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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX: Part BxTC

In Re The Application of

THE PEOPLE OF THE STATE OF NEW YORK

for an Order Unsealing the Records of MANAURI R.,

DECISION

SCI 4090/02

LAURA SAFER ESPINOZA, J.:

I.

On October 11, 2002, Manuari R. (the defendant) was adjudicated a youthful offender. The records were sealed pursuant to CPL §720.35. The acts underlying the adjudication had taken place in the apartment where the defendant lived as a roommate of the leaseholder, Ms. Tavarez. On April 23, 2003, the Narcotics Bureau of the Office of the Bronx District Attorney sent the sealed arrest report and the felony complaint to the landlord with a demand letter instructing him to evict the tenants. On August 18th, the landlord attached these documents to a Petition filed in Housing Court to evict Ms. Tavarez as tenant and the defendant as undertenant, pursuant to the Bawdy-house Laws, RPAPL §§711(5) and 715.[1] The landlord and Ms. Tavarez later reached a settlement which the People refused to accept. Her attorney then sought the records of the defendant's criminal prosecution and learned that they were sealed.

On November 12th, the People presented a motion to unseal the defendant's records for use in the eviction proceeding. They stated that "[i]n order to complete a trial on this

[1] §711 reads in pertinent part: "A tenant shall . . not be removed from possession except in a special proceeding . . . upon the following grounds: . . . (5). The premises, or any part thereof, are used or occupied as a bawdy-house, or house or place of assignation for lewd persons, or for purposes of prostitution, or for any illegal trade or manufacture, or other illegal business." §715 reads in pertinent part: "any duly authorized enforcement agency of the state . . . under a duty to enforce the provisions of the penal law . . . may serve personally upon the owner or landlord . . . a written notice requiring the owner or landlord to make an application for the removal of the person so using or occupying the same."

matter [certain] documents must be unsealed and available to be put into evidence before the [Housing] court." An affidavit stated that notice of the motion had been mailed to the defendant at the address where he had been arrested. Although no one appeared in opposition to the motion, the Court had no reason to assume that the defendant had not been afforded an opportunity to be heard. The motion was granted with the understanding that the eviction proceeding had been commenced with public information supporting the allegation of illegal use of the premises and that the confidential records being sought were necessary to complete a trial in that matter.

On December 2nd, counsel for Ms. Tavarez moved in Housing Court to strike the sealed records and dismiss the Petition. On December 15th, he brought a motion before this Court to deny the People's motion to unseal or, in the alternative, to reseal the records. The People did not refute any of the procedural history or the substantive issues raised in counsel's motion. Their sole contention was that Ms. Tavarez had no standing to oppose the unsealing of the defendant's records.

Although the Court was aware at the time it signed the November 12th order that the records were sought for a pending eviction proceeding, the detailed procedural history recited above was made clear only when Ms. Tavarez filed her motion in this Court. The following facts were presented for the first time in that motion:

1. The People had already disclosed sealed documents from the defendant's case to the landlord to put him on notice of his obligations pursuant to RPAPL §§711 and 715, without court authorization.

2. The landlord had in turn published these sealed documents by attaching them to his Petition filed with the Housing Court to initiate the eviction proceeding, without court

authorization.

3. The Petition contained no allegations of illegal use of the apartment other than those underlying the defendant's youthful offender adjudication.

4. Although the People had asserted that the records were necessary "to complete a trial," in fact no trial had commenced in the eviction proceeding.

5. The motion to unseal had been made only after Ms. Tavarez's attorney discovered that the eviction proceeding had been initiated with copies of sealed documents.

6. An issue existed as to whether the defendant had been properly served with notice of the motion to unseal.[2]

These facts, unchallenged by the People, contradicted the court's original understanding of the facts which preceded its signing of the unsealing order on November 12th, including the relevance and necessity of these records to the eviction proceeding. Finding these factual inconsistencies to be important and disturbing, the Court decided, sua sponte, to reconsider that order. Confronted with analogous situations, other courts have also reconsidered their orders. In **Matter of Dondi**, 63 NY2d 331, 335 (1984), the Court of Appeals, addressing an unsealing motion under CPL §160.50, noted without negative comment: "An order, declaring that the Grievance Committee was a 'law enforcement agency' entitled to the records . . . issued, but was immediately recalled by the Judge [who] reconsidered . . . and denied the application, subject to renewal." The Court in **People v. Canales**, 174 Misc 2d 387 (S. Ct, Bx Co. 1997)

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[2]CPL §170.35 makes no provision for an ex parte motion, unlike CPL §160.50 which provides for a law enforcement agency to proceed ex parte. An affidavit from Ms. Tavarez states that the defendant has not resided at her apartment since his arrest. Her attorney assumes that he was in state custody and argues that the People should have been able to determine his location and properly serve him. The defendant's attorney was not served. The People have neither confirmed nor refuted these allegations.

also reconsidered its order to unseal records pursuant to CPL §160.50 for use in eviction proceedings under conditions similar to the ones presented here.[3] Upon being made fully aware of the facts which preceded the People's motion, the Canales court entertained motions and oral arguments and then vacated its prior order. It noted in particular that the People's failure to state in their original motion "that the records already had been provided to the landlord and filed in Housing Court . . . unnecessarily complicated the situation and led to this Court's issuance of an unsealing order without having all the relevant facts." Id. at 389, fn. 1. See also Matter of Van Leer-Greenberg v. Massaro, 87 NY2d 996 (1996) (under "unusual developments" where court orally dismissed felony charge for legal insufficiency of grand jury evidence and allowed defendant to plead guilty to misdemeanor charge but then filed written motion sustaining felony and allowed defendant the opportunity to withdraw plea, reconsideration of dismissal held not an improper exercise of judicial authority).

Accordingly, the instant matter was conferenced and affirmations and briefs were accepted from both sides on the factual and substantive issues involved. In light of the Court's decision to reconsider its order, the procedural issues of standing or notice were not reached. The Housing Court proceedings were adjourned pending this Court's determination on the use of the youthful offender records. On May 11, 2004, the Court signed an order to reseal the records in accordance with the following decision.

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[3]In Canales, the defendant and her son were arrested in defendant's apartment pursuant to a search warrant. The son pled guilty. A few months later, the People sent a demand letter to the landlord, attaching the felony complaint and police reports. Two months later charges against the defendant were dismissed and sealed. A year after the incident, eviction proceedings were commenced by a Petition to which the sealed records were annexed. Counsel brought a motion to strike the sealed documents in Housing Court. The People then brought an ex parte unsealing order in Supreme Court which stated that "unsealing would permit the proceeding to continue which is presently in the Civil Court."

II.

"All official records and papers, whether on file with the court, a police agency or the division of criminal justice services, relating to a case involving a youth who has been adjudicated a youthful offender, are confidential and may not be made available to any person or public or private agency" except where specifically required or permitted by statute[4] or "upon specific authorization of the court." CPL §720.35. The People do not allege that they are one of the agencies expressly allowed access without court order, nor do they allege that a court order was sought, much less granted, prior to publishing the records to the landlord. Instead, they present two arguments that no such order was necessary in this case. They further argue that, in any event, the use of these documents against a person other than the youthful offender does not contravene the intent of the statute and, finally, that youthful offender records should be afforded less protection than cases terminated in favor of the accused.

A.

Initially, the People argue that their office "is not prohibited from providing the landlord with copies of documents from its files" because CPL §720.35 makes no reference to their agency's files. They contrast CPL §720.35, which expressly refers to files of "the court, a police agency or the division of criminal justice services," with CPL §160.50, which refers to files of "the division of criminal justice services, any court, police agency, or prosecutor's

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[4]CPL §720.35(2) allows for disclosure without the need for a request to stay sealing and without the need for a court order, unlike the sealing provisions of CPL 160.50, for specific purposes, such as "execution of the student's educational plan, . . . successful school adjustment and reentry into the community," and only to specified individuals or entities, such as the "designated educational official of the . . . school in which the youth is enrolled as a student . . ., an institution to which such youth has been committed, the division of parole and a probation department of this state, [and] the statewide automated order of protection and warrant registry."

office." They conclude that their "files are not sealed and therefore any documents contained therein may be used in the litigation of the drug holdover."

The felony complaint is clearly a document which is filed with the court. The laboratory report, property clerk voucher and arrest records are kept in police and court files, both of which are expressly referred to in the statute. Thus, the People's argument would lead to a situation where some copies of the same record would be confidential by statute and others disclosable, simply because they retain copies in their files of documents otherwise mandated to be sealed.

Similar rationales for circumventing other confidentiality statutes have been firmly rejected. In **Matter of Todd H.**, 49 NY2d 1022 (1980), the Court addressed former Family Court Act §753-b which provided for the destruction of fingerprints, palmprints or photographs in certain juvenile delinquency cases, but did not address arrest records. The dissent argued that while the court could expunge the arrest record in its own file, it had no power to order the police department to destroy its copy. The majority rejected this argument, stating

> we cannot agree that a statute, which . . . provides for the destruction of . . . records if the charges are not sustained, nevertheless permits the police to retain in their own files some of the arrest records, essentially copies. . . . The point is that the stigma will remain as long as the police preserve any record of the arrest no matter what the impetus.

Id. at 1024. In **Matter of Alonzo M. v. NYC Dept of Probation**, 72 NY2d 662 (1988), the Court held that "separately maintained records" could not be used to circumvent FCA §375.1(1), the parallel statute to CPL §160.50 for juvenile delinquency cases terminated favorably to the accused.

> It is of no consequence that the source of the arrest and prosecution data . . . was Probation's own . . . records. Indeed, this makes matters worse and more disturbing because it unmasks a concededly regularized Big-Brother-like evasion

> of the prophylactic law itself and of particular sealing orders. This audacious violation of petitioner's statutory rights -- and apparently those of countless others -- in maintaining separate "unsealed" files cannot be blinked - and certainly not by a strained statutory interpretation. That would be turning the "blind eye" and would wrongly place the Probation Department above the law. Even laudable goals and helpful tools cannot justify forbidden means

Id. at 669 (citations omitted). See also First American Corp. v. Al-Nahyan, 2 F Supp 2d 58, 62 (DDC 1998) (CPL §160.50 "would be eviscerated if documents in the possession, custody or control of a protected individual could be freely discovered while duplicates of the same documents in the possession of New York law enforcement agencies are under seal"); Brown v. Passidomo, 127 Misc 2d 700 (S. Ct, Erie Co. 1985) (record of conviction subsequently reversed and sealed could not be disclosed to insurers by Department of Motor Vehicles even though DMV is not one of the enumerated agencies whose files are sealed under CPL §160.50).

State Farm Fire and Casualty Co. v. Bongiorno, 237 AD2d 31 (2d Dept 1997) specifically dealt with records of a youthful offender adjudication. In that case, the insurer, whose motion to unseal the plea allocution had been denied, sought the contents of that plea through a notice to admit. Holding that a youthful offender could not be compelled to divulge the contents of the confidential records, the court reasoned that

> [i]t is illogical to conclude that there is a distinction between the confidentiality of the physical records and papers, as opposed to the information they hold. To attach special significance to physical records and papers, when it is only the information contained in them which could be of interest or probative value . . . would be, in the most literal sense, to place form over substance. Sound policy, good law, and rational thought cannot rest on such sophistry.

Id. at 35. See also Matter of Dillon, 171 Misc 2d 665 (Nassau Co. Ct 1997) (rejecting People's argument that information in their files, acquired prior to the youthful offender adjudication,

remained public after the adjudication).[5]

The same reasoning is applicable in the instant matter. The cloak of confidentiality pertains to the contents of records encompassed by the statute, not to their physical location. Therefore, this Court holds that the prosecutor cannot publish its own copies of otherwise confidential documents without prior approval of the court merely because CPL §720.35(2) makes no explicit reverence to their files.

B.

The Court also rejects the People's argument that the laboratory analysis and property clerk vouchers[6] are not "official records or papers."[7] CPL §720.35, like CPL §160.50, pertains only to "official records and papers," a category which has been defined as "broad and inclusive." **Matter of Dondi**, supra at 337. There is no "bright line rule" which states that

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[5]Cases interpreting the statute as not giving the court power to unseal the People's files do not lead to a contrary result. For example, in Dillon the court denied the People's request to unseal their files. It reasoned that since CPL §720.35(2) did not list the prosecution, it had no authority to grant such an order. Having authority over its own files, however, the court ordered the unsealing of some of the court records while retaining the confidential status of the remainder. While Dillon did not explicitly address the issue of "copies," the clear implication was that the People could not disclose records from its own files which were simply duplicates of those sealed in the court file.

[6]The People requested unsealing of "the voucher, lab and criminal court complaint, and other related documents." As to the complaint and arrest records they attached to the Housing Court Petition, they concede that the former is an "official" record and make no reference to the latter.

[7] The People cite to **Cacchioli v. Hoberman**, 31 NY2d 287 (1972) to support this proposition, although they do not discuss its relevance. This Court does not find that case dispositive. In Cacchioli the Court was not addressing an unsealing order but rather the discharge of an employee who failed to divulge his youthful offender adjudication on his job application. Dismissal on that ground was found to be unjustified since the failure did not constitute willful misrepresentation. The only applicable reference to the issue at hand is found in dicta in the concurring opinion which notes that CPL §720.35 "by its express terms, is restricted to the public records of the adjudication." 31 NY2d 287 at 297. This concurrence, however, does not discuss what constitutes a "public record."

everything in the People's file is an "official" document. Harper v. Angiolillo, 89 NY2d 761, 766 (1997). However, this term clearly encompasses records which are "integral to both [defendant's] arrest and his prosecution." Matter of Dondi, supra at 338. This Court notes that while CPL §720.35 refers to official records "relating to a case," CPL §160.50 refers to official records "relating to the arrest or prosecution." If any import should be afforded this difference, it would be that the youthful offender statute contemplates a more inclusive definition.

Laboratory reports of drug or ballistic tests and property vouchers are documents generated solely for law enforcement purposes to charge and prove criminal offenses. They are not only probative of guilt on the underlying charges, they are records absent which the gravamen of the charges could not be sustained. Accordingly, this Court finds that they were "integral" to the prosecution of defendant's case, thus meeting the standard set forth in Matter of Dondi. Therefore, they became confidential records upon the defendant's youthful offender adjudication pursuant to the express language of CPL §720.35.

The Court is not persuaded by the People's attempt to distinguish these documents from "official records" by characterizing them as investigatory or business records. The People provide no authority to support such per se exemptions to the confidentiality statutes. As to the laboratory report, they rely on Matter of Hynes v. Karassik, 63 AD2d 597, 598 (1st Dept 1978) for the proposition that a tape recording "made in the course of an investigation does not become an official record required to be sealed under [CPL §160.50] simply because it is marked in evidence as an exhibit in the course of a criminal trial." That ruling, affirmed without discussion by the Court of Appeals, 47 NY2d 659 (1979), is of limited value to the issue before this Court, particularly after Matter of Dondi, supra, which on almost identical facts held that a tape

recording generated under similar circumstances was an "official" record.[8] As the concurrence in Hynes pointedly noted, a "proper result is being obtained, although perhaps through a strained construction to achieve a salutary result. ... [I]nasmuch as this is a matter of first impression, we should do so with respect to 'interest of justice' rather than with respect to "official records." 63 AD2d at 599.

Contrary to the People's position, the prevailing view is that "[s]ealing also includes evidence developed during the investigation that preceded the action, if related to the arrest for its prosecution or to the prosecution itself." Preiser, Practice Commentaries, McKinney's Consolidated Laws of NY, Book 11A, CPL §160.50, p. 713. See **People v. Hamilton**, NYLJ, June 11, 1999, at 33, col 4 (S. Ct, Kings Co.) (defendant's statements obtained by investigators for prosecution and marked as grand jury exhibits were sealed under CPL §160.50). In any event, it is clear that laboratory reports are documents generated solely for prosecution purposes. In fact, without the laboratory report, there can be no prosecution on a narcotics charge, absent a stipulation or waiver by the defendant.

Similarly unpersuasive is the People's contention that the property voucher is made in the regular course of police business and therefore "more akin to business records than official records." The types of business records that courts have held are not "official" records are documents produced in the regular course of business by or for third parties for nonlitigation purposes. **People v. McGurk**, 229 AD2d 895 (3d Dept 1996) (defendant's Medicaid claim

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[8]At least one court has noted that Hynes v. Karassik may no longer be good law after Dondi. **Journal Pub. Co. v. Office of Special Prosecutor**, 131 Misc 2d 417 (S. Ct, NY Co. 1986) (tapes in possession of special prosecutor of conversation of detainees, made in the course of an undercover investigation supervised by the Department of Investigation and introduced at trial in which defendant was acquitted, held to be subject to sealing order).

forms submitted to Department of Social Services); **Lockwood v. Suffolk Co. Police Dept.** NYLJ, Feb. 14, 2001, at 32, col 5 (S. Ct. Suffolk Co.) (gas station videotape, made by third party in regular course of surveillance of premises and not as part of investigation of underlying crime, absent information showing tape was integral to arrest and prosecution); **Pritzker v. City of Hudson.** 26 F Supp 2d 433 (NDNY 1998) (nonstigmatizing military records created prior to commencement of criminal perjury proceedings); **People v. Roe**, 165 Misc 2d 554 (S. Ct, Bx Co. 1995) (records subpoenaed from banks and health care providers created and kept as part of the regular course of business for seeking Medicaid reimbursement). In contrast, the property voucher is a document generated by the police specifically to show the chain of custody of evidence in the prosecution of violators of weapons and drug laws. See **Fountain v. City of NY**, 2004 WL 1474695 (SDNY June 30, 2004) (UF-49 and other NYPD documents identifying names of arrestees in antiwar demonstrations deemed "official records"); **Barbour v. People**, 163 Misc 2d 321, 327 (S. Ct, Kings Co. 1994) ("police reports and documents are official records or papers subject to sealing").

C.

Equally unavailing is the People's argument that disclosure of the records did not "contravene the purpose or spirit of CPL §720.35," which is to "spare young adults who have violated the criminal laws from stigma and adverse consequences that necessarily flow from a criminal conviction." The People are not proposing that the complaint, arrest records, property voucher and lab report are the type of documents which are innocuous on their face and therefore nonstigmatizing. See e.g. **People v. Vrooman**, 205 AD2d 235 (3d Dept 1994) (victim's blood sample, sought for use in paternity suit, was not part of "official" record under CPL §160.50 as it was not probative of cause or manner of death and had no bearing on identity of assailant and

thus was nonstigmatizing to acquitted defendant). Rather, they are asserting that publishing the records does not stigmatize the defendant because "the focus is not on the juvenile [but rather] on the adult tenant of record and the misuse and illegal use of the tenant's apartment."

At the outset, it must be noted that the People's motion to unseal requested the documents for use against the defendant as undertenant in the apartment and that he is a named respondent in the eviction proceeding. His failure to appear in Housing Court in response to the Petition, presumably because he no longer resides at the apartment, does not retroactively alter the fact that the People published the confidential records to evict him as well as Ms. Tavarez. To assert now that he was not "the focus" is belied by the reality that, if he still resided in the apartment, he would be subject to forfeiture of his residence, clearly an "adverse consequence" contravening the intent of the statute.

Nor does his default on the proceedings in any way mitigate the damage done to his reputation when he was named in incriminating documents sent to the landlord, published with the Petition and made part of the public record in Housing Court. Indeed, since no court order was requested before these documents were made public, there has been no control over where and how far they may have been disseminated. The potential damage to the defendant's reputation is precisely the stigma the statute was designed to avoid. In this case, where the defendant's name has already been published, the People's alternative request to unseal documents with his name redacted comes too late to avoid those consequences.

Moreover, even if at the outset the People had intended to evict only Ms. Tavarez, the use of the records without court order in violation of CPL §720.35 "would have a chilling effect on the willingness of a charged youth to accept a plea which includes his or her adjudication as a youthful offender. This contravenes the goals set by the youthful offender

policy." State Farm v. Bongiorno, supra at 36.

D.

While CPL §§160.50 and 720.35 are not interchangeable statutory schemes,[9] both are sealing statutes. Capitol Newspapers v Moynihan, 71 NY2d 269, 268 (1988) ("[t]he youthful offender finding and sentence imposed together constitute a 'youthful offender adjudication.' . . . Upon a youthful offender adjudication, all official records and papers must be sealed.") This language used by the Court of Appeals clearly refutes the People's suggestion that the use of "confidential" in the youthful offender statute rather than "sealed" has significance for the issues before this Court. The People's reliance on People v. Gallina, 110 AD2d 847 (2d Dept 1985), for the proposition that the term "confidential" in CPL §720.35 implies a less sweeping prohibition than the "sealing" provided for in CPL §160.50 is not persuasive. While the Court in Gallina found that the difference in these terms was not a meaningless distinction, it dealt with the very limited issue of the return of arrest photographs. Noting that the return of these photographs is mandated under CPL §160.50 but not under CPL §720.35, the court found that law enforcement's retention and investigatory use of a youthful offender's arrest photograph was permissible. Emphasizing that it was sanctioning only this "internal" use in a police investigation, the court went on to rule that the production of the photograph in court and its use at trial to refresh a witness' recollection was improper without a court order. Thus, despite the seemingly broad language in Gallina relied upon by the People, the distinction drawn in that case between "confidential" and "sealed" was limited to a very narrow circumstance.

[9]As to the specific differences and similarities between the two statutory schemes as they pertain to the issues before this Court, they are discussed at length infra. In all instances, however, Article 720 is controlling since it, rather than Article 160, was the basis for sealing in this case.

III.

Violation of sealing statutes has been strongly condemned. "Use of confidential information regarding a youthful offender adjudication, if improperly obtained, is not permitted. . . . CPL §730.25(2) is not to be construed as but a minor obstacle to be easily overcome." State Farm v. Bongiorno, supra at 35-36. See also Green v. Giuliani, 187 Misc 2d 138, 151 (S. Ct, NY Co. 2000) ("[t]he unsealing of the records is not self-executing. The ability and willingness of the Mayor . . . to bypass the sealing safeguards, . . . to ignore the procedures for judicial unsealing, and disseminate information contained in sealed records at will, presents a question as to the functioning of municipal government of sufficient importance to warrant a summary inquiry.")

However, the sealing statutes do not provide sanctions for the improper release of confidential records.[10] The use of evidence obtained in contravention of sealing statutes does not implicate fundamental constitutional rights and courts have not favored suppression in criminal matters, People v. Patterson, 78 NY2d 711 (1991) (identification obtained with photograph sealed under CPL §160.50); People v. Torres, 291 AD2d 273 (1st Dept 2002) (same), or administrative proceedings, Charles Q. v. Constantine, 85 NY2d 571 (1995) (evidence erroneously unsealed under CPL §160.50 used in police disciplinary hearing). Nor have courts found a cause of action for damages as a civil remedy. Moore v. Dormitu, 173 Misc 2d 836 (S. Ct, NY Co. 1997), affd on other grounds as modified 252 AD2d 421 (1998) (CPL §160.50); Yanicki v. State, 174 Misc 2d 149 (Ct of Claims, 1997) (CPL §720.35).

[10] Compare e.g. SSL 422(12) ("any person who willfully permits [or] encourages the release of any data and information contained in the central register [of child abuse and maltreatment] not permitted by this title shall be guilty of a class A misdemeanor").

There have been sanctions imposed, however, in particularly egregious cases. See e.g. **Matter of Dondi**, supra at 339 (recognizing that dismissal was not a usual remedy even where due process rights were violated, nonetheless dismissed attorney disciplinary action pending for nine years on particular facts of the case, including the attorney's cooperation, contrition and otherwise unblemished record); **Ejelonu v. INS**, 355 F 3d 539, 551 (6th Cir. 2004) (recognizing no exclusionary rule in deportation hearings, nonetheless granted writ prohibiting use of youthful offender records disclosed without court permission "by someone in a position of trust." "We should never encourage anyone to break state law or violate judicial orders. Nor should we encourage [the Department of Homeland Security] to ignore how it acquires evidence. . . . To deport [petitioner] would reward the wrongdoer.")

The fact that the People in the instant case sought a court order to unseal these records after counsel learned that the eviction proceedings were based on confidential documents does not cure their disregard for the confidentiality statute. Even more troubling, their unauthorized disclosure of confidential records in this case to a landlord, without a prior court order, is not an isolated example. This Court decided a companion case on the grounds of mootness in which the same practice had been followed. As discussed above, Judge R. Richter wrote several years ago at length disapproving similar practices surrounding motions to unseal brought after records were published without court order in narcotics eviction cases. **People v. Canales**, supra. The extent of this practice is not known since the issue is only raised through motions brought before the Housing Court by civil attorneys or pro se litigants, knowledgeable enough to question the legality of sealed records attached to the Petition. It is clear, however, that to seek unsealing orders only in the rare case where the use of unauthorized documents is discovered in other venues is unacceptable.

In light of the assurances provided by the Bronx District Attorney in his letter to Legal Services of New York that past practices in this area are being examined and that proper procedures will be implemented, this Court declines to impose sanctions in this case for the improper dissemination of confidential records without court order.[11] It is necessary, however, to set forth the appropriate legal standards which must be met in unsealing motions and to apply them to the instant matter.

IV.

CPL §720.35 explicitly allows disclosure of youthful offender records upon the "specific authorization of the court." In this respect, it is structurally different from CPL §160.50, which provides for a stay of sealing, as well as carefully delineating specific persons or agencies to whom disclosure of sealed records may be appropriate, including agencies acting in a law enforcement capacity upon a showing that justice requires unsealing.[12] Beyond these "few narrowly defined exceptions," Matter of Hynes v. Karassik, supra at 663, disclosure of records sealed pursuant to CPL §160.50 under a theory of a court's "inherent power" over its own

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[11]The authority to exclude these records from the eviction proceeding or to dismiss that proceeding lies with the presiding Housing Court judge.

[12]CPL §160.50 (1) (d) states in pertinent part: "such records shall be made available to . . . (i) a prosecutor in any proceeding in which the accused has moved for an order pursuant to section 170.56 or 210.46 of this chapter, or (ii) a law enforcement agency upon ex parte motion in any superior court, if such agency demonstrates to the satisfaction of the court that justice requires that such records be made available to it, or (iii) any state or local officer or agency with responsibility for the issuance of licenses to possess guns, when the accused has made application for such a license, or (iv) the New York state division of parole when the accused is on parole supervision . . . and the arrest which is the subject of the inquiry is one which occurred while the accused was under such supervision or (v) any prospective employer of a police officer or peace officer . . . in relation to an application for employment . . . or (vi) the probation department responsible for supervision of the accused when the arrest which is the subject of the inquiry is one which occurred while the accused was under such supervision."

records is severely limited. **Matter of Joseph M.**, 82 NY2d 128 (1993); **Matter of Dondi**, supra. In contrast, the express language of CPL §720.35 grants the Court statutory power to disclose confidential records of youthful offenders in the exercise of its discretion, without restricting that disclosure to specified individuals or entities. The statute is silent, however, as to when such authorization should be granted. The Court of Appeals, while not specifically addressing youthful offender records, has articulated a general standard for the exercise of judicial discretion in disclosing other types of confidential records.

The framework for any exercise of the court's authority to disclose confidential matters "by its very nature, involve[s] the balancing of competing interests." **Matter of Crain Communications, Inc. v. Hughes**, 74 NY2d 626, 628 (1989) (sealing or disclosing records of civil proceedings). "The rule of secrecy is not absolute and, in the discretion of the trial court, disclosure may be directed when, after a balancing of a public interest in disclosure against the one favoring secrecy, the former outweighs the latter." **Matter of District Attorney of Suffolk Co.**, 58 NY2d 436, 444 (1983) (disclosure of grand jury minutes pursuant to CPL §190.25).

However, the mere recital of a strong public interest in disclosure is not sufficient. There must also be a strong showing that the confidential records are necessary and essential to meeting the competing policy needs.

> [S]ince disclosure is 'the exception rather than the rule,' one seeking disclosure first must demonstrate a compelling and particularized need for access. However, just any demonstration will not suffice. For it and the countervailing policy ground it reflects must be strong enough to overcome the presumption of confidentiality. In short, without the initial showing of a compelling and particularized need, the question of discretion need not be reached, for then there simply would be no policies to balance.

Id. at 444 (citations omitted) (despite public's strong interest in county's recovery of civil damages in tax fraud litigation, motion failed to identify "what made it impossible for the

District Attorney to establish his case without resort to the minutes. Without being provided with such particularization, nisi prius, of course, was hardly in a position to appraise the application intelligently.") See also Matter of the City of Buffalo, 57 AD2d 47 (4th Dept 1977), app dn 42 NY2d 802 (despite strong public interest in possible civil litigation to recoup improperly disbursed public funds for "no-show jobs," no showing "that sources other than the Grand Jury minutes are inadequate to provide the information which the city seeks").

Further clarifying the standard for allowing a public interest in disclosure to override a policy of secrecy, the Court in Matter of Dondi, supra, required a "compelling demonstration, by affirmation, that without an unsealing of criminal records, the ends of protecting the public . . . cannot be accomplished."[13] Moreover, "the request must set forth facts

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[13]In Dondi, the Court held that the provisions of CPL §160.50(1)(d)(ii) did not apply since a Grievance Committee seeking records for use in an attorney disciplinary action was not a "law enforcement agency." Disclosure of records sealed pursuant to CPL §160.50 has generally not been granted to nonlaw enforcement agencies where other means to obtain the information exist. Matter of NY State Police v. Charles O., 192 AD2d 142 (3d Dept. 1993) (no indication that victim and her foster mother were unavailable to testify at police disciplinary hearing); Ferreria v. Palladium Realty Partners, 160 Misc 2d 841 (S. Ct, NY Co. 1994) (other sources of information available and mere relevance to issues in victim's claim in tort action not sufficient); Matter of People v. James M., NYLJ, Apr. 14, 1997, at 29, col 4 (S. Ct, Bx Co.) (no facts showing investigation could not have been completed or that information not available by conventional investigation given affidavits that witnesses available to testify at police disciplinary proceeding and that one witness had not been contacted by police department); People v. Davis, NYLJ, Aug. 1, 1996, at 26, col 4 (S. Ct, Qns Co.) (no facts showing information could not be reconstructed from other sources or that without unsealing People would be foreclosed from bringing Article 78 proceeding); People v. Joseph I., NYLJ, May 27, 1992, at 25, col 3 (S. Ct, Bx Co.) (no showing that record contained relevant information not otherwise available for use in disciplinary proceeding, noting that Transit Police Department had officer present during proceeding who had full knowledge of trial testimony); Matter of People (M.I.), NYLJ, May 22, 1992, at 24, col 5 (S. Ct, Bx Co.) (despite relevancy of information to civil claim, other sources available; acquitted defendant, plaintiff and other witnesses subject to subpoena and several had been deposed). Moreover, the First Department has recently held that even a party who could be considered a law enforcement agency entitled to sealed records under CPL §160.50 must "demonstrate that its investigation would be frustrated if defendant's records were to remain sealed" and denied unsealing where the agency had "sufficient information to

indicating that other avenues of investigation had been exhausted or thwarted or that it was probable that the record contained information that was both relevant to the investigation and not otherwise available by conventional investigative means." 63 NY2d at 338-9. **Matter of Abram v. Skolnik**, 185 AD2d 407 (3d Dept 1992) (disclosing records of criminal prosecution for failure to pay sales and fuel taxes sealed under §160.50 for use in tax assessment determination where key trial witnesses either deceased or unavailable and certain records not otherwise available); **Matter of Application of Police Com'r. of the City of NY v. Patrick M.** 131 Misc 2d 695, 702 (S. Ct, NY Co 1986) (disclosing records sealed under §160.50 where Special Prosecutor, unable after more than three years to find evidence other than sealed records for use in disciplinary proceeding, asserted that "an investigation taken at the present time would be futile because the recollection of witnesses is stale and some have been convicted of related crimes and thus are not disposed to cooperate with the police").

Applying the "compelling and particularized" standard enunciated in Suffolk and Dondi, the lower courts have denied "specific authorization" to disclose youthful offender records pursuant to CPL §720.35 where there was no showing of a compelling, public need sufficient to override the interest in confidentiality, **People v. John F.**, 174 Misc 2d 540 (Nassau Co. Ct 1997) (confidentiality outweighed any pecuniary or economic interest of homeowners' insurer); or where that showing was not sufficiently particularized, **People v. Whitehurst**, 167 Misc 2d 383, 384 (S. Ct, Qns Co. 1996) (assertions that "information is necessary for investigative purposes relative to the defendant's background, and possibly rebuttal during the penalty phase of the trial . . . are far too tenuous and nebulous to overcome the legislatively

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conduct a thorough investigation, including interviews with defendant and access to" alleged witnesses. **People v. Anonymous**, 7 AD3 309, 311 (1st Dept 2004).

authorized confidentiality of those records"); or where there were other avenues available to meet the countervailing public need without resort to the youthful offender records, **People v. Wooden**, 289 AD2d 1083, 1084 (4th Dept 2001) ("here, it cannot be said that the court abused its discretion in refusing to unseal the victim's youthful offender file, particularly in view of the fact that the victim's testimony was supported by a videotape of the events"); **Van Loon v. Moskowitz**, 172 AD2d 749 (2d Dept 1991) (denying motion to unseal for homeowner being sued in civil court by defendant's girlfriend where other sources available); **People v. Ramos**, 153 Misc 2d 277 (S. Ct, Bx Co. 1992) (denying disclosure of the complainant's record to defendant in a pending action which concerned the same underlying facts for which defendant was arrested); **People v. J.K.**, 137 Misc 2d 394, 398 (Suffolk Co. Ct, 1987) (denying insurance company's motion to unseal because oral depositions and testimony by non-party witnesses available).

Given the strong policy for secrecy embodied in all of the confidentiality statutes, the "compelling and particularized" standard articulated by the Court of Appeals cannot be met in mere boilerplate language. "Conclusory allegations that the evidence is 'relevant and necessary' and 'will assist [agencies] to fulfill [a] statutory obligation' are grievously inadequate." **Matter of New York State Police v. Charles Q.**, 192 AD2d at 146. "Characterization of the information as being 'both pertinent and necessary' is simply that, a characterization." **People v. J.K.**, supra at 398. See also **People v. Anthony R.**, 170 Misc 626 (Nassau Co. Ct 1996) ("In order to properly investigate these allegations, it is necessary to review the information contained in the Wade investigation file" was an "unsupported, conclusory statement," insufficient to warrant disclosure of sealed files to the Police Department investigating allegations that officer filed false reports or testified falsely in hearings). The

factual allegations required by case law enable the court to make an informed decision regarding unsealing records as well as to tailor disclosure as narrowly as possible. As the Court noted in Matter of District Attorney of Suffolk Co., supra at 446, "the conclusory generalizations to which the application was confined left the court without any rationale by which it could minimize any invasion of secrecy by narrowing it to the essential. Instead, the court was confronted with a choice between an uninformed wholesale grant or none at all." When the "compelling and particularized" standard has been met by presenting the court with all the relevant facts rather than conclusory statements, the court is then able to make an informed and tailored decision as to the disclosure of records of a youthful offender. See e.g. Matter of Dillon, supra at 671-72 (disclosing felony complaint and indictment, notices of appearance of counsel, transcript of arraignment limited to plea entered and appearance of counsel, transcript of proceeding where counsel requested adjournment, photocopy of back of court jacket, and Chief Clerk's letter indicating date of arraignment; denying disclosure of location of offense and home address of witness given that People had witnesses who could testify to same; denying use of adjudication and sentence); People v. Scott, 134 Misc 2d 224, 226 (S. Ct, Kings Co. 1986) ("youthful offender file of the complaining witness herein is to be unsealed to afford defense counsel an opportunity to learn the underlying facts. The record is then to be resealed and counsel is directed not to question the witness as to the fact of the adjudication itself.")

V.

In the instant matter, the People stated in their original motion that unsealing was required because "these records contain information relevant to said eviction proceeding in that the site of the alleged criminal occurrence is the location from which an eviction of the tenant . . . is sought." They recite that it "is in the interest of justice to evict persons who use or allow the

use of residential or retail premises as narcotics warehouses and factories . . . in order to restore these premises to the housing and commercial stocks so that they can be lived and worked in by law-abiding persons," as well as that "it is in the interest of justice that the Housing Court hear and see all the necessary evidence to decide if an eviction should occur. Clearly society, by way of the statutes in the RPAPL wants to remove this type of illegal drug activity from residential apartment buildings."[14]

This Court agrees that there is a strong public interest in protecting law-abiding tenants from the illegal use of premises as contemplated by the Bawdy-house laws. Laudatory though these generalized aims may be, however, the terms "narcotics warehouses and factories" and "this type of illegal drug activity" are conclusory and must be supported by compelling facts to show the nexus between the acts underlying the criminal proceeding and the basis for the eviction. Not every allegation of drug possession in a residential apartment, while prohibited by the Penal Law, rises to the level of an "illegal trade or manufacture or other illegal business" prohibited by the Bawdy-house laws. "For example, the personal use of illegal drugs within a premise, even if habitual and customary, does not constitute an illegal use . . . because such conduct does not amount to a commercial activity or enterprise." 1165 Broadway Corp. v. Davana of N.Y. Sportswear, Inc., 166 Misc 2d 939, 944 (Civ. Ct, NY Co. 1995). "To find that

[14]The People's repeated use of "the interest of justice" is presumably based on language in CPL §160.50 (1)(d)(ii) which provides for disclosure to persons acting in the capacity of law enforcement where "justice requires." As discussed in Section IV, there is no parallel language in CPL 720.35 and disclosure of youthful offender records must meet the "compelling and particularized" standard articulated in Suffolk and Dondi. Whether law enforcement agencies seeking disclosure under CPL §160.60 have a lower burden is not a question before this Court. However, the mere recitation that unsealing is "in the interest of justice" without facts "demonstrat[ing] that its investigation would be frustrated" without the records would be insufficient to warrant unsealing even under CPL §160.50 (1)(d)(ii). People v. Anonymous, 7 AD3 at 311.

the tenant is using or permitting a housing accommodation to be used for an illegal or immoral purpose, it must appear that the premises have been 'used' for the unlawful purposes, and this imports, not an isolated act, but some measure, even though brief, of continuity and permanence." 190 Stanton Inc. v. Santiago, 60 Misc 2d 224, 225 (Civ. Ct, NY Co. 1969).

The allegations in the instant case are that the "police officers recovered [two loaded firearms] on the fire escape outside of [the apartment and two other weapons], a large quantity of cocaine, and plastic baggies inside." Although the weight is not specified, it appears to have been sufficient to support the presumption of an intent to sell. Coupled with the packaging material and weapons recovered from the premises, the information in the sealed records appears to be relevant to an eviction proceeding pursuant to the Bawdy-house Laws.

While the records of this prosecution may be relevant to the Housing Court proceeding, mere recitation that "[t]he files from the criminal prosecution are necessary" begs the question. Notably absent is any factual showing that "other avenues of investigation had been exhausted or thwarted or that it was probable that the record contained information that was both relevant to the investigation and not otherwise available by conventional investigative means." Matter of Dondi, supra at 339.[15]

The People cite no specific efforts made to discover whether any independent investigations of these premises exist showing prior or subsequent incidents of illegal use. Presumably this apartment was the focus of previous police investigation since, as stated for the

[15]The People's further recitation that "without the unsealing the 'ends of protecting the public' cannot be met and they would be foreclosed from bringing/proving eviction" and that "in order to remove the tenant of record and any other unlawful occupants from the subject premises, the Petitioner must prove, by a preponderance of the evidence, that the premises have been used for an illegal business or trade" does not cure this lack. These are boilerplate generalizations coupled with a statement of the law which is applicable to all narcotics eviction proceedings.

first time in the People's Affirmation in Opposition, a search warrant was issued for this location. The premises may have been the subject of other complaints, investigations, arrests or prosecutions of other individuals resulting in unsealed records. Witnesses may exist who could testify regarding illegal narcotics activity at this location. The People have not addressed these issues, nor have they represented that such testimony would jeopardize the safety of confidential informants or undercover officers or prejudice ongoing investigations.

Moreover, even if the acts underlying the defendant's youthful offender adjudication were the only available evidence of illegal business or trade on these premises, the People's motion to unseal failed to set forth facts to show that these acts could not be reconstructed from other sources, without resort to the sealed records. As counsel for Ms. Tavarez notes, "the District Attorney does not tell us whether the arresting officer(s) can testify to indicia of illegal activity." Only in their Affirmation in Opposition do the People begin to address this issue as regards their need for the laboratory report and property vouchers.

"Convenience alone will not justify an unsealing." **Matter of Dondi**, supra at 339. Use of confidential documents merely to take a short-cut or avoid a thorough investigation is insufficient to warrant breaking the seal of confidentiality. See e.g. **Anthony R.**, supra at 630 The People have failed to offer a "compelling and particularized" showing as to how the sealed records in the instant case are necessary and essential to protecting the public from the evils which the Bawdy-house Laws address. There has been a dual failure to inform the court whether there was any evidence available other than the allegations in the sealed records that the subject apartment was being used illegally and whether there were any independent evidence or witnesses to support the activities alleged in this sealed complaint. See **People v. Canales**, supra at 391 (unsealing denied where "no showing as to why unsealed records of tenant's son would

not be sufficient or whether there were no other witnesses, including other tenants or the officers who executed the search warrant, who could testify about narcotics activity in the apartment.") Had the proper showing delineated above been met initially, the alternative of releasing some or all of the records with defendant's name redacted could have been considered. It is, however, unacceptable to leave the Court to conjecture on these points. Based upon the People's failure to meet the necessary standards, the records in the instant matter have been resealed.

This constitutes the decision and order of this Court.

Dated: Bronx, New York
September 27, 2004

LAURA SAPER ESPINOZA, J.S.C.