

Matter of Oddone v Suffolk County Police Dept.

2013 NY Slip Op 32479(U)

October 3, 2013

Supreme Court, Suffolk County

Docket Number: 2036/2011

Judge: Jones

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

COPY

Present:

HON. JOHN J.J. JONES, JR.
Justice

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In the Matter of the Application of
ANTHONY ODDONE,

Petitioner,

-against-

SUFFOLK COUNTY POLICE DEPARTMENT,
STEVE LEVY as Suffolk County Executive,
CHRISTINE MALAFI as Suffolk County
Attorney, and CHRISTOPHER GATTO as
FOIL Appeals Officer,

Respondents.

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By prior order of the court dated January 11, 2013, the application of the petitioner, Anthony Oddone, ["the petitioner" or "Oddone"], for an order pursuant to CPLR 2307 for the issuance of subpoenas to the Custodian of Records, Suffolk County Police Department, and Detective Richard Higgins calling for the production of records at a hearing, to the extent that they were described in the Freedom of Information Act ["FOIA"], request filed by the petitioner on June 16, 2010, was granted.

The instant dispute concerns documents that the Suffolk County Attorney's Office, the attorney for the Suffolk County Police Department, ["the County Attorney"], contends are exempt from disclosure under certain provisions of **PUB. OFF. LAW** § 87. With the parties' consent, the Court conducted an *in camera* review of documents withheld by the County Attorney from its supplemental Freedom of Information Law ["FOIL"] production.

PUB. OFF. LAW § 87, entitled "Access to agency records", contains exemptions from disclosure codified in, inter alia, paragraph 2, subsections (b), (e) [iv], and (g) upon which the County Attorney relies to withhold documents generated by the Suffolk County Police Department. The documents concern the investigation, prosecution, and conviction of the petitioner in connection with the death of Andrew Reister in the early morning hours of August 7, 2008, in Southampton, Suffolk County. The underlying events giving rise to this special proceeding and its history have been fully set forth in the prior decision of the

Court dated January 11, 2013, and the decision of the Appellate Division Second Judicial Department (*People v. Oddone*, 89 A.D.3d 868, 932 N.Y.S.2d 149 [2d Dept. 2011]), and will not be repeated here except to inform the instant decision.

The petitioner commenced a related Article 78 proceeding against the Office of the Suffolk County District Attorney entitled, *In the Matter of the Application of Anthony Oddone, Petitioner, against Suffolk County District Attorney's Office, Thomas Spota as Suffolk County District Attorney, Steve Levy as Suffolk County Executive, Christine Malafi, as Suffolk County Attorney, and Christopher Gatto, as FOILS Appeals Officer*, under Index No. 14955/2011. That proceeding also sought to compel disclosure of similar information in response to the petitioner's FOIL request on the Suffolk County District Attorney dated January 14, 2011. The FOIL request there was almost identical to the FOIL request in the instant proceeding. The proceeding against the District Attorney resulted in disclosure of approximately 750 pages of documents, many of them duplicates, and many of them redacted.

In this proceeding, the petitioner has provided the Court with the 745 pages of documents disclosed in the Article 78 against the District Attorney. The respondent, through the County Attorney, has likewise provided the Court with 346 pages of documents that it contends are exempt from the petitioner's FOIL request. The parties have agreed to *in camera* review and comparison of the documents provided by the District Attorney and the County Attorney, respectively, in an effort to address the claimed exemption of the remaining documents that have not already been disclosed by either the District Attorney or the respondent here, the Suffolk County Police Department.

As the parties suspected, the Court's *in camera* review and comparison of both sets of documents revealed that many of the documents withheld by the County Attorney under a claimed exemption have already been disclosed by the District Attorney in the other Article 78 proceeding. The issue here is whether the Police Department's remaining withheld documents are exempt from disclosure pursuant to **PUB. OFF. LAW § 87 (2)**.

In a letter from the County Attorney to petitioner's counsel dated June 6, 2013, the County Attorney has categorized the withheld documents into thirteen groups. They are as follows: Line-up Reports and information, CAD Reports from SHVPD [Southampton Village Police Department], Subpoenas, Cobleskill PD documents, Independent Ins Docs, SHVPD Photo spreads, Associates Personal, Royal Canadian Mounted Police records, Search Warrant documents, SUNY Cobleskill Police documents, Probation records, Oddone Personal Documents (facebook, e-justice), SCPD [Suffolk County Police Department] Reports. The documents within these categories or files have been reviewed by the Court *in camera*.

By letter to the Court dated July 15, 2013, the petitioner has agreed to drop any challenge to the claimed exemptions in eight of the thirteen categories, with the caveat that the Court confirms upon its *in camera* review that the County Attorney's characterization of the documents in the eight categories is accurate. The petitioner maintains his challenge to the claimed exemptions in the following five categories: Independent Insurance documents, Associates Personal, Royal Canadian Mounted Police records, Oddone Personal Documents (facebook, e-justice), and SCPD Reports. The documents in the five remaining categories number a total of 156 pages.

The Court starts with the general proposition that public records are presumptively open to the public, unless they fall under one of the enumerated exemptions listed in **PUB. OFF. LAW** § 87(2). “Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access.” *Matter of Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566, 505 N.Y.S.2d 576, 496 N.E.2d 665 (1986), citing *Matter of Farbman & Sons v. New York City Health & Hosps. Corp.*, 62 N.Y.2d 75, 80, 476 N.Y.S.2d 69, 464 N.E.2d 437 (1984); *Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463 (1979).

The first category of as-yet undisclosed documents is labeled “Independent Insurance documents”. The documents consist of forty-nine pages of uncertified, unsigned, and unsworn transcripts of five recorded witness interviews taken by law enforcement personnel between August 22, 2008 and March 9, 2009. From the documents that the Court has before it, at least four of the transcribed interviews are from individuals who were called as witnesses at the petitioner’s criminal trial.

By letter from the Suffolk County FOIL Appeals Officer to petitioner’s counsel dated June 6, 2013, the County Attorney claims an exemption from disclosure of these transcribed interviews pursuant to **PUB. OFF. LAW** § 87 (2)(g). That exemption covers inter-agency or intra-agency materials which are not statistical or factual tabulations or data; instructions to staff that affect the public; final agency policy or determinations; external audits, including but not limited to audits performed by the comptroller and the federal government.

Blanket exemptions for particular types of documents are inimical to FOIL's policy of open government (*Gould v. New York City Police Dept.*, 89 N.Y.2d 267, 653 N.Y.S.2d 54, 675 N.E.2d 808 [1996], citing *Matter of Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 569, 505 N.Y.S.2d 576, 496 N.E.2d 665). To invoke one of the exemptions of § 87(2), the agency must articulate “particularized and specific justification” for not disclosing requested documents (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463).

Although the names and statements of witnesses who did not testify at trial need not necessarily be disclosed under FOIL, (see *Matter of John H. v. Goord*, 27 A.D.3d 798, 800, 809 N.Y.S.2d 682 [3d Dept. 2006]; *Matter of Carnevale v. City of Albany*, 68 A.D.3d 1290, 1292, 891 N.Y.S.2d 495 [3d Dept. 2009]), it appears that at least four of the interviews were conducted of witnesses who testified at the petitioner’s criminal trial. The County Attorney has failed to provide a “particularized and specific justification” for not disclosing the transcribed statements of trial witnesses. The transcripts of trial witnesses are subject to disclosure under FOIL (*Gould v. New York City Police Dept.*, 89 N.Y.2d at 277; *McCrary v. Village of Mamaroneck*, 34 Misc.3d 603, 623, 932 N.Y.S.2d 850 [N.Y. Sup. 2011]). The County Attorney is directed to provide the petitioner with copies of the transcripts of the interviews of any witnesses who testified at the petitioner’s criminal trial within twenty days of the entry date of this Order.

The second category of documents labeled “Oddone Personal Documents (facebook, e-justice)”, consists of twenty-four pages which the County Attorney contends are exempt pursuant to **PUB. OFF. LAW** § 87 (2) (b) and (2) (g), respectively. Section (2) (b), the privacy exemption, exempts information that, if disclosed, would constitute an unwarranted invasion of personal privacy under the provisions of § 89 (2)

(b) (*MacKenzie v. Seiden*, 106 A.D.3d 1140, 964 N.Y.S.2d 702 [3d Dept. 2013]). That section lists several types of information that would be considered an unwarranted invasion of personal privacy if disclosed, but does not encompass the information sought in petitioner's FOIL request. This list, however, is not exclusive (see *Matter of Schenectady County Socy. for the Prevention of Cruelty to Animals, Inc. v. Mills*, 74 A.D.3d 1417, 1418, 904 N.Y.S.2d 512), and a determination of whether disclosure of the information at issue would amount to an unwarranted invasion of personal privacy requires balancing the private interests at stake against the public interest in access to such information (see *Matter of New York Times Co. v. City of N.Y. Fire Dept.*, 4 N.Y.3d 477, 485, 796 N.Y.S.2d 302, 829 N.E.2d 266 [2005]; *Matter of Edwards v. New York State Police*, 44 A.D.3d 1216, 1216, 843 N.Y.S.2d 729 [3d Dept. 2007]).

The first eight pages of the Oddone Personal Documents category comprise a comprehensive report about the petitioner including his personal information, addresses, registered motor vehicles, criminal record, possible associates and relatives and their identifying information including social security numbers and dates of birth. To the extent that pages four through eight contain personal identifying information about individuals other than the petitioner, including their social security numbers and dates of birth, the Court agrees that such identifying information is exempt under the privacy exemption; the names, addresses, social security numbers and dates of birth of the individuals described in the report as "possible associates and relatives" should be redacted before the eight page report is produced by the County Attorney. Otherwise, the eight page "Comprehensive Report" must be disclosed (**PUB. OFF. LAW** § 89 (2) (b); *Prall v. New York City Dept. of Corrections*, 40 Misc.3d 940, --- N.Y.S.2d ----, 2013 WL 2501750 [N.Y.Sup. 2013], citing *Scott, Sardano & Pomeranz v. Records Access Officer of City of New York*, 65 N.Y.2d 294, 480 N.E.2d 1071 [1985]).

The County Attorney has failed to articulate a "particularized and specific justification" for not disclosing the eight page document entitled "Comprehensive Report", based on the alternate exemption relied on, the inter-agency/intra-agency exemption as stated in the County Attorney's letter to petitioner's counsel dated June 6, 2013. The report primarily contains what purports to be factual data about the petitioner. Blanket exemptions are inimical to the purposes behind F.O.I.A. (*Thomas v. New York City Dept. of Educ.*, 103 A.D.3d 495, 962 N.Y.S.2d 29 [1st Dept. 2013]; *New York State Defenders Ass'n v. New York State Police*, 87 A.D.3d 193, 927 N.Y.S.2d 423 [3d Dept. 2011]). The report, as redacted due to privacy concerns, must be disclosed (see *Matter of Molloy v. New York City Police Dept.*, 50 A.D.3d 98, 100-101, 851 N.Y.S.2d 480 [1st Dept. 2008]; *Kwasnik v. City of New York*, 262 A.D.2d 171, 691 N.Y.S.2d 525 [1st Dept. 1999]).

Five pages of the category of documents entitled "Oddone Personal Documents (facebook, e-justice)", comprise a report generated by the Southampton Village Police Department upon the petitioner's arrest on August 7, 2008, including his identifying information, arrest record, criminal history, and a response from an inquiry to the Federal Bureau of Investigation. The County Attorney has failed to provide a "particularized and specific justification" for not disclosing the report obtained by the SHVPD concerning the petitioner. Thus, the subject report is not exempt (*Gould v. New York City Police Dept.*, 89 N.Y.2d 267, 653 N.Y.S.2d 54, 675 N.E.2d 808 [1996]).

The final eleven pages in the category entitled "Oddone Personal Documents (facebook, e-justice)", are copies of pages from the petitioner's Facebook account which do not appear to be blocked by privacy settings and were printed on August 28, 2008. The first two pages appear to be the petitioner's Home Page

on Facebook on August 28, 2008. Those pages are not exempt and must be provided in the absence of a “particularized and specific justification” for not disclosing them. The remaining nine pages contain a list of the petitioner’s “Facebook friends” and their photographs. The Court determines that these pages are not exempt under the personal privacy exemption. While there is no specific case on point, at least one court has concluded in the context of a discovery dispute concerning a litigant’s Facebook account, that information posted in [the] open on social media accounts are freely discoverable and do not require court orders to disclose them (*Fawcett v. Altieri*, 38 Misc.3d 1022, 1027, 960 N.Y.S.2d 592 [N.Y.Sup. 2013]). The privacy exemption is not needed to protect that which is literally accessible to the world to view.

The third category of documents is entitled, “Associates Personal” and consists of 14 pages of documents that are not related to Anthony Oddone in the sense that they contain factual information about other individuals. The County Attorney has claimed exemptions from disclosure based upon **PUB. OFF. LAW § 87 (2) (b)** [privacy], (2) (g) [inter-agency or intra-agency], and (e) (iv) [would reveal criminal investigative techniques or procedures]. Upon an *in camera* review the Court finds that these pages are exempt from disclosure based on **PUB. OFF. LAW § 87 (2) (b)**, (2) (g), and (e) (iv).

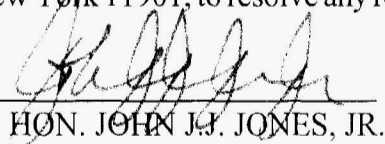
The fourth category of documents claimed to be exempt consists of thirteen pages of documents obtained from the Royal Canadian Mounted Police which the County Attorney claims are exempt from disclosure based upon **PUB. OFF. LAW § 2 (b)** [privacy exemption], and 2 (g) [inter-agency and intra-agency records]. The Court has reviewed these documents and agrees with the County Attorney that they fit within the exemption for inter-agency or intra-agency materials which are not: i. statistical or factual tabulations or data; ii. instructions to staff that affect the public; iii. final agency policy or determinations; iv. external audits, including but not limited to audits performed by the comptroller and the federal government (**PUB. OFF. LAW § 87 [2] [g]**).

The final category of documents is entitled “SCPD Reports” and consists of 56 pages of documents, each of which has already been disclosed to the petitioner in the production made by the District Attorney thereby making the petitioner’s FOIL challenge in this proceeding academic (*see Matter of Espiritu v. Vance*, 39 Misc.3d 1214[A], *4, 2013 WL 1715514 [N.Y. Sup.]).

The documents in the remaining eight categories are as described by the County Attorney with one exception. Page 62 of the category denominated “Cobleskill PD Docs” is a hand-written note dated “8/22/08 1200 hrs” stamped “Police Department County of Suffolk, N.Y.” The note shall be disclosed within twenty days of entry of this Order.

Based upon the foregoing, the County Attorney is directed to provide the described documents to counsel for the petitioner within twenty days of entry of this Order. Counsel for the parties are directed to appear at a conference on October 30, 2013, at 10:30 AM on the Fourth Floor of the Arthur M. Cromarty Court Complex located at 210 Center Drive, Riverhead, New York 11901, to resolve any remaining issues.

DATED: 3 Oct 2013


 HON. JOHN J. JONES, JR.
 J.S.C.

CHECK ONE: FINAL DISPOSITION

NON-FINAL DISPOSITION