

FILED
AND
ENTERED
ON 3-19-1992
WESTCHESTER
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of
J. BRUCE MAFFEO, ESQ.,

Petitioner,

DECISION & ORDER

For a Judgment Under Article 78 of
the Civil Practice Law and Rules

Index #92-18502

-against-

THE STATE OF NEW YORK ORGANIZED
CRIME TASK FORCE, and RONALD
GOLDSTOCK, as Task Force Director,

Respondents.
-----x

LANGE, J.

This is an Article 78 proceeding wherein petitioner seeks, inter alia, an order directing disclosure of certain documents pursuant to the Freedom of Information Law.

By letter dated July 8, 1992, petitioner, J. Bruce Maffeo, requested from respondent Ronald Goldstock, Director, Organized Crime Task Force, "... all records in your office's possession, custody, or control relating to Alphonso D'Arco and Joseph D'Arco" pursuant to Public Officers Law Section 84, et seq., known as the Freedom of Information Law (FOIL). In support of this request, Mr.

Maffeo stated to respondent:

As you are aware, Messrs. D'Arco have been publicly identified as cooperating witnesses in a number of pending and prospective criminal actions on the federal and state levels. During the recent trial of United States v. Vitorio Amuso, ..., Alphonso D'Arco testified that during 1990 he was contacted by members of your staff. We seek all records relating to that contact as well as any other matter involving either Mr. D'Arco or his son, Joseph.

The records access officer for respondent Organized Crime Task Force denied petitioner's request by letter dated July 30, 1992, and advised petitioner:

... it is Task Force policy not to admit or deny the existence of any confidential investigation as to any individual. Thus, if the Task Force did have documents which fell within the terms of your request as a result of a confidential investigation, such documents would be exempt from disclosure under Public Officers Law Sections 87(e) and (g).

Petitioner thereafter appealed the July 30, 1992 denial by letter dated August 26, 1992 to respondent Ronald Goldstock, Director, Organized Task Force. In his appeal, petitioner pointed out that Public Officers Law Sections 87(2)(e) and (g):

... relate to confidential investigations and are patently irrelevant to Messrs. D'Arco, who, as you are aware, have appeared publicly as cooperating

witnesses in a number of criminal and related proceedings.

Respondent Ronald Goldstock, by letter dated September 2, 1992, denied petitioner's appeal and stated:

... if the Task Force did have any documents falling within the terms of your request, they would be exempt from disclosure under [Public Officers Law Sections 87(2)(e) and (g)].

Petitioner thereafter brought the instant Article 78 proceeding, contending that respondent Goldstock has failed to perform a duty enjoined upon him by law. Petitioner asserts that there is a presumption that the requested documents are open for inspection, and that respondents have failed to demonstrate that the requested documents are exempt from disclosure.

By notice of cross motion, respondents seek an order granting an in camera disclosure of whether the requested documents exist and, if so, whether the Organized Crime Task Force is in possession of said records. Respondents contend that Alphonso D'Arco's testimony at a Federal trial did not make reference to respondent Organized Crime Task Force, but rather to some other government agency; that disclosure of whether or not the requested documents exist would interfere with respondents'

investigations and disclose confidential information; and that if the documents in fact exist, respondents will meet their burden of articulating a "particularized and specific justification" (M. Farbman & Sons v. New York City Health and Hospitals Corp., 62 NY2d 75, 83) for denying access at the time of an in camera inspection. Specifically, respondents assert that if they admit existence of records regarding contacts with Alphonso D'Arco, the former boss of the Lucchese crime family, then a D'Arco associate "might be motivated to alter the manner in which [continuing criminal] schemes are carried out"; and that, on the other hand, if respondents disclose they have none of the requested documents, then petitioner or a D'Arco associate could "deduce whether the Task Force was or is investigating criminal activities associated with the Lucchese family generally or D'Arco in particular." Page 17, respondents' answer to petition, notice of cross motion.

In response, petitioner argues that Alphonso D'Arco cooperated with law enforcement officials for more than a year, and testified as a prosecution witness at at least three public trials regarding his own and his associates' alleged criminal activities.

The legislative intent of the Freedom of Information Law is set forth in Section 84 of the Public

Officers Law. Section 84 reads as follows:

The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.

...

The legislature therefore declares that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article.

The governmental agency therefore must make available for public inspection all agency documents unless specifically exempted in Public Officers Law Section 87(2)(a) - (i) which states:

... such agency may deny access to records or portions thereof that:

...

(e) are compiled for law enforcement purposes and which, if disclosed, would:

(i) interfere with law enforcement investigations or judicial proceedings;

...

(iii) identify a confidential source or disclose confidential information relating to a criminal investigation; or

(iv) reveal criminal investigative techniques or procedures, except routine techniques and procedures;

(g) are inter-agency or intra-agency materials ...

If an exemption is claimed by an agency:

... the burden lies with the agency 'to articulate particularized and specific justification', and to establish that 'the material requested falls squarely within the ambit of [the] statutory exemptions.'

M. Farbman & Sons, supra, page 83.

The Court of Appeals in Capital Newspapers v. Burns, 67 NY2d 562, 566-567, followed the reasoning in Farbman, supra, and went on to hold:

Moreover, because FOIL has made full disclosure by public agencies a public right, the status or need of the person seeking access is generally of no consequence in construing FOIL and its exemptions.

The Appellate Division, Second Department, recently addressed the law enforcement exemption under Public Officers Law Section 87(2)(e) as follows:

A police report may be withheld or redacted, in part, if the information in the report was compiled for law enforcement purposes and, if disclosed, would, inter alia, interfere with law enforcement investigations, identify a confidential source or disclose confidential information relating to a

criminal investigation (see Public Officers Law Section 87[2][e]; [cites omitted]). Moreover, the law enforcement exemption (Public Officers Law Section 87) is not rendered unavailable because the investigation has been concluded [cite omitted]. Additionally, scientific records revealing nonroutine criminal investigative techniques or procedures are exempt from disclosure under FOIL [cite omitted]. 'Indicative, but not necessarily dispositive, of whether investigative techniques are nonroutine is whether disclosure of these 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 agency personnel' (see, Matter of Fink v Lefkowitz, 47 NY2d 567, 572, supra). Ballistic and fingerprinting tests are examples of routine investigative techniques ...

Lastly, we note that while statements of the petitioner, his codefendants and witnesses obtained by the respondent in the course of preparing a criminal case for trial are generally exempt from disclosure under FOIL [cite omitted], once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public [cites omitted].

Moore v. Santucci, 151 AD2d 677, 679. See also Laureano v. Grimes, 179 AD2d 602, 604.

In light of respondents' claim that the requested documents are exempt under the Freedom of Information Law, this Court will follow the suggested procedure in Farbman,

supra, page 83, and conduct an in camera inspection of all documents claimed exempt under the law enforcement exemption. This Court will make a determination as to whether respondents will be directed to disclose the existence or nonexistence of the requested documents, i.e., whether the FOIL request "would cause harm cognizable under a [FOIL] exemption" (Gardels v. Central Intelligence Agency, 689 F.2d 1100, 1103; and Antonelli v. Federal Bureau of Investigation, 721 F.2d 615, 616), and whether the requested documents are exempt under Public Officers Law Section 87(2)(e).

Accordingly, respondents' cross motion is granted to the extent that respondents are directed to provide to the Court for an in camera inspection all requested documents, along with a proposed redacted version of said documents, within twenty days of receipt of this decision and order. Finally, petitioner's request for attorney's fees under Public Officers Law Section 89(4)(c) is held in abeyance pending this Court's in camera inspection of the requested documents; and petitioner's request for oral argument is denied at this time.

The Court considered the following papers on this application:

1. Notice of petition dated October 15, 1992, with accompanying petition, verified on October 15, 1992,

and Exhibits A-E;

2. Respondents' answer to petition verified on November 5, 1992, with accompanying notice of cross motion for in camera disclosure dated November 5, 1992, affidavit in support of cross motion, memorandum of law, and appendix;

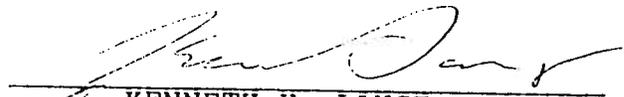
3. Petitioner's answer, verified November 10, 1992, and memorandum of law in opposition to cross motion for in camera disclosure;

4. Letter dated December 29, 1992 from petitioner's attorney to The Hon. James D. Hopkins, enclosing a copy of Judge LaCava's decision which appeared in the New York Law Journal, Friday, 11/27/92, page 28, column 1; and

5. Letter dated February 2, 1993 from petitioner's attorney to The Hon. Kenneth H. Lange, requesting oral argument.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
March 19, 1993


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Acting J.S.C.

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THE STATE OF NEW YORK ORGANIZED
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LANGE, J.

By decision and order dated, filed and entered March 19, 1993, this Court directed respondents to provide certain documents to this Court for an in camera inspection in order to determine whether or not they are exempt under the Freedom of Information Law (FOIL). Specifically, respondents were directed to provide "... all requested documents, along with a proposed redacted version of said documents, ..."

On April 8, 1993, counsel for respondents submitted to this Court copies of the requested documents in the following four categories:

1. A series of affidavits for eavesdropping

warrants which make reference to Alphonso D'Arco;

2. Five volumes of transcripts of trial testimony given by Alphonso D'Arco at a public trial conducted on May 26, 1992 in the Eastern District of the United States District Court;

3. A series of F.D. 302 investigation interviews of Alphonso D'Arco prepared by the Federal Bureau of Investigation; and

4. A one-page roster listing of members of the Lucchese crime family prepared by the Federal Bureau of Investigation.

Respondents consent to the disclosure of item #2, however, claim an exemption for items #1, #3 and #4.

I make the following findings and conclusions:

Upon an in camera review of the requested documents, I am satisfied that respondents have met their burden of articulating a "particularized and specific justification" (M. Farbman & Sons v. New York City Health and Hospitals Corp., 62 NY2d 75, 83) for denying access of the documents in items #1, #3 and #4. Item #1 is exempt from disclosure by New York State statute, CPL Section 700.55(1) which states:

Applications made and warrants issued

under [Article 700--Eavesdropping and video surveillance warrants] shall be sealed by the justice.

These affidavits are part of a current investigation.

The requested documents in items #3 and #4 are also part of a current investigation, and disclosure would interfere with a law enforcement investigation by the Organized Crime Task Force (see Public Officers Law Section 87(2)(e); and see Moore v. Santucci, 151 AD2d 677, 679).

Also, respondents' contention that disclosure of whether or not the requested documents exist would interfere with respondents' investigations and disclose confidential information is not persuasive. Respondents have not demonstrated that the FOIL request "would cause harm cognizable under a [FOIL] exemption" (Gardels v. Central Intelligence Agency, 689 F.2d 1100, 1103; and Antonelli v. Federal Bureau of Investigation, 721 F.2d 615, 616).

Finally, petitioner's request for attorney's fees under Public Officers Law Section 89(4)(c) is denied. There has been no showing that the requested material is "of clearly significant interest to the general public." Public Officers Law Section 89(4)(c); Matter of MacRae v. Dolce, 130 AD2d 577, 578; and Wurster v. LeFevre, 152 AD2d 810, 811.

Accordingly, based upon an in camera review of the documents presented, respondents are directed to make available for inspection all the material in item #2, that is the trial transcript of Alphonso D'Arco on May 26, 1992. The remainder of the requested documents are exempt under the Freedom of Information Law.

The Court considered the following papers on this application:

1. Notice of petition dated October 15, 1992, with accompanying petition, verified on October 15, 1992, and Exhibits A-E;

2. Respondents' answer to petition verified on November 5, 1992, with accompanying notice of cross motion for in camera disclosure dated November 5, 1992, affidavit in support of cross motion, memorandum of law, and appendix;

3. Petitioner's answer, verified November 10, 1992, and memorandum of law in opposition to cross motion for in camera disclosure;

4. Letter dated December 29, 1992 from petitioner's attorney to The Hon. James D. Hopkins, enclosing a copy of Judge LaCava's decision which appeared in the New York Law Journal, Friday, 11/27/92, page 28, column 1;

5. Letter dated February 2, 1993 from petitioner's attorney to The Hon. Kenneth H. Lange, requesting oral argument;

6. Letter dated March 24, 1993 to the Court from J. Bruce Maffeo; and

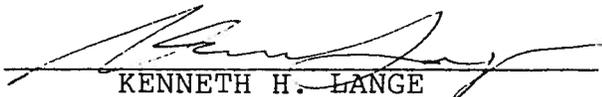
7. Letter dated April 2, 1993 to the Court from R. Harcourt Dodds, Staff Attorney of the Organized Crime Task Force.

The foregoing constitutes the decision, order and

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judgment of this Court.

Dated: White Plains, New York
April 14, 1993


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