

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

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In the Matter of the Application of
THE HERALD COMPANY and JOHN O'BRIEN,

Petitioners,

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

-against-

NEW YORK STATE DIVISION OF STATE POLICE,
LAURIE M. WAGNER, as Captain and Records Access
Officer, New York State Division of State Police, and
WILLIAM J. CALLAHAN, as Administrative Director,
New York State Division of State Police,

Respondents.

Supreme Court Albany County Article 78 Term
Hon. Roger D. McDonough, Acting Supreme Court Justice Presiding
RJI # 01-07-ST7955 Index No. 6082-07

Appearances:

Hiscock & Barclay, LLP
Attorneys for Petitioners
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and Gabriel M. Nugent, of Counsel)
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(Michael McCartin, Esq., Assistant
Attorney General)

DECISION/ORDER/JUDGMENT

Roger D. McDonough, Justice

Petitioners seek to vacate certain decisions made in response to their Freedom of Information Law ("FOIL") requests. They also seek attorneys' fees and litigation costs. Respondents have answered and asked the Court to dismiss the petition. The Court conducted oral argument on the matter on November 7, 2007.

Background

Petitioner O'Brien is a journalist employed by petitioner Herald Company as a staff reporter for *The Post Standard*. *The Post Standard* is a daily, general circulation newspaper published in Syracuse, New York. On September 23, 2006, a murder-suicide took place in Cicero, New York. There is no meaningful dispute that the victim was Mrs. Wendy Dirk and that the perpetrator was her husband. The event was the subject of extensive coverage by the newspaper. As a part of its investigation of the event, the newspaper made several FOIL requests.

First FOIL Request

On September 27, 2006, O'Brien made a FOIL request to the State Police. The relevant portion of the request read as follows:

Under the New York State Freedom of Information Act, The Post-Standard requests copies of all state police reports related to the Sept. 23, 2006, homicide-suicide of Wendy and James Dirk at their home at 6510 Dawns Ridge Road, Cicero, N.Y. This request includes all witness statements and reports made by investigators.

The request was denied by respondent Wagner who informed O'Brien, via letter, that disclosure would interfere with a law enforcement investigation. O'Brien appealed the denial based, in part, on his interview with a State Police Lieutenant who had told O'Brien that the case was closed. O'Brien's appeal was denied by respondent Callahan, who cited the same rationale relied upon by respondent Wagner.

Second FOIL Request

On March 7, 2007, O'Brien made a second FOIL request to the State Police. The

relevant portion of the request read as follows:

Under the New York Freedom of Information Act, The Post-Standard requests copies of all state police reports related to the September 23, 2006, homicide-suicide of Wendy and James Dirk at their home at 6150 Dawns Ridge Road, Cicero, N.Y.

In October, you denied a previous FOI request from the newspaper for these records on the grounds that the investigation was ongoing. If that is still the case, I ask that this FOI remain in effect until the investigation is completed and the documents are released.

Respondent Wagner denied this request because disclosure “would constitute an unwarranted personal privacy of those concerned.” O’Brien’s appeal of the denial was rejected by respondent Callahan. Callahan concurred with respondent Wagner’s determination that disclosure would constitute an unwarranted invasion of personal privacy. Callahan also stated that disclosure of the records “would reveal non-routine criminal investigate techniques and procedures.” Finally, Callahan stated that certain records were exempt under County Law § 677(3)(b).

O’Brien sought reconsideration of Callahan’s denial of the second FOIL request. The reconsideration was based, in part, upon a favorable advisory opinion respondents had received from the Executive Director of the New York State Committee on Open Government. Callahan denied the request for reconsideration, and this proceeding ensued.

Discussion

The public is entitled to broad “access to the records of government” (Public Officers Law § 84). A state agency must “make available for public inspection and copying all records” except those for which it can claim a specific exemption applies (*see* Public Officers Law § 87[2]; 89 [3]). Courts must narrowly interpret the exemptions so as to comport with the legislative intent that the public is granted maximum access to the records of government (*Matter of Capital Newspapers v Whalen*, 69 NY2d 246, 252 [1987]).

Privacy Exemption

Pursuant to Public Officers Law § 87[2], agencies are permitted to deny access to records or portions thereof that: “(b) if disclosed would constitute an unwarranted invasion of personal

privacy under the provisions of subdivision two of section eighty-nine of this article.” The non-exhaustive list from § 89 is comprised of the following:

- i. disclosure of employment, medical or credit histories or personal references of applicants for employment;
- ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility;
- iii. sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes;
- iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; or
- v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency; or
- vi. information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten-a of the workers' compensation law.

Respondents' privacy argument does not fall within any of the specific enumerated exceptions. Rather, the argument is based on the New York State Police's policy to deny FOIL requests for investigative files related to individuals who have never been convicted of a crime related to the incident investigated. In her affidavit, Wagner averred that based on this policy the entire investigative file was exempt from disclosure and there was no need to examine the particular contents of the file.¹ In support of the legality of the policy, respondents have cited two unreported and factually distinguishable decisions from Supreme Courts in Albany County and St. Lawrence County respectively.

In Pfeiffer v New York State Police, Justice Thomas J. McNamara concluded that an

¹ At oral argument, counsel for respondents asserted that the privacy exemption was strictly based on the personal privacy of the alleged perpetrator of the murder-suicide and did not relate to the privacy interests of witnesses.

alleged perpetrator's privacy interests in not being stigmatized by an accusation of criminal conduct warranted non-disclosure of certain records (*Matter of Pfeiffer v New York State Police*, Index No. 6087-01 (Alb. Co. Sup. Ct., March 4, 2002)). In *Meacham v Wagner*, Justice David Demarest relied upon the *Pfeiffer* decision and concluded that the alleged perpetrator's privacy interests warranted non-disclosure of the requested records (*Matter of Meacham v Wagner*, Index No. 121142 (St. Lawrence Co. Sup. Ct., March 1, 2006)). In both cases the alleged perpetrator was never formally charged with criminal conduct.

The three cases are similar in the sense that all involved situations where the sealing protections of Criminal Procedure Law § 160.50 were not available because no criminal action or proceeding ever arose. The critical distinction herein is that the alleged perpetrators in *Pfeiffer* and *Meacham* did not foreclose any possible criminal action or proceeding by taking their own life after killing their victim. Compounding the distinction is the fact that respondents have in no way challenged the conclusion of the Onondaga County Medical Examiner that Dirk had shot his wife to death and then proceeded to shoot himself to death. This unchallenged conclusion puts the instant matter far beyond the realm of a mere accusation of criminal conduct. As such, the Court finds no basis for relying upon the *Pfeiffer* and *Meacham* decisions in this proceeding.²

The Court begins its analysis of Mr. Dirk's privacy interests with the recognition that his surviving relatives have a legally protected privacy interest in keeping private the affairs of the decedent (*see, Matter of New York Times Co., v City of New York Fire Department*, 4 NY3d 477, 485 [2005]). The Court must determine whether disclosure would injure that interest, and whether any such injury would be "unwarranted" as defined by FOIL's privacy exception (*Id.*). The ultimate determination boils down to a "balancing of the privacy interests at stake against the public interest in disclosure of the information" (*Id.*).³

² In their submissions and at oral argument, respondents relied solely on the *Pfeiffer* and *Meacham* decisions and have not provided the Court with any privacy arguments specific to the instant case.

³ The Court notes that none of Mr. Dirk's surviving blood relatives have been heard on this matter and further notes that respondents have made no attempt to educate the Court as to the views of said relatives. Petitioners have indicated that Wendy Dirk's surviving brother has called for full disclosure of the State Police investigative file.

The privacy interests of the murder-suicide perpetrator, and his relatives, herein cannot be accurately described as compelling (*cf. Id.*). Additionally, petitioners have established the existence of a legitimate public interest in the disclosure of the investigative file. Specifically, petitioners have sufficiently established the public's interest in the extremely serious issue of domestic violence and the relevance of this event to said issue. These arguments were not addressed by respondent. Based on the foregoing, the Court concludes that disclosure of the State Police's investigative file in this matter would not constitute an unwarranted invasion of the personal privacy of decedent and his surviving relatives.

Non-routine criminal investigative techniques and procedures

Respondents also contend that pages 46-91 and 144-149 of the investigatory file are exempt from disclosure because they would reveal non-routine criminal investigation techniques and procedures. These pages contain the State Police Forensic Identification Unit's ("FIU") Supplemental Report concerning the FIU's forensic processing of the crime scene. Respondents describe the report as a "highly detailed step-by-step depiction of the FIU's forensic processing of that crime scene . . ." According to respondents, release of the report would allow criminals to evade detection by tailoring their actions to counter FIU's techniques and procedures.⁴ The substance of respondents' arguments on this issue does not extend far beyond the above statements.

In reply, petitioners argue that respondents have failed to establish a particularized and specific justification for the denial of public access to the investigatory file. Specifically, petitioners argue that respondents failed to demonstrate that disclosure of the FIU report would reveal detailed, specialized methods of conducting a criminal investigation.

The Court has conducted an *in camera* review of the materials and reaches the following determinations. Pages 46-53 & 73-74 constitute nonroutine criminal investigative techniques for the processing of a homicide scene and are therefore exempt from disclosure (Matter of Allen v Strojnowski, 129 AD2d 700, 701 [2nd Dept. 1990]). Pages 54-72 constitute property logs from the crime scene, diagrams of the crime scene and field notes from the crime scene. Said items do

⁴ At oral argument, respondents' counsel conceded that fingerprint and ballistics information in the report could be disclosed under the precedent of the Third Department.

not contain information pertaining to nonroutine investigatory procedures and are therefore not exempt from disclosure (*see, Matter of Spencer v New York State Police*, 187 AD2d 919, 921 [3rd Dept. 1992]). Page 75 will be further discussed in that portion of the decision which discusses County Law § 677, but the Court does find that page 75 should not be exempt from disclosure on the articulated basis that it contains nonroutine investigatory procedures. Pages 76-77 constitute a crime scene attendance log, pages 78-83 and 144-149 consist of two evidence record lists, page 84 constitutes a property receipt for property of the victim and pages 85-91 constitute a list of the digital photos related to the investigatory file. Said items do not contain information pertaining to nonroutine investigatory procedures and are therefore not exempt from disclosure (*see, Id.*).

County Law § 677

Lastly, respondents argue that pages 52,53, 75, 90-116, 140 and 141 of the investigatory file are exempt from disclosure based on County Law § 677(3)(b). The Court has reviewed the relevant pages and finds that, with the exception of pages 90-91, they are exempt from disclosure based upon their status as an autopsy report and descriptions of the autopsies performed on the victim (*see, Id.* at 921-922; *Matter of Moore v Santucci*, 151 AD2d 677, 679 [2nd Dept. 1989]). Pages 90-91 are not exempt because they merely constitute a partial list of the digital photos related to the investigatory file.

Attorneys' Fees and Litigation Costs

To recover attorneys' fees and litigation costs, petitioners must show that: 1) they "substantially prevailed" on the petition and 2) "the agency has no reasonable basis for denying access" (Public Officers Law § 89(4)(c)). Based on the Court's determinations regarding disclosure, the Court concludes that petitioners have "substantially prevailed" on their petition.

Respondents assert that they had a reasonable basis for denying access based upon the "substantial legal precedent" cited in their memorandum of law. Respondents are presumably referring to the *Pfeiffer* and *Meacham* decisions, but the Court has already noted the critical factual distinction between the cases. As detailed above, the *Pfeiffer* and *Meacham* decisions cannot be read to support the blanket proposition that police investigatory files are exempt from disclosure whenever the accused has not been formally charged with criminal conduct. Rather,

in both decisions the Courts balanced the competing interests of public access and individual privacy. Here, there is nothing in the record which would indicate that respondents considered the interests of public access. Additionally, there is nothing in the record to indicate that respondents made any effort to determine the privacy wishes of the surviving relatives of the perpetrator or the victim. As such, the Court recognizes the merit in petitioners' assertion that respondents lacked a reasonable basis for denying access to the records.

Nevertheless, the Court finds that respondents' actions and inactions in this matter were based on a colorable legal argument, providing the agency with some reasonable basis for denying access to the records. Respondents were relying upon the only legal precedent in this state which dealt with the issue of a FOIL request in a potential criminal matter which had not resulted in charges being lodged against the alleged perpetrator. While the Court found the respondents' interpretation of this precedent to be overly broad, respondents' interpretation and implementation of the legal precedent cannot be said to be without some reasonable basis. As such, the Court declines to award attorneys fees and costs in this matter.

Accordingly it is hereby,

ORDERED AND ADJUDGED, that the petition is hereby granted, with the exception of the following pages – 46-53, 73-75, 92-116 and 140-141 which were properly deemed to be exempt from disclosure; and it is further

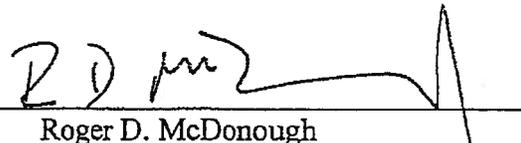
ORDERED AND ADJUDGED, that respondents are directed to redact all Social Security Numbers, telephone numbers and addresses and other personal identifying information of the witnesses disclosed in the investigatory file; and it is further

ORDERED AND ADJUDGED, that petitioners' request for attorneys fees and costs is hereby denied.

This shall constitute the decision, order and judgment of the Court. All papers, with the exception of the *in camera* exhibits, are returned to the attorney for the petitioners who is directed to enter this Decision/Order/Judgment without notice and to serve all attorneys of record with a copy of this Decision/Order/Judgment with notice of entry.

ENTER

Dated: Albany, New York
February 21, 2008



Roger D. McDonough
Acting Supreme Court Justice

Papers Considered:

1. Notice of Petition, dated August 3, 2007;
2. Verified Petition, dated August 2, 2007, with annexed exhibits;
3. Respondents' Answer, dated September 20, 2007, with annexed Record;
4. Affidavit of Laurie M. Wagner, sworn to September 19, 2007;
5. Reply Affidavit of William A. Hurst, Esq., sworn to October 5, 2007, with annexed exhibits;
6. Transcript of Oral Argument, received on December 11, 2007.

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v.

NEW YORK STATE DIVISION OF STATE POLICE, LAURIE
M. WAGNER, as Captain and Records Access Officer, New York
State Division of State Police, and WILLIAM J. CALLAHAN, as
Administrative Director, New York State Division of State Police,

Respondents.

NOTICE OF ENTRY

Article 78 Term

Hon. Roger D. McDonough

RJI No.: 01-07-ST7955

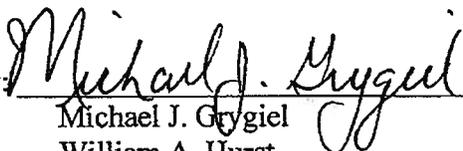
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HISCOCK & BARCLAY, LLP

PLEASE TAKE NOTICE that the within is a true copy of a Decision, Order and Judgment
executed by the Honorable Roger D. McDonough, A.J.S.C. and duly entered in the office of the clerk of
the within named Court on February 28, 2008.

DATED: March 11, 2008
Albany, New York

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