is appropriate to remand this discrete and narrow issue to Respondent for determination, as more fully set forth in the decretal paragraph below. Requiring Petitioner to lodge a new request with Respondent on this limited issue would exalt form over substance.

Grand Jury Materials

As stated, POL 87 (2) (a) excepts from disclosure "access to records or portions thereof that . . . are specifically exempted from disclosure by state . . . statute." Under CPL 190.25 (4) (a), grand jury proceedings are considered secret. The protective shield for the secrecy of grand jury proceedings and records is guaranteed by longstanding statutory provisions and well-founded precedents (*see Attorney General of State of NY v Firetog*, 94 NY2d 477, 483 [2000]).[3] "Although the rule of secrecy is not absolute, a presumption of confidentiality attaches to the record of grand jury proceedings (*see People v Fetcho*, 91 NY2d 765, 769 [1998]). The presumption of confidentiality may be rebutted only by a demonstration of "a compelling and particularized need" for access to the grand jury material (*Perryman v Gennaro*, 147 AD3d 852, 852 [2d Dept 2017] [internal quotation marks omitted]). "If a defendant meets that initial burden, the trial court must then balance the public interest for disclosure against the public interest favoring secrecy" (*People v Fetcho*, 91 NY2d at 769). "Where the former outweighs the latter, the trial court may exercise its discretion to direct disclosure" (*id.*).

Here, Petitioner, as designee of Washington, has failed to meet its initial burden of demonstrating a compelling and particularized need for access to the portions of his memo which summarized the grand jury materials (*see Perryman*, 147 AD3d at 853). Instead, Petitioner contends that the Court should conduct an in-camera review of the unredacted Washington memo to determine whether "the exemption for grand jury material is being applied properly or [is] being extended to information that does not fall within the bounds of grand jury secrecy" (Reply Memorandum of Law at 13). Yet, an in-camera examination of the unredacted Washington memo would not resolve Petitioner's concern in the absence of a concurrent in-camera examination of the entirety of the grand jury minutes. Such an examination may be burdensome, and would be necessarily conducted without benefit of

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[3] Typically, grand jury materials are made available only to defendant and only when he or she will be otherwise unable to formulate any meaningful argument against one that the prosecutor postulates is supported by them. *See e.g. People v Baxin*, 26 NY3d 6, 11 (2015) (where the grand jury testimony was being used as evidence in chief against defendant in support of his adjudication as a sex offender); CPL 210.30 (2) (inspection of the grand jury minutes by defendant to determine legal sufficiency of indictment).

criticism and illumination by a party with the actual interest in forcing disclosure. In sum, Petitioner has made no initial showing of a compelling and particularized need for disclosure that would justify the Court using its limited resources to examine the unredacted Washington memo and the grand jury minutes in camera.

The Deliberative Portions Of The Washington Memo

The so-called deliberative portions of the Washington memo, with the exception of the portion which was disclosed to Petitioner and, separately, to the public in Respondent's press release, was redacted on the grounds of, among others, attorney work product.[4] CPLR 3101 (c), made applicable hereto under POL 87 (2) (a), grants absolute immunity from disclosure to the "work product of an attorney." According to Respondent, the redacted portions of the Washington memo consist of the legal analyses, opinions, and conclusions of Assistant District Attorneys in the CRU regarding the merits of Washington's prosecution, trial, and conviction,[5] thus rendering them attorney work product under CPLR 3101 (c) (*see Matter of Gartner v New York State Attorney General's Off.*, ___ AD3d ___, 2018 NY Slip Op 02381, *3 [3d Dept 2018]). Petitioner waived any challenge to Respondent's claim to the attorney work product privilege by failing to challenge same in its petition.[6] Respondent did not relinquish the attorney work product privilege attached to the Washington memo when it subsequently issued a press release summarizing the basis for Respondent's decision to seek a vacatur of Washington's conviction and dismissal of his indictment in the interest of justice.[7]

Attorney's Fees And Litigation Costs

Under POL 89 (4) (c) (ii), "[t]he court . . . shall assess, against [the] agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in

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[4] *See* Respondent's letter, dated October 16, 2017, to Petitioner at 2 ("Moreover, the deliberative portions that are not reflected in the press release are exempt as attorney work product.").

[5] *See* Respondent's Memorandum of Law in Opposition at 9.

[6] As the attorney work product privilege applies, the Court need not address Petitioner's alternative argument that the portions of the Washington memo at issue are subject to disclosure because they represent "final agency policy or determinations" within the meaning of POL 89 (2) (g) (iii).

[7] In addition to its press release, Respondent specifically described the misconduct underlying Washington's wrongful conviction at oral argument on July 12, 2017, in support of its motion to vacate his conviction and dismiss his indictment (*see People v Moses*, 58 Misc 3d 1226[A], 2018 NY Slip Op 50282[U], *7 [Sup Ct, Kings County 2018] ["on July 12, 2017, in support of the motion to vacate the conviction (and dismiss the indictment) of Jabbar Washington(,) . . . the KCDA asserted that Detective Scarcella 'intentionally and improperly' testified to a non-responsive statement to make it falsely appear as if a witness had identified Washington as the perpetrator in the lineup rather than as someone she knew from the neighborhood"]). The July 12, 2017, hearing on Washington's exoneration was attended by Petitioner's reporter and was referenced in his article which Petitioner published approximately one month thereafter. *See* Alan Feuer, *Wrongful Convictions Are Set Right, But Few Fingers Get Pointed*, NY Times, August 9, 2017, § A at 17 (print edition).

any case under the provisions of this section in which such person has *substantially prevailed* and the court finds that the agency had no reasonable basis for denying access" (emphasis added). Inasmuch as Petitioner has not "substantially prevailed" in this proceeding, it is not entitled to an award of reasonable attorney's fees or other litigation costs (*see Matter of Cook v Nassau County Police Dept*, 140 AD3d 1059, 1061 [2d Dept 2016]).

CONCLUSION

Respondent's determination denying Petitioner's FOIL request was not affected by an error of law as it was then in effect in the Second Department. In light of the Court of Appeals' subsequent decision in *Matter of Friedman v Rice*, 30 NY3d 461 (2017), however, the Court *grants* the petition *solely to the extent* of remanding Petitioner's FOIL request to Respondent to determine whether under *Friedman* there remains a valid basis to withhold the nondisclosed names and statements of non-testifying witnesses in the Washington memo. The remainder of the petition is *denied*.

The Clerk is directed to enter judgment accordingly.

This constitutes the Decision/Order and Judgment of the Court.

Dated: May 16, 2018
Brooklyn, NY

Matter of New York Times Co. v District Attorney of Kings County
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ENTER,

Dawn Jimenez-Salta, J.S.C.

Hon. Dawn Jimenez-Salta

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