SUPREME COURT, NEW YORK COUNTY
NYLJ, OCTOBER 22, 1998

Justice Schlesinger

IN RE APPLICATION OF LEGAL AID SOCIETY v. NEW YORK CITY POLICE DEPARTMENT *QDS:22302448* — In November, 1996, the New York Court of Appeals, in a trilogy of cases, under the caption Gould v. NYC Police Dept. (89 NY2d 267) stated the general proposition that the Criminal Procedure Law did not preclude defendants, in criminal matters, from using the Freedom of Information Law (FOIL) to obtain documents. It stated further, that the previously articulated interpretations of the Public Officers Law §84 apply to those individuals as well, including the principles that all government records are presumptively open for public inspection, that they are only not discoverable if they fall within one of the enumerated exemptions of §87(2), that these exemptions are to be narrowly construed, and that the burden lies on the governmental agency to demonstrate that the material sought falls squarely within one of these specified exemptions.

In the cases decided that day, the three defendants had all requested police follow up reports (DD-5's) and police activity logs (memo books). They had been denied these records by the Police, which denials had been upheld in court, on the basis that the documents were exempt from disclosure as intra agency records and/or that the activity logs were the personal property of the officers.

This was rejected by the high court. It held that the complaint follow-up reports were not entitled to a blanket exemption as intra agency material because these reports contain factual data, meaning objective information, in contrast to opinion, ideas, or advice exchanged in the process of government decision making. Further, such items as witness statements, constitute factual data to the extent it embodies factual accounts of witnesses' observations. As to activity logs, the court held that they were not the personal property of police officers but were agency records available under FOIL.

Thus, while permitting FOIL to serve as an avenue of discovery for criminal defendants, the court emphasized that "The holding herein is only that these reports are not categorically exempt as intra-agency material" (page 277). The Police were still "entitled to withhold complaint follow-up reports or specific portions thereof, under any other applicable exemption, such as the law enforcement exemption or the public safety exemption, as long as the requisite particularized showing is made." Id.

I have begun this opinion with a somewhat lenghty discussion of Gould because it is the position of the petitioners here that the New York City Police Department has consistently failed to adhere to its dictates. This matter first came before me, by Order to Show Cause in an Article 78 proceeding in July 1997. At that time the Legal Aid Society on behalf of four of its clients, I. Holloway, H. Jennings, J. Allendes, and A. Umar, asked that the court direct the Police Department to make their agency records, which had been demanded by these individuals who had pending indictments against them, available to them, or to the court, for a judicial inspection of such records. In virtually identical letters the Police Department had denied the request for documents citing two reasons. First, the Department claimed that access to the records would interfere with an ongoing investigation or judicial proceeding pursuant to §87(2)(e)(i) of the Public Officers Law. Second, the Department claimed that access to the records would endanger the life or safety of person pursuant to §87(2)(e)(f) of the Public Officers Law.

The Petitioners administratively appealed and receiving no timely response, brought this proceeding pursuant to §89(4)(a) of the Public Officers Law and Matter of Floyd v. McGuire, 87 AD2d 388 (1st Dept. 1982). Counsel pointed out that all of the denials were identical and were legally deficient because, though they were required to articulate particularized and specific justification for denials, they did not do that. Thus a criminal defendant was at a loss to understand why the particular documents he/she was seeking were exempt from disclosure and the court reviewing such denial was in an equal state of ignorance. There were simply no particularized or specific justification for the denials given, and this violated Matter of Fink v. Lefkowitz, 47 NY2d 567 (1979) as well as Gould.

Respondent cross moved to dismiss, essentially complaining that the timing for their response was simply insufficient and they were not able to review and respond to the petition. At oral argument, I declined to dismiss the petition on these grounds. The respondent had never dealt with the merits of the applications. I instructed completion of the administrative review and adjourned the matter for one week.

Shortly thereafter, petitioners noticed a motion to amend its application to request class certification and for declaratory relief. Specifically, with regard to the class certification aspect, the Legal Aid Society asked that the named petitioners act as class representatives, and that pursuant to CPLR Article 900 that the class be defined as persons who apply to the New York City Police Department under the Freedom of Information Law for agency records relating to pending criminal cases.

As to the declaratory relief, petitioners asked the court to grant a judgment that the members of the above class are entitled to receive from the Police Department an individualized review and a specific response to their applications for agency records as provided by FOIL. Petitioners further requested an order that the Department respond to each application by identifying and reviewing each requested agency record in its possession, an order directing the Department to explain any denial by reference to the applicable statutory exemption and to explain the denial with specific reference to the contents of the particular record. Finally, with regard to the above responses, an order was requested directing the Department to demonstrate its compliance with the prescribed procedures by submitting an attestation from the responsible F.O.I.L. access officer that such individual has personally reviewed all requested records and determined that the record actually contained information which was exempt from disclosure.

In counsel's accompanying papers, it was urged that the request for class certification satisfied the five prerequisites set forth in CPLR 901(a) and none of the objections listed in CPLR 902. It was argued that the proposed class is large as the Criminal Defense Division of the Legal Aid Society files hundreds of applications for its clients with pending cases each year. These applicants all present common questions of statutory law on the proper implementation of F.O.I.L. requests from persons with pending criminal matters in accordance with recent judicial opinions, and specifically whether the Department's policy of responding with a pro forma denial of these applications, based solely on a pending prosecution, satisfies the language of the statute or the direction from the courts.

Since virtually every person filing such an application receives the same denial, counsel urged there was a complete identity of interest within the proposed class. Also the claims of the four representative parties, who received these pro forma denials are typical of the class. Therefore, a resolution of their claims would avoid duplicative actions and result in judicial economy.

Counsel contended that the representative parties, through the Legal Aid Society as their common counsel would fairly and adequately protect the interests of the entire class. In this regard, it was pointed out that the Society's Special Litigation Unit has substantial experience and continuing interest in pursuing FOIL requests against respondent. They were authorized to appear as amicus curiae before the Court of Appeals on the question of criminal defendants' right of access to these types of records in the Gould case. They were seeking no counsel fees.

Finally, petitioners urge that class certification is the superior means of dealing with this issue for their numerous indigent clients now and in the future, as well as for the Public Department, who would be relieved of the burden of defending multiple separate actions. Since declaratory relief was being sought, there would be no need to notify individual class members pursuant to CPLR 904(a).

This motion was made by Petitioners and served on Respondents on August 6 of 1997. After that and for the following eight months, counsel for both sides attempted, with occasional informal court intervention, to work out a FOIL procedure which would be acceptable i.e., one that both sides (including the respective District Attorney's Offices) could live with. But this was not to be.

Also early in this period, the Police Department changed its way of responding to FOIL requests from individuals with pending criminal matters, the proposed members of the class. As noted above, the motion for class certification and for injunctive relief was served on August 6th and was returnable September 10. At about that time, Respondent instituted a new system encompassing two form responses. Applicants would be informed that the Department had received their requests under F.O.I.L. Then they would be told the following:

> As a preliminary matter, I have determined that the records you have requested, if contained in the files of this office, are at least partly disclosable under FOIL. However, before you can be granted access to specific records or portions thereof that are responsive to your request, such records must be located in the files of this office and review to assess the applicability, if any, of the particular exemption from disclosure set forth in FOIL. I estimate that this review will be completed within one hundred twenty (120) days of this letter.

The applicant was also told that he/she could appeal this decision by writing, within 30 days to a Ms. Susan Petitio, Special Counsel to the Deputy Commissioner of Legal Matters Records Access Appeal Officer.

The Department would then forward the request to the District Attorney's office where the matter was pending and ask a designated individual Assistant to respond back within two weeks. The assistant would be provided with a form titled "Suggested D.A. Codes", "A through K" which would encompass virtually all the reasons why the document was exempt from disclosure and should not be released, or state or that the document, with or without redactions, had previously been given to defense counsel.

In response to this new procedure and to the fruitless negotiations previously alluded to, Legal Aid filed a Supplemental Affirmation to its motion dated May 12, 1998. In it, despite counsel's acknowledgment that Respondent no longer routinely denied FOIL requests on the basis of §87(2)(e)(i), "interference with a judicial proceeding" exemption, he argued that the changes were "strictly cosmetic", in that "the new procedures simulate a process of individualized deliberation with respect to the class, but mask a continuation of the old policy first delaying and then denying any access for information gathered by the police while criminal cases are pending" (paragraph 7).

Further, it was pointed out that the 120-day period was factually unsupportable and ran counter to Rules applicable to City agencies in responding to FOIL applications, which sets a 15-day period. He also argued that the 120-day period probably would outlast the duration of most of the criminal proceedings. Thus, this would defeat the purpose of the application which was to aid in the preparation and defense of the case.

Finally, examples were given of matters where applications were denied either until after the criminal matter was resolved, as in the case of Raheem Taylor, despite the fact that the materials consisted exclusively of police accounts of a shooting incident, or in response to judicial intervention, as in the matter of John McLaughlin whose robbery indictment was eventually dismissed by the District Attorney based on fingerprint evidence disproving McLaughlin's involvement in the crime. In the latter case the records were initially denied based on the "judicial interference" exemption, but those records contained information relevant to the fingerprint investigation, which led to his release.

The affirmation concluded with a renewed request for class certification, and declaratory judgment and injunctive relief.

In early June of this year, Respondent answered and opposed all aspects of the Amended Petition. In the answer, the Department pointed out that the three cases discussed by counsel in his supplemental affirmation all concerned FOIL requests made before they implemented their new procedure. Thus, it was argued, they have no probative valve in evaluating current practices. Further, the answer denied an alleged practice of rountinely denying FOIL requests made by criminal defendants and proceeded to give examples of responses to certain applications where information was provided.

Finally, it was pointed out that Petitioners had not sought to further amend their petition to include applicants under the Department's new practice. Therefore the proposed class was not aggrieved by, nor representative of, applicants requesting records under this new practice. The answer concluded by asking the court to dismiss the petition.

In the accompanying memorandum of law, counsel for Respondent argued for dismissal urging that the Article 78 proceeding was moot. The original applicants have been provided with documents and no requests have been made under the Department current F.O.I.L. practices. Further, the petitioners and the proposed class lack standing to pursue this action because they cannot show that they have been injured by the revised practice.

Moreover, counsel argued that the petitioners have failed to meet their burden of establishing the five requirements for class certification: numerosity, commonality, typicality, adequacy of representation, and superiority. Similarly, as in the arguments made relating to mootness and lack of standing, counsel again pointed out that since none of the petitioners, as representative class members, can show that they have been aggrieved by the new Department practice of responding to F.O.I.L. requests, (effective August 1997) they cannot establish the existence of common issues of law or fact among the class they seek to certify.

Finally, Respondent urged that class certification shoud be denied because of the governmental operations rule. Counsel opined that if petitioners did have standing to pursue their action and did prevail, then comparable relief would be afforded all other criminal defendants under the principle of stare decisis. Thus the prosecution of this action as a class action was not a superior method of adjudication but rather, under the circumstances here, unnecessary.

The petitioners responded to the above application to dismiss on all the points argued urging that there was no legal or factual basis for dismissing the action or denying class certification. Further, two weeks later, with the Court's permission, they filed a further motion to amend their Petition to add additional class representatives, specifically three individuals and the circumstances of their FOIL requests since the implementation of the Department's revised procedure. It was counsel's position that these proposed additional petitioners amply illustrate that the Department's policy of refusing disclosure to criminal defendants without adequate, specific explanation, continues. Further, that the altered policy, containing a four month delay period, in most cases succeeds in forestalling judicial intervention or compliance until the criminal proceeding is over.

The final papers received by the court, dated July 23, 1998 consisted of Respondent's answer to Petitioner's most recent motion to add the three additional class representatives (a motion, which as counsel for Respondent correctly points out, I granted petitioners, at oral argument on July 1, 1998). With regard to the added petitioners, John Haggerty, David Garcia, and Daniel Gari, the answer acknowledged that the denial of access to certain of the requested records was after consultation with the District Attorney where they were advised that the release by the Department of the requested records would interfere with an ongoing criminal prosecution. Therefore, counsel suggested to the court that the Department's decision not to release those records was rational and neither arbitrary nor capricious.

After exhaustively reviewing all of the papers and exhibits submitted, along with the arguments of respective counsel, and researching the applicable law, I conclude that Petitioner's amended motion for class certification and for declaratory and injunctive relief should be granted.

As noted above, there are five criteria that should be considered and met before a court decides that class certification is appropriate and proper. In point III of their memorandum of law opposing all relief, Respondents' counsel properly states that it is the Petitioner's burden to demonstrate all five. However, since she then contests only two of those, commonality and superiority, it appears unnecessary to discuss at any length the remaining three: numerosity, typicality and the adequacy of the representation. The Criminal Defense Division of the Legal Aid Society files hundreds of FOIL applications for their clients each year, so the numbers are there. Because of this practice, which they believe is necessary for the competent representation of their clients and because, in the course of their pursuing the denials of these applications, even up to the Court of Appeals, they have developed an expertise and familiarity with the applicable law, it is clear that they are ably suited to fairly and adequately protect the interest of the class, their clients.

As to the typicality requirements, the original petitioners and added petitioners represent the wide range of criminal proceedings wherein FOIL applications are made in preparation for criminal trials.

But counsel for Respondent contends that — at least as it pertains to the original petitioners (this argument itself may now be mooted by the addition of the three petitioners) — since these individuals cannot show that they were aggrieved by the new procedures adopted in August 1997, they cannot show that they have interests common to those individuals who filed applications after that date.

This argument is similar to Respondent's arguments on mootness and standing. Therefore, they will be discussed as one.

First, I find the defect to be cured by the addition of post-August 1997 petitions since they do come under the revised procedure and they do allege that they have suffered from the same kind of routine denial as existed before the Department changed its practices.

More substantively, this action falls into that category of cases in which termination of a class representative's claim does not moot the claims of the unnamed members of the class. Such situtations typically, as in this case, arise in criminal actions, where by the time the court addresses the underlying problem, the individual bringing the claim is no longer affected. Examples of this are found in United States Supreme Court decisions such as Gerstein v. Pugh, 95 S. Ct. 854, 420 U.S. 103 (1975) and County of Riverside v. McLaughlin, 111 S. Ct. 1661, 500 U.S. 44 (1991). Both of these proceedings involved arrestees who complained that their Constitutional rights were being violated because of a failure to give them timely hearings on probable cause for their detention.

In Gerstein, for example, in footnote #11, the Court, in declaring that the termination of the class, representatives' claim did not moot the claims of the unnamed members of the class, said that this type of case is a suitable exception to the requirement that a controversy by continuing.

> The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case.

The same factors certainly apply to the instant case where the original petitioners, and even the added ones, may well have had their cases concluded before a full judicial review occurs. However, as the court declared in County of Riverside, at page 12, dealing with the issue of standing:

> That the class was not certified until after the named plaintiff's claims had become moot does not deprive us of jurisdiction. We recognize in Gerstein that "some claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest express" (citations omitted). In such cases, the "relation back" doctrine is properly invoked to preserve the merits of the cause for judicial resolution.

This same mootness exception has also been adopted in New York, for example in People Ex Rel Maxian v. Brown, 77 NY2d 422 (1991), which involved arrest to arraignment delay and was the "quintessential issue capable of repetition yet evading review" (at pg 423).

This doctrine has also been applied in civil matters, as in the Second Circuit decision Comer v. Cisneros, 37 F 3rd 775 (1994). This was a controversy involving claims of discrimination in public housing where the court observed that law suits of this type are acutely susceptible to mootness arguments because of the fluid composition of the public housing population. "Thus, while the harm remains constant, those who suffer from the harm often change identity" (Id. at page 33).

Respondent also makes the argument that since the Department has changed its practice,[1] there is no further ground for complaint. Petitioners, as noted, challenge this and urge that the change is merely a cosmetic one.

The argument appears to be that since there has been a voluntary cessation of the earlier (perhaps improper) practices, the claims of all present and future petitioners here are moot. However, as in Comer (at pages 36-37) it is far from clear here that the earlier practice of routine, wholesale denial of all FOIL requests from persons with pending criminal matters has really changed, or alternatively that if relief were not to be granted such denials would not resume. Respondent's continued defense of its past and current procedures, which appear to result in the continuation of virtually no meaningful disclosure of requested records while criminal proceedings are pending, does not convince this court that there has now been compliance.

Responent's next argument against class certification is based on the governmental operations rule. The few instances when this principle of stare decisis has been overruled, in favor of certification, are when the past actions of the government or administrative agency have left the court with little confidence that there will be voluntary compliance. See for example, Allen v. Blum, 58 NY2d 256 (1983); Matter of Lamboy v. Gross, 126 AD2d 256 (1st Dept. 1987); McCain v. Koch, 117 AD2d 198 (1st Dept. 1986); Velasquez v. State of New York, 226 AD2d 141 (1st Dept. 1996).

Here, I do not believe that stare decisis will adequately protect the interests of the proposed class. Gould was decided in November 1996, and it is not a particularly difficult holding to understand. Yet in July 1997, when this proceeding was first commenced, it is clear from the response of the Department in its continued, unexplained denials of FOIL requests using the same excuse, as well as the position that counsel for respondent took originally in the first oral argument before this court, that the Department was unwilling to comply with the direction given months before by this State's highest court.

As late as April 24, 1998, the Queens District Attorney's office, in a letter responding to an individual defendant as to his FOIL request stated:

> The documents you requested are exempt from disclosure under §87(2)(e), which specifically exempts from disclosure documents compiled for law enforcement purposes which, if disclosed, would interfere with pending judicial proceedings. This exception recognizes in essence, that ample discovery is afforded the litigants to a pending criminal proceeding under the Criminal Procedure Law, and the exemption serves to prevent the Freedom of Information law for being used as a substitute for traditional discovery procedures.

I recognize that the quoted letter is from the office of a District Attorney which is not a party to this action. However, the Respondent's (Police Department) revised policy relies on consultation with, and determinations by, District Attorneys of the City. Moreover, the statement appearing in this letter is absolutely wrong as the unavailability of FOIL to criminal defendants in favor of the Criminal Procedure Law; Gould makes that abundantly clear.

The government operations rule is predicated on the assumption that officials of the government understand and are willing to conform to precedent. I find that this is one of those rare cases where the continued and obvious resistance on the part of

government officials to follow the mandate of the law makes class certification appropriate.

As for the declaratory relief and injunction requested by the class, to be described as "FOIL applicant for records complied by the NYPD in connection with pending criminal prosecutions", that is granted to the following extent. There must be compliance with the clear dictates of Gould. That is not to say that all requested records must be disclosed, but it is to say that there is a presumption of disclosure, and in order for a requested document not to be disclosed or to be redacted, there must be a prompt, detailed, fact-specific reason for that nondisclosure. The denial must be by an individual within the Department who has personally located and identified the documents and has explained the factual and legal basis for nondisclosure.

This means that the Department can not merely rely on the opinion of an Assistant District Attorney, who might believe that his/her case against the applicant might be weakened if disclosure were to be provided. Denial must be predicated on interference with the judicial process. It does not include giving the prosecution in a criminal proceeding a strategic advantage over a defendant by possessing more information about a case.

If the exemptions used are ones that allegedly interfere with an active law enforcement investigation or compromise the safety of a member of the public, then it is incumbent on the Respondent to state with factual particularity how and why such is the case. In this regard, in the former situation, it is difficult to see how this would be legitimate if the crime alleged was a single one wherein an arrest had been made and the case marked closed, or in the situation where the criminal defendant was considering or pursuing a civil action against the Department or a civilian witness. (These were the situations in some of the representative cases.) Normally it should not be a legitimate use of the exemption where the information sought was of a factual nature, such as fingerprint or line-up information.

With regard to the issue of safety, while it may be arguable that the names and addresses of civilian and police witnesses may be exempt and so redactable, it seems hard to justify using this exemption with regard to the narrative or factual aspects of police reports, such as the description of the perpetrators) given by witnesses.

As to how quickly applications must be responded to, this court is loathe to establish a precise time table but notes the following. First, Petitioners have pointed out, without dispute by Respondent, that almost immediately after an individual is arrested the Department is obliged to turn over to the various District Attorneys copies of virtually all the documents requested in these FOIL applications. That includes initial complaint reports and follow ups, memo book entries and the like. Therefore, since these documents have already been located and segregated, it is difficult to see why the Department cannot take steps to preserve that status. Alternatively it is hard to comprehend why it should take months to meaningfully comply with these requests.

The F.O.I.L. Rules talk of a period of 15 days. There should therefore be a presumption that such is the appropriate time period for compliance unless it is the extraordinary case. And if it is the extraordinary case, that must be explicitly explained.

While counsel for Respondent was correct in oral argument when he said that criminal defendants should not necessarily be given a preference, it is also correct that since it is proper, as per Gould, for criminal defendants to use F.O.I.L. requests as a means of disclosure, there should be a response in a meaningfully timely manner so that such disclosure can be used in preparation for trial.

In summary, this court declares that neither the prior or present procedures utilized by the New York City Police Department in responding to F.O.I.L. requests from persons with pending criminal matters comply with the dictates of the Freedom of Information Law, that in order to comply each member of the designated class must receive, in a timely fashion, from the Department, specifically from an individual with personal knowledge of the facts, either the documents sought or alternatively a specific, factually based explanation (individul to their situation) as to why that document, in whole or in part is exempt from disclosure as well as the legally-claimed statutory exemption.

The foregoing decision constitutes the order and judgment of the court.

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(1) Interestingly, despite such alteration, there is no consession or acknowledgment that the policy and practice existing at the time of the filing of the original petition of denying all FOIL requests as "interfering with judicial proceedings" was improper under Gould.