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Office of the State Prosecutor v. Judicial Watch, Inc.

Grand Jury Investigation Materials Are Not Subject to “Vaughn Index” under Maryland Public Information Act because the Act Does Not Trump Grand Jury Secrecy Rule

By Brent Bolea

The Court of Appeals of Maryland held that a court may not order a “Vaughn index” under the Maryland Public Information Act (“PIA”) to determine whether grand jury investigatory information shall remain secret. *Office of the State Prosecutor v. Judicial Watch, Inc.*, 356 Md. 118, 737 A.2d 592 (1999). Rather, the court held that the decision whether to release grand jury information is dictated by applicable Maryland Grand Jury Rules applied by a court in the grand jury’s jurisdiction. In so holding, the court of appeals declared that the PIA right to disclosure does not override the traditional rule of grand jury investigation secrecy. The court additionally held that a trial court’s order under Section 10-623 of the PIA is an immediately appealable injunction.

On July 7, 1998, the Office of the State Prosecutor (“OSP”) announced a grand jury investigation into Linda Tripp’s alleged violations of Maryland’s Wiretap and Electronic Eavesdropping Statute. Subsequently, Judicial Watch, Inc. (“Judicial Watch”), a conservative watchdog group, filed with the OSP a request for “all documents and things related to, among others, Linda Tripp, Lucianne Goldberg, Monica Lewinsky, Kenneth Starr, and the White House,” pursuant to the PIA.

The OSP denied the request on the grounds that Judicial Watch was not a person in interest, and that information sought was part of a law enforcement or prosecutorial investigatory file. Consequently, Judicial Watch filed a complaint in the Circuit Court for Baltimore County, alleging that the OSP’s denial violated the PIA. The trial court ordered the OSP to submit a “Vaughn index” that “word for word, paper for paper” identified all information sought. The OSP made a timely appeal to the Court of Special Appeals of Maryland. The Court of Appeals of Maryland granted certiorari on its own motion prior to any action by the Court of Special Appeals of Maryland.

The court initiated its inquiry by addressing the issue of appealability, and held that the trial court’s order under the PIA to produce a “Vaughn index” was an injunction. *Judicial Watch, Inc.*, 356 Md. at 127, 737 A.2d at 596. The court of appeals concluded that the trial court’s order was immediately appealable by reasoning that the harm against which protection was sought would occur with the submission of the “Vaughn index.” *Id.* at 128, 737 A.2d at 597.

The court then addressed the issue of whether the trial court erred in ordering the OSP to provide a detailed “Vaughn index” to assist it in

determining if the information sought was protected from disclosure under the PIA. *Id.* at 128, 737 A.2d at 598. The court first noted that section 10-615 of the PIA states that a “custodian must deny inspection of public records that are, by law, privileged or confidential, or when inspection would be contrary to a State statute or rules adopted by the court of appeals.” *Id.* at 130, 737 A.2d at 598. Cognizant of this section, the court emphasized the importance of secrecy to “the proper workings of the grand jury system.” *Id.* In exploring the policies behind grand jury secrecy, the court referenced two main cases; *In re Criminal Investigation No. 437*, 316 Md. 66, 557 A.2d 235 (1993), and *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979). In general, these cases pronounce secrecy as the “lifeblood of the grand jury,” which encourages participation by witnesses, prevents indictees from fleeing, and protects those accused but then exonerated by the grand jury from public scorn. *Id.* at 130-31, 737 A.2d at 598-99.

The court turned to Maryland Rule 4-642, which embodies the disclosure policies discussed in the cases, and declared that the rule unambiguously states that inspection of grand jury files can occur only when a court so orders after a hearing

convened on a motion filed in the jurisdiction where the grand jury takes place. *Id.* at 131-32, 737 A.2d at 599-600. The court emphasized how this rule was not followed in the circuit court in the instant case. First, the proceeding regarding disclosure was undertaken pursuant to the PIA when it should have been under Maryland Rule 4-642. *Id.* at 132, 737 A.2d at 600. Second, the court noted that the Circuit Court for Baltimore County was the improper venue in the wrong jurisdiction. *Id.* at 133, 737 A.2d at 600. Declaring that Judicial Watch used the PIA in an attempt to circumvent grand jury secrecy, the court expounded its concern that allowing such a practice would undermine the grand jury process. *Id.* The court then held that the “PIA does not trump or override the traditional rule of grand jury secrecy,” and that the trial court erred in hearing and deciding the case, in light of Maryland Rule 4-642. *Id.*

The court went on to provide instructions to be utilized if the Circuit Court for Baltimore County decided to transfer the matter to Howard County. *Id.* The court explained that the applicable standard for a court deciding grand jury disclosure issues is whether there is a strong showing of particularized need for the information. *Id.* In defining “particularized need,” the court of appeals analyzed *In re Criminal Investigation*, 316 Md. 66, 557 A.2d 235 (1993), which states that: “(1) the material sought must be necessary to avoid possible injustice; (2) the need for disclosure must outweigh the need for secrecy; and

(3) the request must be narrowly structured so as not to disclose unnecessary information.” *Id.* at 134, 737 A.2d at 600. The court noted that none of these factors were asserted in the circuit court. *Id.* Even if they had been, the court stated that the request still would have failed not only because Judicial Watch was not a person in interest under the PIA, as it was unrelated to any party in the criminal investigation, but it was not a government or law enforcement entity. *Id.*

The court of appeals also analyzed the PIA to determine what explanation, if any, the OSP had to supply for denial of the PIA request. *Id.* at 134, 737 A.2d at 600-01. According to the court, section 10-618(f)(1) does not require that an enumerated agency provide an explanation for denial unless a “person in interest,” as defined in section 10-611(e), is involved in the request. *Id.* at 136, 737 A.2d 601-02. Even if a person in interest is involved, the court concluded that under *Faulk v. State’s Attorney*, 299 Md. 493, 474 A.2d 880 (1984), the agency need only provide a “generic” determination that disclosure would interfere with a pending criminal investigation. *Id.* at 137, 737 A.2d at 602.

Furthermore, the court held that an enumerated agency under section 10-618 was presumed to have compiled records for a law enforcement or prosecutorial purpose. *Id.* at 140, 737 A.2d at 604. Even though the OSP is not an enumerated agency, the court stated that it should receive the benefit of the presumption because it was acting at

the request and in the manner of the State’s Attorney for Howard County, which is an enumerated agency. *Id.* Consequently, the court of appeals found that the OSP “stood in the shoes” of an enumerated agency. *Id.*

The court determined in *Judicial Watch, Inc.*, that because the OSP was acting as an enumerated agency, and Judicial Watch was not a person in interest under the PIA, there was no explanation owed for the refusal to disclose the requested information. Based on these findings, the court concluded that under the circumstances of this case, a “Vaughn index” cannot be ordered by a court to determine whether requested information is immune from a PIA request.

Although the public’s interest in having free access to information gathered by its government is far-reaching, it is not absolute. In certain realms of government activity, secrecy is of more value to society than disclosure. Such is the case in grand jury proceedings. This concept could have been no better illustrated than under the facts at hand. The Court of Appeals of Maryland has struck the proper balance in this case between the public’s right to know and the government’s need to keep certain information confidential.

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