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Governmental Records of Investigatory Nature Not Open to Public Inspection - Whittle v. Munshower

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Governmental Records Of Investigatory Nature Not Open To Public Inspection

Whittle v. Munshower[1]

Petitioner's decedent had been employed at an aircraft factory in Baltimore County for about three months prior to his death on July 7, 1942. Although the cause of death was officially listed as accidental drowning by the Maryland State Police, petitioner alleged that fellow employees at the aircraft factory had conspired against the deceased by claiming he "made a defective piece of material," thereby causing false charges of sabotage to be filed by the FBI and Army Intelligence Personnel, and that such charges "led to" the death of the deceased. In a writ of mandamus filed against the Maryland State Police, the petitioner alleged that the state police possessed information showing that the deceased had been officially charged with making this "material"; but that, in addition, they possessed information which tended to clear the deceased of this charge. Petitioner, therefore, sought the release of all such information.

The lower court sustained a demurrer to the petition without leave to amend. On appeal, the Court of Appeals *held* that, since the record showed no entry of a final judgment, the appeal must be dismissed as being premature, but took occasion, nevertheless, to express an opinion on

[1] 221 Md. 258, 155 A. 2d 670 (1959).

the merits,[2] and in so doing, indicated that the demurrer to the petition was properly sustained, since in the absence of statutory requirements police records are confidential and not a proper subject of inspection.

The right to inspect public records, or the certain classes of records kept by a public official as a necessary part of his duties, has been held a right guaranteed at common law, the common law principle being that any public record was open to an unqualified inspection.[3] Mandamus is considered to be an appropriate course of action to enforce the production of public records for inspection,[4] and private persons may avail themselves of this power without the need for intervention by a government law officer.[5]

The question of an individual's right to inspect governmental records depends upon two basic requirements: first, that the individual have a sufficient interest in the records or information; and second, that the records not be of such a nature that disclosure might violate the law or public policy.

A person applying for a writ of mandamus must show a clear legal right in himself as well as a corresponding duty on the part of the defendant.[6] The requirement of showing a clear legal right, or some sort of special interest, has been upheld in numerous decisions as a necessary limitation that must be imposed upon the original common law principle of unqualified right of inspection.[7] In a situation where the party seeking the writ is a litigant in a matter to which the records sought could be considered relevant, the requirement of special interest to show a clear legal right would be satisfied.[8] In many instances, however, it appears that practically any interest the petitioner

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[2] Following the rule of Penny v. Department of Maryland State Police, 186 Md. 10, 45 A. 2d 741 (1946); and Walter v. Board of County Commissioners of Montgomery County, 179 Md. 665, 22 A. 2d 472 (1941).

[3] McCoy v. Providence Journal Co., 190 F. 2d 760 (1st Cir., 1951); Butcher v. Civil Service Commission of City of Philadelphia, 163 Pa. Super. 343, 61 A. 2d 367 (1948); Nowack v. Fuller, 243 Mich. 200, 219 N.W. 749, 60 A.L.R. 1351 (1928).

[4] Pressman v. Elgin, 187 Md. 446, 50 A. 2d 560, 169 A.L.R. 646 (1947); Wellford v. Williams, 110 Tenn. 549, 75 S.W. 948 (1903).

[5] Union Pacific R.R. Co. v. Hall et al, 91 U.S. 343 (1875).

[6] Pressman v. Elgin, *supra*, n. 4; Buchholtz v. Hill, 178 Md. 280, 13 A. 2d 348 (1940); Jones v. House of Reformation, 176 Md. 43, 3 A. 2d 728 (1939).

[7] State ex rel Donahue v. Holbrook, 136 Conn. 691, 73 A. 2d 924 (1950); State v. Harrison, 130 W. Va. 246, 43 S.E. 2d 214 (1947); Fayette County v. Martin, 279 Ky. 387, 130 S.W. 2d 838 (1939); Holcombe v. State ex rel. Chandler, 240 Ala. 590, 200 So. 739 (1941); Logan v. Mississippi Abstract Co., 190 Miss. 479, 200 S. 716 (1941).

[8] Nolan v. McCoy, 77 R.I. 96, 73 A. 2d 693 (1950); People ex rel Stenstrom v. Harnett, 226 N.Y.S. 338, 131 Misc. 75 (1927).

might be able to show above a mere idle curiousity would be held sufficient to constitute a legal right.[9]

The principal difficulty in obtaining records in the possession of the government for inspection lies not in the status of the person seeking such right, but in the nature of the records themselves, and the discretion allowed the official charged with their care and safekeeping. The general records kept by a city, state or the federal government are for the most part considered public records and are, therefore, open to public inspection.[10] But records and reports made in connection with or as a result of investigation by a governmental agency or official, such as police or FBI reports, grand jury records, and records of penal institutions, are generally considered to be of a confidential nature, either by law or by reason of public policy.[11]

Because of the likelihood that the release of such confidential information to the general public would produce results which would be detrimental to the interests of the public, any request to a court for access to or inspection of such records is either automatically denied,[12] or left to the discretion of the agency or officer charged with the keeping of such records.[13] The theory that public policy demands that certain types of information possessed by the government be kept secret has been adopted by state courts throughout the country as a basis for holding investigatory records confidential.[14] In *Runyon v. Board of Prison Terms & Paroles*,[15] the District Court of Appeals of California demonstrated this underlying policy concept in the following manner:

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[9] It has been held that there is no right of inspection of a public record when the inspection is sought to satisfy a mere whim or fancy; there must be a legitimate interest. State v. Harrison, *supra*, n. 7; however, in Appeal of Simon, 353 Pa. 514, 46 A. 2d 243 (1946), it was held "Any Citizen" may inspect such records as have been made public records by law. In State v. McGrath, 104 Mont. 490, 67 P. 2d 838 (1937), it is pointed out that the requirement to show interest cannot be imposed arbitrarily.

[10] *Supra*, n. 3.

[11] Mathews v. Pyle, 75 Ariz. 76, 251 P. 2d 893 (1952); Cherkis v. Impellitteri, 307 N.Y. 132, 120 N.E. 2d 530 (1954); Greff v. Havens, 66 N.Y.S. 2d 124, 186 Misc. 914 (1946); Lee v. Beach Pub. Co., 127 Fla. 600, 173 S. 440 (1937).

[12] Mathews v. Pyle, *ibid.;* Lee v. Beach Pub. Co., *ibid.;* People v. Wilkins, 135 Cal. App. 2d 371, 287 P. 2d 555 (1955).

[13] Chytracek v. United States, 60 F. 2d 325 (D.C. Minn. 1932); Laydon v. Maltbie, 76 N.Y.S. 2d 368 (1940); Hale v. City of New York, 251 App. Div. 826, 296 N.Y.S. 443 (1937).

[14] Mathews v. Pyle, *supra*, n. 11; Lee v. Beach Pub. Co., *supra*, n. 11; People v. Wilkins, *supra*, n. 12; People v. Pearson, 111 Cal. App. 2d 9, 244 P. 2d 35 (1952); Runyon v. Board of Prison Terms and Paroles, 26 Cal. App. 2d 183, 79 P. 2d 101 (1938).

[15] *Supra*, n. 14.

> "[P]ublic policy demands that certain communications and documents shall be treated as confidential and therefore are not open to indiscriminate inspection, notwithstanding that they are in the custody of a public officer . . . Included in this class are . . . the files in the offices of those charged with the execution of the laws relating to the apprehension, prosecution, and punishment of criminals."[16]

Federal criminal investigatory records are likewise considered inaccessible because of the great harm that could result to our national security as well as to any persons involved with the records, should these records reach the wrong hands.[17] Only by means of the Jencks Act[18] can an individual, as a defendant under a criminal prosecution, gain access to such records, should the government decide to allow the requested inspection in order to maintain its criminal action against that individual.[19] In addition the trial court must find such requested records to be relevant to the particular case.[20] However, in matters where the government is not a party, requests to inspect federal records are not enforceable against the government by law as in criminal cases, but rather the matter is left to the discretion of the department head, who by law is "authorized to prescribe regulations . . . for the custody, use, and preservation of records [and] papers. . . ."[21] The right of the department heads to so regulate the production of records has been upheld in numerous cases.[22]

The possibility of obtaining the release of such confidential information, where such has been left to the discretion of an official charged with their keeping, would appear slight, since a person applying for a writ of mandamus must show a clear legal duty on the part of the official, and should such duty be merely discretionary, the writ will not be granted.[23] As in the instant case, the courts of this country have denied granting writs to examine governmental papers and records unless they are

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[16] *Ibid.*, 101.

[17] Palermo v. United States, 360 U.S. 343 (1959).

[18] 18 U.S.C.A. (1947) § 3500.

[19] Jencks v. United States, 353 U.S. 657 (1957).

[20] 18 U.S.C.A. (1947) § 3500, as interpreted in Rosenberg v. United States, 360 U.S. 367 (1959); Pittsburgh Plate Glass Co. v. U.S., 360 U.S. 395 (1959); Palermo v. United States, *supra*, n. 17.

[21] 5 U.S.C.A. (Supp. 1959) § 22.

[22] Touhy v. Ragen, 340 U.S. 462 (1951); Fowkes v. Dravo Corp., 5 F.R.D. 51 (E.D. Pa. 1945); Walling v. Richmond Screw Anchor Co., 4 F.R.D. 265 (E.D.N.Y. 1943).

[23] Upshur v. Baltimore City, 94 Md. 743, 51 A. 953 (1902).

clearly of a public nature.[24] It is noted that the policy behind the refusal to release investigatory records has caused several states to enact statutes expressly forbidding the release of any such investigatory records for public inspection,[25] with numerous decisions upholding the laws involved.[26]

Grand jury records and minutes are generally considered similar in nature to investigatory records for the purpose of holding them confidential.[27] Federal grand jury records are covered under the Federal Rules of Criminal Procedure where it is provided that disclosure of grand jury proceedings may be made only to government attorneys, or where directed by the court, if the defendant can show that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.[28]

Maryland grand jury records are likewise not subject to inspection by individuals, in that by statute the disclosure of such records is forbidden to anyone but the State's Attorney unless disclosure is made in compliance with an order of a court.[29] A recent decision by the Criminal Court of Baltimore City held that a defendant in a criminal action had no right to inspect grand jury records prior to trial, but that the trial court in the exercise of its discretion, apart from any statute or rule on the matter, could grant such a right in the interests of justice.[30] The element of necessity, therefore, is a basic requirement for the release of any grand jury records for inspection on the federal as well as the state level, as compared to a requirement of mere relevancy for other investigatory records.

In a criminal proceeding, a defendant may avail himself of Maryland Rule 728, which allows pre-trial discovery and inspection of records and evidence upon a showing that the items sought may be material to the

[24] Clay v. Wickins, 7 Misc. 2d 84, 166 N.Y.S. 2d 534 (1957); People v. Prendergast, 89 Misc. 584, 153 N.Y.S. 699 (1915).

[25] New York: 46 McKENNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED § 66A; GENERAL MUNICIPAL LAW § 51; GREATER NEW YORK CHARTER § 1545. Louisiana: 24 LOUISIANA STATUTES ANNOTATED § 44:3; also Louisiana Attorney General's Opinion (1933).

[26] Jordan v. Loos, 125 N.Y.S. 2d 447, 204 Misc. 814 (1953); People v. Harnett, 226 N.Y.S. 338, 131 Misc. 75 (1927); State v. Vallery, 214 La. 495, 38 S. 2d 148 (1948); State v. Mattio, 212 La. 284, 31 S. 2d 801 (1947).

[27] Pittsburgh Plate Glass Co. v. U.S., *supra*, n. 20.

[28] 18 U.S.C.A. (1947) Rule 6 (e).

[29] 2 MD. CODE (1957) Art. 26, § 41.

[30] State v. Forrester, Criminal Court of Baltimore City, Daily Record, March 20, 1958 (Md. 1958).

preparation of a defense, in order to gain access to investigatory records.[31] However, this rule is considered an exception to the general rule throughout the country,[32] and it should be kept in mind that the matter of inspection being left to the discretion of the trial court prevents such inspection from being a matter of right. It appears, therefore, that Maryland follows the federal rule in allowing a defendant in a criminal action access to investigatory records only under the discretion of the trial court in that the records must prove to be relevant to the case.

Since the instant case did not involve a criminal proceeding, nor was the State a party to any proceedings for which the records were sought, the State was under no express obligation to disclose investigatory records as might have been imposed otherwise. Thus the decision that police records are confidential in nature by reason of public policy, and therefore not open to inspection, has placed Maryland among the great majority of states holding that investigatory reports do not fall within the general class of those open to public inspection. This does not automatically bar all types of police records from inspection, in that the Maryland Code provides that accident reports made by the Maryland State Police are available for public inspection.[33] In addition, accident reports filed with the Department of Motor Vehicles, by the motorists involved, are likewise subject to inspection by interested parties.[34] However, because of a desire to keep certain investigatory records from inspection by the general public in that such an inspection could have results more detrimental than beneficial, with respect to the interests of the public as a whole, the Court of Appeals has properly held that such police records are not a proper subject of inspection in absence of statutory authority.

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[31] MD. RULE 728.
[32] State v. Haas, 188 Md. 63, 51 A. 2d 647 (1947).
[33] 8 MD. CODE (1957) Art. 88B, § 47.
[34] Pressman v. Elgin, 187 Md. 446, 50 A. 2d 560, 169 A.L.R. 646 (1947).