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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50B

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COLLIER COUNTY PUBLISHING COMPANY,
Petitioner,

For a judgment pursuant to Article 78 of the Civil Practice Law and Rules

-against-

Index No. 109610/00

OFFICE OF THE DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK and GARY J. GALPERIN, ASSISTANT DISTRICT ATTORNEY,
Respondents.

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For Petitioner: Karen M. Kramer
For Respondent: Kristin A. Kirk
JUSTICE BRUCE ALLEN:

Petitioner seeks review of a determination denying its Freedom of Information Law ("FOIL") request. In two requests (which were treated as one combined request by respondent) petitioner sought access to documents presented to defense attorneys in discovery in cases pending under indictments arising out of the investigation of A.S. Goldmen & Co.. On administrative appeal, respondent Galperin, the agency's FOIL appeals officer, upheld denial of the request. Respondent determined that the denial was proper under Public Officers Law §87(2)(e)(i) and (e)(iii). Those subsections exempt from disclosure records which are compiled for law enforcement purposes and which, if disclosed, would (i) interfere with law enforcement investigations or judicial proceedings or (iii) identify a confidential source or disclose confidential information relating to a criminal investigation.

There do not appear to be any reported New York cases regarding third party FOIL requests for materials provided to

defendants in pending criminal cases. Petitioner cites several Florida cases on this issue. However, Florida has a statute which specifically provides that documents which are required by law to be given to a criminal defendant are public records subject to disclosure. Fla. St. §119.011(c)(5). New York does not have any similar statute. Indeed, numerous decisions have noted the lack of connection between the materials which must be disclosed to a defendant under the discovery provisions of the CPL and those which must be disclosed to a member of the general public under FOIL. Legal Aid Society v. New York City Police Department, _A.D.2d_, 713 N.Y.S.2d 3 (1st Dept. 2000); Gould v. NYPD, 89 N.Y.2d 267; People v. Seely, 179 Misc.2d 42 (Sup. Ct. Kings County, 1998).

Prior to the determination of the administrative appeal, petitioner sought an advisory opinion from the Committee on Open Government. The Committee issued an opinion which generally supports the position which petitioner takes in this proceeding: that respondent's initial denial did not contain a sufficient articulation of a particularized and specific justification to overcome the presumption of public access which attaches to agency records.

Normally, courts should defer to the opinions of the Committee on Open Government with respect to FOIL issues. Kwasnik v. City of New York, 262 A.D.2d 171 (1st Dept. 1999). However, the Committee's opinion was necessarily based on the facts presented to it at the time, which included only

and prosecution of the cases [illegible] specific facts significantly alters the issues in the present case. The Committee's opinion also predated the First Department's decision in Legal Aid v. NYPD, supra.

One of the arguments made by respondents is that they were entitled to rely on a blanket exemption of the requested materials under Public Officers Law §87(2)(e)(i). The First Department, in Legal Aid v. NYPD, and the Second Department, in Pittaro v. Pirro, 258 A.D.2d 202 (2nd Dept. 1999) each held that such an exemption could apply to FOIL requests made by defendants in a pending criminal action. As set out below, I do not find that respondents need to rely on a blanket exemption at this point. Nevertheless, the Pittaro and Legal Aid cases are instructive on two issues. First, it is clear that petitioner's contention that §87(2)(e)(i) does not apply because indictments have been handed down is incorrect. Second, it is also clear that the specificity required of an agency to justify nondisclosure will be less when it involves the application of §87(2)(e)(i) to a pending case or investigation.

That a lesser showing than normal is required (and therefore more discretion is afforded the agency) in such cases is entirely logical. In contrast to, for example, the exemptions claimed in Gould v. NYPD, supra, an exemption claimed under §87(2)(e)(i) is necessarily only temporary.

The affirmation of A.D.A. Suttlehan indicates that the requested records are compromised of "several truckloads" of materials, including hundreds of boxes and file cabinets full of documents, photographs, audio and video recordings, and electronic records. Discovery was carried out over the course of several months, with defense attorneys inspecting the materials in the presence of members of the District Attorney's staff. Some of the materials were provided to only some of the defendants, who were restricted by court order from disclosing their content to other defendants. Because of the volume of documents, and because the physical location and order of the documents is relevant to the People's case, close supervision is required during the inspection process.

I find that this is a sufficient showing to establish that allowing inspection by the general public would interfere with law enforcement investigations or judicial proceedings by straining resources and threatening the integrity of the evidence.

Petitioner apparently believes that respondent is required to set out a specific justification with regard to each separate record. However, this ignores the nature of petitioner's own

request. In Gould v. NYPD, supra, the petitioners had each requested memo books and/or dd5's with respect to their individual cases. The Court of Appeals held that the respondent could not rely on claimed blanket exemptions -- i.e., that those types of documents were exempt in all cases -- rather than address the specific document in the specific case. That is not the situation here. Petitioner has not requested any specific documents. Petitioner's request was to inspect all discovery evidence that has been presented to defense attorneys. The justification offered, as now enlightened by the supporting affirmation, is entirely responsive to the terms of that request.

Since I find that respondents have made a sufficient showing to justify exemption from disclosure under §87(2)(e)(i), there is no need at this time to consider the applicability of §87(2)(e)(iii).

October 5, 2000

J.S.C.