

Matter of Bellamy v New York City Police Dept.

2009 NY Slip Op 32705(U)

November 13, 2009

Supreme Court, New York County

Docket Number: 401463/98

Judge: Alice Schlesinger

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

IA PART 16

PRESENT: ALICE SCHLESINGER
Justice

PART _____

Index Number : 401463/1998
BELLAMY, PERRY
VS.
NEW YORK CITY POLICE
SEQUENCE NUMBER : 005
RENEWAL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION.**

FILED

NOV 18 2009

NEW YORK
COUNTY CLERK'S OFFICE

NOV 13 2009

Dated: _____

Alice Schlesinger

ALICE SCHLESINGER 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):

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

-----X
In the Matter of the Application of
PERRY BELLAMY

Petitioner,

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

-against-

NEW YORK CITY POLICE DEPARTMENT,

Respondent.

-----X
SCHLESINGER, J.:

This Court has attempted to balance the public interest with the petitioner's legitimate request pursuant to FOIL on a number of occasions. The most recent of these was a decision of June 18, 2009. The matter had been remanded to me and pursuant to that remand, I had directed the respondent New York City Police Department to submit unredacted copies of the documents at issue to me for an *in camera* inspection together with an instruction to "establish particularized exemptions as well as proposed redactions."

After obtaining these documents and arguments, I directed that various documents be turned over. Those included an arrest report and complaint follow-up reports. However, respecting the privacy of the witnesses and heeding the arguments proffered by respondent, I ordered that "all addresses, ages or dates of birth, employment information, telephone numbers, etc. be redacted." I merely directed that the names and statements of the witnesses be left intact and turned over. There were reports prepared twenty-four years earlier.

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Rather than complying, two months later, respondent has moved to renew and reargue this decision pursuant to CPLR §2221(e) and CPLR §2221(d), with regard to those portions of the decision which dealt with the complaint follow-up reports. There was compliance vis-a-vis the other documents.

The proffered reason for renewal is that now, after all of these years, the Police Department has learned from the Queens District Attorney's office (presumably after some inquiry following my decision) that the individuals whose names appear on the reports at issue did not actually testify at the trial. This was the "new information" just recently acquired.

On the basis of this information, counsel argues this was new material facts which should lead the Court to conclude that disclosure of these individuals and their statements now would constitute an unwarranted invasion of their personal privacy. Several cases from the Second and Third Departments are cited for support for this argument, such as *Johnni v. Hynes*, 264 AD2d 777 (2nd Dept 1999) and *Spencer v. New York State Police*, 187 AD2d 919 (3rd Dept 1992).

However, upon a review of these opinions, no rationale for this exemption is given. Further, upon tracing back to the cited cases referenced therein, one finds *Knight v. Gold*, 53 AD2d 694 (2nd Dept 1976) which was a civil case wherein the District Attorney, in a related criminal matter, had interviewed witnesses in preparation for a trial. Those statements to the prosecutor were denied disclosure as part of its investigatory files compiled for law enforcement.

The First Department, while never (to this Court's knowledge) dealing directly with this issue, in *Johnson v. New York City Police Dept.*, 257 AD2d 343. 346 (1999) opined that:

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.

The court further stated that it was necessary that the agency set forth a “particularized and specific justification for denying access.” That court then went on in *Matter of Gould*, 89 NY2d 267 to discuss the balancing that trial court was required to do, which included the concern that disclosure could result in an unwarranted invasion of personal privacy.

Respondent argues now that because these witnesses did not testify at trial, their names and statements should not be disclosed as it would constitute an unwarranted invasion of personal privacy. But I do not see why such a conclusion is an irresistible one from this fact alone. For example, the prosecutor trying the case may have believed their statements were irrelevant or not particularly helpful in trying the case.¹ He did achieve a conviction without them.

There is nothing in any of these statements which promises confidentiality. But that in itself is not dispositive. The *Johnson* court went on to say (at p 348) that a specific promise of confidentiality is not necessary and adds “if the circumstances give rise to the clear inferences that such a promise was assumed, that too warrants exemption.”

Therefore, the courts are required to make individualized assessments based on all the circumstances here. I have done that. There is nothing that I have read in the documents, nor anything about the new information, which convinces me to now exempt these follow-up reports. Thus, renewal is denied.

¹Twenty-four years later, from my review of the documents, I can detect nothing particularly material or helpful to the prosecution in them

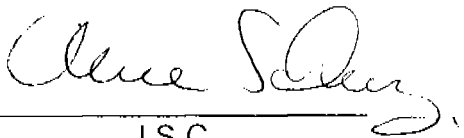
As to reargument, I am granting that only to clarify, though I had believed clarification was not needed, that all information about the witnesses (described in the decision as "etc") was to be redacted except for names and content. So of course, any medical or other similar information would be subject to that exclusion.

The respondent should now fully comply with this Court's June 18 decision and such is so ordered.

This constitutes the decision and order of this Court.

Dated: November 13, 2009

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J.S.C.

ALICE SCHLESINGER

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