SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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IN THE MATTER

OF

MICHAEL KAVANAGH, DISTRICT ATTORNEY
OF ULSTER COUNTY,

Petitioner,

-against-

THE DEPARTMENT OF CORRECTIONAL
SERVICES, STATE OF NEW YORK AND
THOMAS A. COUGHLIN, III, AS
COMMISSIONER OF THE DEPARTMENT OF
CORRECTIONAL SERVICES.

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Albany County Special Term, March 28, 1986
Motion No. 24

HON. ROBERT C. WILLIAMS, Presiding

APPEARANCES: Michael Kavanagh, Esq.
Petitioner Pro Se
Ulster County District Attorney
Ulster County Courthouse
Kingston, New York 12401

Hon. Robert Abrams
Attorney General of the State of New York
(Judith I. Ratner, Assistant Attorney General,
of Counsel)
The Capitol
Albany, New York 12224

WILLIAMS, J.

Petitioner moves for judgment pursuant to Article 78 of the Civil Practice Law and Rules directing respondents to furnish him with all misbehavior reports concerning inmate Gerald McGivern from September 15, 1968 to date and the final dispositions of all such reports.

Petitioner is the District Attorney for the County of Ulster. He tried and convicted Gerald McGivern. Inmate McGivern was granted executive clemency by Governor Mario Cuomo, and was thereby put into a position whereby he could apply for parole immediately. Upon Gerald McGivern's application, parole was denied.

Petitioner maintains that both, as a citizen and as District Attorney, he is entitled to the misbehavior reports concerning Gerald McGivern while he was in prison, together with the final dispositions of such reports. As so postured, the present request comes under Article 6 of the Public Officers Law, commonly referred to as the Freedom of Information Law.

There is no dispute in this action that the information sought by petitioner constitutes records (Public Officers Law, §86, subd 4) of an agency (Public Officers Law, §86, subd 3). As such, they are presumptively subject to disclosure unless the agency resisting disclosure satisfies its burden of demonstrating that the materials sought fall within one of the enumerated statutory exemptions (Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY2d 75; Matter of Westchester Rockland Newspapers v Kimball, 50 NY2d 575; Matter of Capital Newspapers Division of the Hearst Corporation v Whalen, _____AD2d_____[Third Dept., November 21, 1985]). In addition, there is agreement that an Article 78 proceeding may be brought at this juncture, there being no requirement, under the circumstances, of exhaustion of administrative remedies.

Paragraph 2 of subdivision (b) of section 87 of the Public Officers Law reads as follows:

> "Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:
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> * * *
>
> "(b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article."

Paragraph (b) of subdivision two of section 89 provides:

> "An unwarranted invasion of personal privacy includes, but shall not be limited to:
>
> * * *
>
> "iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it."

Subparagraph (i) of paragraph (c) of suddivision 2 of section 89, however, provides that disclosure will not be deemed to constitute an unwarranted invasion of personal privacy if identifying details are deleted.

Initially, the Court will look to the right of petitioner, as an individual, to have disclosure of the material in question.

Respondent maintains that the release of the misbehavior reports and final dispositions of said reports would constitute an unwarranted invasion of the personal privacy of inmate McGivern as resulting in personal hardship to said inmate. This Court agrees. Said reports contain numerous allegations, many of which were not

accepted. In addition, the nature of the reports alone requires a holding that their disclosure constitutes an unwarranted invasion of privacy, per se. The detailed nature of said reports is as an open book to all of the wrongs and alleged wrongs committed by inmate McGivern while in prison. Disclosure of same would surely be an unwarranted invasion of said inmate's personal privacy under any definition of those terms (cf. Department of Air Force v Rose, 425 US 352; Berry v Department of Justice, 733 F2d 1343; Cooper v Department of Justice (FBI), 578 F Supp 546).

In addition, respondent is correct that, due to the nature of the materials being sought, deletion of identifying details is not possible or practicable (cf. Matter of Nicholas, 117 Misc 2d 630).

Next, the Court will look to determine whether petitioner, as District Attorney of the County of Ulster, may obtain the information sought.

First, the Court holds that, for the reasons set forth above, petitioner is not entitled to disclosure of the material he seeks since it constitutes an unwarranted invasion of personal privacy. Certain exceptions to this exemption do exist (Public Officers Law, §96), but respondent maintains that petitioner has not demonstrated that he falls within any of said exceptions set forth in section 96.

Initially, this Court holds, as a matter of law, that once a respondent has demonstrated that the material falls within one of the enumerated statutory exemptions (supra), the burden of

proving an exception to that exemption falls upon the petitioner (21 NY Jur, Evidence, §158).

The two sections cited by respondent as potentially applicable but which, in fact, do not have any application in the present proceeding are paragraphs (d) and (e) of subdivision (1) of section 96. This Court holds that subdivision (d) is inapplicable since there is no allegation or proof by petitioner that the information sought "is necessary for the receiving governmental unit to operate a program specifically authorized by statute." Subdivision (e) is similarly of no use to petitioner since the use of the material sought by petitioner does not constitute a "routine use" as that term is defined in subdivision (10) of section 92.

Petitioner maintains, however, that his duties and responsibilities as District Attorney require the disclosure of inmate McGivern's misbehavior reports and the dispositions of same. For the following reasons, assuming arguendo that such an exception could be created as a matter of law, this Court disagrees and dismisses the petition.

Petitioner contends that he has a duty to make a recommendation to the Board of Parole with respect to inmate McGivern's application for release on parole. Petitioner continues that he cannot adequately fulfill his responsibility unless he has full access to the content of the misbehavior reports and the dispositions thereof.

Subdivision 2 of section 259-i of the Executive Law provides for the mechanism of review by the Board of Parole for applications by inmates to be released on parole. Contained in paragraph

(c) thereof are the factors which must be considered, none of which include any input or recommendation of the District Attorney. The final sentence of said paragraph does provide that, when "making the parole release decision for persons whose minimum period of imprisonment was not fixed pursuant to the provisions of subdivision one of this section, in addition to the factors listed in this paragraph the board shall consider the factors listed in paragraph (a) of subdivision one of this section." While there is no indication in the record whether or not inmate McGivern's minimum period of imprisonment was fixed pursuant to subdivision one, a finding that he was not, such that the factors listed in paragraph (a) of subdivision one would be considered, would not help petitioner.

The guideline listed in paragraph (a) of subdivision one which the Board of Parole must consider (see People ex rel. Herbert v New York State Board of Parole, 97 AD2d 128) and which petitioner is apparently relying on is subparagraph (i):

> "the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the presentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest and prior to confinement" (emphasis supplied).

A clear reading of the above language leads to the inescapable conclusion that the recommendation of the district attorney to be considered pertains solely to the seriousness of the offense, i.e. matter(s) which occurred prior to the inmate's incarceration. Therefore, any material contained in the misbehavior reports and the dispositions thereof, i.e. matter(s) which occurred subsequent to

inmate McGivern's incarceration, are irrelevant to the recommendation to be given by petitioner, assuming that such a recommendation was required at the parole release hearing (supra).

Petitioner, however, contends that, prior to the parole release hearing, he received a form addressed to him from the Division of Parole which stated that "[t]he Board of Parole would appreciate receiving any statements or recommendations you may care to present with regard to your knowledge of this case." According to petitioner, said language evidences that he requires, or has a "particularized need" for, the information contained in the misbehavior reports. Initially, this Court does not believe that a letter from the Board of Parole can create a responsibility upon petitioner not contained in statute or regulation with respect to the information contained in said reports. Second, and even more importantly, the letter requests a statement or recommendation "with regard to your knowledge of this case." Surely such innocuous language, which asks only for a recommendation with regard to petitioner's then-present knowledge of the case, does not seek to cause petitioner to obtain additional information which he did not then possess. In sum, this Court will not strain the language of said letter well beyond its intent by creating a new responsibility upon petitioner which requires his performing additional research, particularly with respect to inmate McGivern's behavior while incarcerated. All that was requested of petitioner was a statement or recommendation, apparently with regard to petitioner's knowledge of inmate McGivern's participation in the crime(s) for which he was convicted.

Even assuming, arguendo, that petitioner did require the misbehavior reports and dispositions for purposes of a recommendation, the posture of the parole release process in the present proceeding would require a similar holding. At the present juncture, inmate McGivern's application for release on parole has been denied and he is appealing that decision. Subdivision 4 of section 259-i, the section dealing with appeals, does not provide for any input by the District Attorney. Section 8006.3 of 9 NYCRR, the regulations setting forth the questions which may be raised on appeal, evidence that only legal matters, and not factual matters, may be considered. In other words, only the record below may be considered, with an interpretation as to the propriety of said determination as a matter of law being made. Petitioner may not, therefore, submit any recommendation at this level of proceeding. Support for such a holding comes from subdivision (c) of 9 NYCRR, §8006.3, which provides that no newly discovered evidence will be considered on appeal; such evidence must be the subject of a rehearing. Clearly, matters which were not before the Board of Parole at the initial hearing may not be submitted on appeal, thus precluding the introduction of any recommendation of the District Attorney.

Petitioner, however, asserts that, since inmate McGivern, even if he loses his appeal, will be eligible for parole within twenty-four months after a disadvantageous determination (9 NYCRR, §8002.3, subd [c]), that he (petitioner) requires the information sought for purposes of a recommendation at that juncture. First, whether or not inmate McGivern will lose his appeal and thus have

to await a new parole release hearing is speculative and would not warrant disclosure. Second, as stated above, petitioner has no responsibility or particularized need for said information, since any recommendation of his would pertain solely to the crime(s) committed prior to incarceration.

Finally, petitioner maintains that respondent's disclosure to him of a summary of the misbehavior reports waives their right to prevent disclosure. This Court disagrees. Regardless of the fact that petitioner has submitted no statute or case law supporting his position and this Court is similarly unaware of any, public policy would require that respondent not be held to have waived its right to not disclose. Respondent, in disclosing a summary of the misbehavior reports and the dispositions thereof, properly fulfilled the public policy of accommodation between the public's right to know and the inmate's privacy concerns (Matter of Krauss v Nassau Community College, 122 Misc 2d 218; Matter of Bahlman v Brier, 119 Misc 2d 110). In addition, disclosure of any additional matter could result in respondent being the subject of a civil suit (Public Officers Law, §97). As held above, respondent was not required to disclose any material to petitioner with respect to the misbehavior reports, and its attempt at accommodating petitioner should not be converted into a waiver of its right which it has so vehemently protected.

The Court dismisses the petition.

Submit judgment accordingly.

(Judgment to be submitted by Hon. Robert Abrams, Attorney General by Judith I. Ratner, Assistant Attorney General, of Counsel.)

Dated: April 22, 1986
Monticello, New York