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No. 49

In the Matter of Michael Lesher,
Appellant,

v.

Charles J. Hynes, &c., et al.,
Respondents.

Michael Lesher, appellant pro se.
Morgan J. Dennehy, for respondents.
New York Civil Liberties Union, amicus curiae.

READ, J.:

In 1984, a Kings County grand jury handed down an indictment charging Avrohom Mondrowitz with multiple counts of sexual abuse involving young boys. But he had already fled from the United States to Israel, one step ahead of an arrest warrant. Attempts to extradite Mondrowitz foundered early on, apparently because differences in Israeli and New York law prevented his

return under the extradition treaty then in force between the United States and Israel.

At some point, petitioner Michael Lesher, an attorney and author, became interested in the Mondrowitz case. On August 4, 1998, he made a request to the District Attorney of Kings County pursuant to New York's Freedom of Information Law (FOIL) (Public Officers Law § 84 et seq.) for documents relating to Mondrowitz. The District Attorney furnished material in response, including police reports, statements edited to remove the names of alleged victims and witnesses and some correspondence with federal agencies.

On October 17, 2007, nearly a decade later, Lesher made a second FOIL request to the District Attorney in which he sought

"[a]ny and all records, files, notes, correspondence, memoranda or other documents pertinent in any way to the matter State v Mondrowitz, Indictment No. 7693/84 and pertaining to the time period from September 1, 1993 to the present date, including but not limited to any correspondence between the D.A.'s office and the Department of Justice, the Department of State or any other branch of the United States government."

After considerable delay, the FOIL records access officer denied Lesher's request on December 23, 2008, invoking Public Officers Law § 87 (2) (e) (i-iv), the law enforcement exemption, because the records sought "pertain[ed] to an open case in that a bench warrant was issued on 02/21/1985." In particular, she relied on section 87 (2) (e) (i), which allows an agency to "deny access to records or portions thereof that . . . are compiled for law enforcement purposes and which, if

disclosed, would . . . interfere with law enforcement investigations or judicial proceedings." Leshner took an administrative appeal of this denial, which the FOIL appeals officer upheld in a letter dated January 29, 2009. She stated that "because the documents [sought were] relevant to an ongoing prosecution, . . . disclosure at this time would interfere with the prosecution."

Leshner apparently argued in his administrative appeal that Public Officers Law § 87 (2) (e) (i) was inapplicable to his 2007 FOIL request because in 1998 the District Attorney had furnished several documents associated with the Mondrowitz case. The FOIL appeals officer replied that in 1998, though,

"the prosecution against Mr. Mondrowitz, although open and pending, was not actually active due to the fact that we were unable to extradite Mr. Mondrowitz from Israel because the extradition treaty in force at the time between Israel and the United States did not cover Mr. Mondrowitz's crimes. However, the new extradition treaty, which went into effect in January, 2007, and now includes Mr. Mondrowitz's crimes, makes extradition a possibility. Thus, the prosecution of Mr. Mondrowitz is now viable, and, therefore, the above-cited FOIL exemption [i.e., Public Officers Law § 87 (2) (e) (i)] is fully applicable."

By verified petition sworn to May 26, 2009, Leshner commenced this CPLR article 78 proceeding to compel the District Attorney and the FOIL appeals officer to comply with his records request. In his petition, Leshner alleged that the District Attorney resumed efforts to extradite Mondrowitz in October 2007, and

"Mondrowitz was arrested in Israel the next month,

November 2007, and has been incarcerated . . . since then awaiting extradition. His extradition was ordered by the Government of Israel, which order was affirmed by a District Court in Jerusalem. The decision of Israel's Supreme Court on Mondrowitz's appeal of his extradition order is still awaited."

He insisted that it was "extremely unlikely" that "investigatory documents" had been added to the Mondrowitz case file after September 1993, the beginning of the time period addressed by his FOIL request. He further urged that there were "no 'judicial proceedings' against Mondrowitz . . . in progress" except in Israel; and that the District Attorney had not explained how the release of "documents, including correspondence, pertaining to the renewed extradition request conveyed to Israel in October 2007" interfered with law enforcement investigations or judicial proceedings.

The FOIL appeals officer countered in an affirmation dated June 18, 2009 that Lesher was "wrong" to claim that the District Attorney was not entitled to rely upon Public Officers Law § 87 (2) (e) (i) to deny access to the requested documents. She cited Matter of Pittari v Pirro (258 AD2d 202 [2d Dept 1999], lv denied 94 NY2d 755 [1999] [where a criminal proceeding is pending, documents are exempt under Public Officers Law § 87 (2) (e) (i) upon "generic determination" that disclosure of categories of records would create broad risks of harm; a document-by-document showing of interference is not required]) and Matter of Legal Aid Socy. v New York City Police Dept. (274 AD2d 207 [1st Dept 2000], lv denied 95 NY2d 956 [2000] [same])

for the proposition that the "mere fact" that documents were compiled in furtherance of an ongoing criminal prosecution was a sufficiently particularized explanation to justify denial of access, and "that an agency need not advance an explanation as to how the disclosure of each document . . . would interfere with that prosecution or investigation." Leshner in his reply affidavit sworn to June 22, 2009 alleged that there was a difference between prosecution and extradition, and the "specific focus" of his FOIL request was "correspondence, memoranda or other documents relating to communications between the District Attorney and the federal government, regarding the extradition of Avrohom Mondrowitz."

In a judgment entered November 23, 2009, Supreme Court granted the petition "to the extent only of directing [disclosure] of all correspondence, memoranda or other documents between the Office of the District Attorney and agencies or departments of the federal government" regarding Mondrowitz's extradition. Relying on Pittari and Legal Aid Society, the judge reasoned that a claim that disclosure would interfere with a pending criminal prosecution was sufficiently particularized to justify denying a FOIL request under Public Officers Law § 87 (2) (e) (i), but that the "correspondence and communications between the District Attorney and federal agencies . . . being sought" were not likewise exempt because "those records allegedly pertain[ed] to Mondrowitz's extradition."

On December 21, 2009, the District Attorney moved to reargue. He informed Supreme Court that the records compiled in connection with Mondrowitz's prosecution filled roughly four boxes, and that nearly half of the documents in those boxes comprised

"correspondence between the District Attorney's Office and the United States Department of State in which the District Attorney's Office provided detailed information about Mondrowitz's crimes so that the State Department could prepare extradition requests. The correspondence consists of crime summaries, timelines of when and where each crime occurred, witness names and personal information, and witness statements."

The District Attorney maintained that this correspondence was necessarily "related to the ongoing prosecution because [it] involve[d] the efforts made to return Mondrowitz to the jurisdiction so that the prosecution [might] proceed"; and that "disclosure of the documents surely would interfere with the prosecution[] because they [were] replete with information about the crimes committed." Supreme Court denied the motion to reargue on April 28, 2010, and the District Attorney took an appeal.

On January 11, 2011, the Appellate Division unanimously reversed and dismissed the petition (80 AD3d 611 [2d Dept 2011]). The court concluded that the District Attorney had established that the materials requested by Leshner were covered in their entirety by Public Officers Law § 87 (2) (e) (i). This was so because "[c]ontrary to [Leshner's] contention," the District Attorney was "not required to detail the manner in which each

document sought would cause such interference. Rather, . . . the assertion that disclosure would interfere with an ongoing law enforcement investigation was a sufficiently particularized justification" under the circumstances (id. at 613).¹ We subsequently granted Leshner permission to appeal (16 NY3d 710 [2011]), and now affirm.

Leshner emphasizes that Supreme Court only ordered the District Attorney to disclose correspondence and communications related to Mondrowitz's extradition. In his view, such documents are not part of the criminal prosecution, "cannot possibly compromise a criminal prosecution" and so are not exempt from disclosure under Public Officers Law § 87 (2) (e) (i). In short, he argues that FOIL does not permit an agency to deny access to an "extradition-related" record compiled during the course of a criminal prosecution absent an explanation as to how the particular document's release would undermine ongoing or future investigatory or judicial proceedings.

FOIL's "legislative history . . . indicates that many of its provisions . . . were patterned after the Federal analogue. Accordingly, Federal case law and legislative history . . . are instructive" when interpreting such provisions (Matter

¹In his brief to the Appellate Division, the District Attorney stated that after Supreme Court's decision, "an Israeli appeals court" overturned Mondrowitz's extradition order, but that "the prosecution remain[ed] viable" because the United States Departments of Justice and State were still considering whether to pursue further action with the Israeli government.

of Fink v Lefkowitz (47 NY2d 567, 572 n * [1979] [citations omitted]). Notably, the law enforcement exemption is modeled on 5 USC § 552 (b) (7). As originally enacted by Congress, this provision of the Freedom of Information Act (FOIA) (5 USC § 552) exempted from disclosure "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." Similarly, the law enforcement exemption, as originally enacted in FOIL in 1974, shielded "information that is . . . part of investigatory files compiled for law enforcement purposes" (Public Officers Law former § 88 [7] [d]).

Congress rewrote FOIA's law enforcement exemption in 1974 to permit the nondisclosure of "records or information compiled for law enforcement purposes, but only to the extent that the production of such records would" create one of six specified dangers, the first of which was to "interfere with enforcement proceedings" (see 5 USC § 552 [b] [7] [A]) (Exemption 7A).² When the Legislature amended FOIL in 1977, it followed suit by enacting Public Officers Law § 87 (2) (e) (i), which, as previously noted, denies access to records "compiled for law enforcement purposes and which, if disclosed, would . . . interfere with law enforcement investigations or judicial proceedings."

²In 1986, Congress amended FOIA's law enforcement exemption to substitute "could reasonably be expected" for "would" (see United States Dept. of Justice v Reporters Comm. for Freedom of Press, 489 US 749, 777 n 22 [1989]).

As the Supreme Court explained in Natl. Labor Relations Bd. v Robbins Tire & Rubber Co. (437 US 214, 228-229 [1978]), Congress adopted Exemption 7A to register its disapproval of decisions handed down by the Circuit Court of Appeals for the District of Columbia in 1973 and 1974, which interpreted FOIA's original law enforcement exemption too broadly for Congress's taste. These decisions withheld material from disclosure so long as it was kept in an investigatory file compiled for law enforcement purposes, without regard to the nature of the documents or the status of the investigation. For example, in Aspin v Department of Defense (491 F2d 24, 30 [D.C. Cir 1973]), the D.C. Circuit held that the content of investigatory files remained exempt from disclosure even "after the termination of investigation and enforcement proceedings." The court reasoned that legislative history did not "compel a contrary view"; "if investigatory files were made public subsequent to the termination of enforcement proceedings, the ability of any investigatory body to conduct future investigations would be seriously impaired"; "[f]ew persons would respond candidly to investigators if they feared that their remarks would become public record after the proceedings"; and "the investigative techniques of the investigating body would be disclosed to the general public" (id.). "Thus, the thrust of congressional concern" when it enacted Exemption 7A "was to make clear that [FOIA's law enforcement exemption] did not endlessly protect

material simply because it was in an investigatory file" (Robbins, 437 US at 230); and "that by extending blanket protection to anything labeled an investigatory file, the D.C. Circuit had ignored Congress' original intent" (id. at 235; see also Title Guar. Co. v NLRB, 534 F2d 484, 492 [2d Cir 1976], cert. denied 429 US 834 [1976] ["The cases that Exemption 7A was intended to overrule were for the most part closed investigative file cases"]).

In light of this legislative history, the Court in Robbins considered whether the National Labor Relations Board (NLRB or the Board) was required to produce copies of witness statements requested by an employer pursuant to FOIA. At argument in the District Court, the NLRB contended that the statements were exempt from disclosure because their production would interfere with a pending enforcement proceeding -- in this case, a hearing on an unfair labor practice complaint lodged against the employer. The District Court held that Exemption 7A did not apply because "the Board did not claim that release of the documents at issue would pose any unique or unusual danger of interference with [the] particular enforcement proceeding" (id. at 217). On appeal, the United States Court of Appeals for the Fifth Circuit concluded generally "that Exemption 7(A) was to be available only where there was a specific evidentiary showing of the possibility of actual interference in an individual case," which it accurately concluded the NLRB had not demonstrated (id.

at 218).

The Supreme Court reversed. The Court ruled that Exemption 7A applied to the entire category of statements of witnesses whom the NLRB intended to call at the hearing, observing that Exemption 7A "[spoke] in the plural voice" about "enforcement proceedings" and therefore Congress "appear[ed] to contemplate that certain generic determinations might be made" (id. at 223-224). As the Court explained,

"While the Court of Appeals was correct that the amendment of [FOIA's original law enforcement exemption] was designed to eliminate 'blanket exemptions' for Government records simply because they were found in investigatory files compiled for law enforcement purposes, we think it erred in concluding that no generic determinations of likely interference can ever be made. We conclude that Congress did not intend to prevent the federal courts from determining that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records [] while a case is pending would generally 'interfere with enforcement proceedings'" (id. at 236).³

The Court then determined that the Board had met its burden of demonstrating that disclosure of witness statements would interfere with enforcement proceedings. The NLRB

³Justice Stevens in a concurring opinion observed that the majority's "rationale applie[d] equally to any enforcement proceeding" (437 US at 243). Justice Powell, in partial dissent, endorsed the Court's approach, agreeing that "the congressional requirement of a specific showing of harm does not prevent determinations of likely harm with respect to prehearing release of particular categories of documents" (id. at 249). He simply disagreed with the definition of the category, which he would have limited to statements of witnesses currently employed by the employer.

accomplished this by pointing out that disclosure threatened to undermine its discovery procedures, delay adjudication of the unfair labor practice and heighten the danger of witness intimidation.

The Appellate Division in Pittari and Legal Aid Society adopted the Robbins analysis when interpreting Public Officers Law § 87 (2) (e) (i), as do we. A criminal prosecution is a "particular kind[] of enforcement proceeding" where "disclosure of particular kinds of investigatory records [] while a case is pending would generally 'interfere with enforcement proceedings'" (Robbins, 437 US at 236). We emphasize that this does not mean that every document in a law enforcement agency's criminal case file is automatically exempt from disclosure simply because kept there. The agency must identify the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of these categories of documents. Put slightly differently, the agency must still fulfill its burden under Public Officers Law § 89 (4) (b) to articulate a factual basis for the exemption.

Here, the District Attorney sustained this burden. First, he identified for Supreme Court the categories of records that he sought to withhold on the basis of the exemption -- i.e., correspondence with the United States Department of State "consist[ing] of crime summaries, timelines of when and where each crime occurred, witness names and personal information and

witness statements." Next, he identified the generic harm that disclosure would cause -- i.e., disclosure would necessarily interfere with law enforcement proceedings because the correspondence was "replete with information about the crimes committed," and so its release posed an obvious risk of prematurely tipping the District Attorney's hand. Finally, there is no doubt that law enforcement proceedings were ongoing when Leshar commenced this CPLR article 78 proceeding. Indeed, at that time there was every reason to believe that Mondrowitz would soon be returned to Brooklyn for trial. Leshar himself declared in his petition that Mondrowitz was incarcerated in Israel, awaiting extradition.

Of course, Public Officers Law § 87 (2) (e) (i) ceases to apply after enforcement investigations and any ensuing judicial proceedings have run their course. Thus, the exemption does not bar disclosure of records compiled for law enforcement purposes in a criminal matter where the prosecution has been completed, absent some unusual circumstance such as the prospect that disclosure might compromise a related case. And criminal cases are typically wound up within a reasonable time after a crime is committed. At the other end of the spectrum, though, are "cold cases" where an investigation remains open, perhaps for a very long time, once probative leads have been exhausted. Similarly, where a suspect flees the jurisdiction the potential to prosecute remains, although an eventual trial might be

uncertain of occurrence or timing. But this case of a fugitive from justice may now effectively be over.

Both parties have referred in their papers to a decision handed down by the Supreme Court of Israel in early 2010, after the record closed in Supreme Court. Leshner intimates that this decision brings to an end any realistic possibility that Mondrowitz will ever be extradited from Israel to stand trial for the crimes alleged in the indictment. Of course, Mondrowitz might always in theory return to Brooklyn voluntarily or relocate or travel to another nation from which extradition is possible, but such a happening is speculative and improbable.

Thus, Leshner is free to make another FOIL request for the correspondence and communications that he sought in this proceeding, based on the intervening Israeli judicial decision. If he is correct in his assessment of the decision's effect -- a matter for the FOIL records access officer to consider in the first instance -- there is, practically speaking, no longer any pending or potential law enforcement investigation or judicial proceeding with which disclosure might interfere. Public Officers Law § 87 (2) (e) (i) would not preclude release of the records.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

* * * * *

Order affirmed, with costs. Opinion by Judge Read. Chief Judge Lippman and Judges Ciparick, Graffeo, Smith, Pigott and Jones concur.

Decided April 3, 2012