

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FIRST DEPARTMENT

Mitchell v. Slade

173 A.D.2d 226 (N.Y. App. Div. 1st Dep't 1991) · Decided May 9, 1991

SUMMARY

The court modified and otherwise affirmed an order granting a CPLR article 78 petition under New York's Freedom of Information Law. It held that specified police follow-up reports were not exempt from disclosure under the law-enforcement or intra-agency exemptions, but that the agency was not required to consult with the petitioner to help identify additional documents because the petitioner bears the burden of reasonably describing the requested records.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, First Department
WRITING FOR THE COURT	Murphy, P. J.; Sullivan, J.; Carro, J.; Wallach, J.; Kupferman, J.
JURISDICTION	New York
DECIDED	May 9, 1991
DISPOSITION	modified
PROCEDURAL POSTURE	Article 78 proceeding seeking disclosure under New York's Freedom of Information Law. The Supreme Court, New York County, granted the petition in part and ordered disclosure of specified complaint follow-up reports with redactions and further consultation concerning other requested documents. The Appellate Division modified that order by deleting the consultation requirement and otherwise affirmed.
STANDARD OF REVIEW	De novo review of the legal issues and review of the in camera record concerning the claimed FOIL exemptions.
PRECEDENTIAL VALUE	Published appellate decision

TOPICS

- judicial review of agency action
- administrative law
- administrative procedure act
- civil procedure

PRACTICE AREAS

- administrative law
- freedom of information
- civil procedure

QUESTIONS PRESENTED

1. Whether the DD-5 arrest follow-up report and related materials were exempt from disclosure under the FOIL law-enforcement and intra-agency exemptions.
2. Whether FOIL required the Police Department to solicit additional information from the petitioner to assist in locating documents potentially responsive to his request.

HOLDINGS

1. On the in camera record, the materials were not exempt from disclosure under Public Officers Law § 87(2)(e) or § 87(2)(g), subject to appropriate redaction.
2. FOIL does not require an agency to solicit additional information from a requester to enable the agency to identify documents possibly responsive to the request; the requester bears the burden of reasonably describing the documents sought.

KEY QUOTATIONS

“We hold that, on this record, the Freedom of Information Law does not require respondent to solicit additional information from petitioner to enable respondent to identify documents possibly responsive to the FOIL request.” (227)

“Public Officers Law § 89 (3) places the burden on petitioner to reasonably describe the documents requested so that they can be located.” (227)

FACTUAL BACKGROUND

Mitchell, who was incarcerated following a second-degree murder conviction, requested records relating to the investigation leading to his 1976 arrest. The New York City Police Department supplied redacted versions of his arrest and complaint reports, later located and produced a ballistics report and a wanted circular, and asserted that follow-up reports were exempt and that other records could not be located or had been destroyed. The Supreme Court reviewed the documents in camera and ordered disclosure of a redacted DD-5 follow-up report.

PROCEDURAL HISTORY

Mitchell requested investigation-related records from the New York City Police Department under FOIL. The Department produced some records in redacted form and later located and produced a ballistics report and a wanted circular, while asserting that other records were exempt, unavailable, or destroyed. After in camera review, the Supreme Court ordered production of a redacted DD-5 follow-up report and directed the Department to obtain additional information from Mitchell to aid its search. The Appellate Division held that the records were not exempt under the asserted FOIL exemptions but deleted the requirement that the Department solicit additional information from Mitchell.

DISPOSITION

modified

CASES CITED

- Cornell Univ. v. City of N.Y. Police Dep't, 153 A.D.2d 515
- Matter of Farbman & Sons v. New York City Health & Hosps. Corp., 62 N.Y.2d 75, 83
- Matter of Corbin v. Ward, 160 A.D.2d 596
- Matter of Moore v. Santucci, 151 A.D.2d 677

OPINION

PER CURIAM.

Order of the Supreme Court, New York County (Phyllis Gangel-Jacob, J.), entered on August 28, 1989, which, inter alia, granted the CPLR article 78 petition brought pursuant to the New York Freedom of Information Law (FOIL; Public Officers Law art 6), ordering respondent to turn over certain specified complaint follow-up reports, with appropriate redaction, and to turn over other documents in consultation with petitioner, unanimously modified, on the law, to the extent of deleting the requirement that respondent consult with petitioner with respect to the additional documents requested, and otherwise affirmed, without costs.

Petitioner is currently incarcerated pursuant to a judgment convicting him of murder in the second degree. He was arrested in 1976. The final appeal of his conviction was decided in 1986. By letter dated May 30, 1988, petitioner made a Freedom of Information Law request to the New York City Police Department asking for specified categories of documents related to the investigation leading to his arrest.

The Department provided petitioner with a redacted copy of his arrest report and the complaint report and asserted that follow-up reports were exempt from disclosure and the other documents requested could not be located.

After petitioner commenced this article 78 proceeding, the Department conducted a further search and located two additional responsive documents, a ballistics report and a *227"wanted" circular, which were produced. Respondent averred that many of the categories of documents either didn't exist in 1976 or have been destroyed in the intervening years in accordance with Department policy.

The Department asserted that the arrest follow-up report, internally designated a form DD-5, was exempt from disclosure. The Motion Court, after reviewing the documents in camera, declined to dismiss the petition and held that respondent had failed to meet its burden of proving exemption for the redacted DD-5 follow-up report.

The Motion Court held that the exceptions contained in Public Officers Law § 87 (2) did not apply in this factual context, citing *Cornell Univ. v City of N. Y. Police Dept.* (153 AD2d 515), and ordered production of the DD-5 with appropriate redaction.

On this record, after a careful review of the documents produced to the Motion Court in camera, we are satisfied that the materials are not exempt under the law enforcement exemption (Public Officers Law §87 [2] [e]) or the intra-agency (Public Officers Law §87 [2] [g])X However, the Motion Court, citing neither statutory nor common law authority, but only "general principles of FOIL", stated that "petitioner should supply any additional information requested by respondent to aid in the search for these documents." We hold that, on this record, the Freedom of Information Law does not require respondent to solicit additional information from petitioner to enable respondent to identify documents possibly responsive to the FOIL request.

Public Officers Law § 89 (3) places the burden on petitioner to reasonably describe the documents requested so that they can be located. (See, *Matter of Farbman & Sons v New York City Health & Hosps. Corp.*, 62 NY2d 75, 83.) Petitioner must show by more than speculation that all responsive documents were not produced. (See, *Matter of Corbin v Ward*, 160 AD2d 596; *Matter of Moore v Santucci*, 151 AD2d 677.)

Concur—Murphy, P. J., Sullivan, Carro, Wallach and Kupferman, JJ.