

IN THE COURT OF APPEALS OF MARYLAND

No. 16

September Term, 1998

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LORETTA V. FIORETTI, R.D.H.

v.

MARYLAND STATE BOARD OF DENTAL  
EXAMINERS

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Bell, C.J.  
Eldridge  
Rodowsky  
Chasanow  
Raker  
Wilner  
Cathell,

JJ.

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Concurring Opinion by Raker, J. in which  
Rodowsky, J. and Wilner, J., join

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Filed: August 31, 1998

Raker, J. concurring:

I concur with the judgment of the Court reversing the Circuit Court for Baltimore City. I agree that the Maryland State Board of Dental Examiners failed to meet its burden in proving that the documents in its possession were investigatory files compiled for a law enforcement purpose. I join in the concurring opinion of Judge Wilner. In as much as the majority gratuitously addresses issues that need not be addressed in this case, I write separately because I disagree with the *dicta* in Section III. B. of the majority opinion as to the manner in which the State may satisfy its burden in sustaining its denial of a request to inspect records.

The majority correctly concludes that once the Board shows that the files were compiled for law enforcement purposes, the burden is on the Board to show that disclosure of the records would have prejudiced the investigation. Maj. op. at 22. Yet in interpreting Maryland Code (1984, 1995 Repl.Vol., 1997 Supp.), §§ 10-618(f)(2) and 10-623(b)(2)(i) of the State Government Article,<sup>1</sup> the majority concludes that:

[T]he circuit court can deny inspection *only to the extent* that disclosure would result in prejudice to the particular investigation. That is, if the Dental Board only could show that disclosure of the name of the person filing the complaint would have prejudiced its investigation, then the files should have been disclosed to appellant with the complainant's name, or any other information identifying the complainant, redacted.

Maj. op. at 22. If the majority is suggesting that the circuit court must make a document-by-

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<sup>1</sup> All statutory references shall be to the State Government Article, Maryland Code (1984, 1995 Repl.Vol., 1997 Supp.).

document, case-specific determination in every case that the examination of a particular record would prejudice an investigation, and that no generic determination of prejudice can ever be made, I believe the majority is incorrect.

The Board relies on *Faulk v. State's Attorney for Harford Co.*, 299 Md. 493, 474 A.2d 880 (1984), to support its argument that it may make a generic<sup>2</sup> determination that disclosure of documents would necessarily prejudice an investigation. In *Faulk*, the records sought were police investigatory files related to a criminal investigation, and the police department was an enumerated agency under the statutory predecessor to present § 10-618(f)(1)(i). We held that a trial court could make a *generic* determination that disclosure of the requested materials necessarily would interfere with law enforcement proceedings. *Id.* at 508, 474 A.2d at 888. We concluded that “the General Assembly did not intend to preclude generic determinations of interference when the circumstances were such that disclosure necessarily ‘would interfere’ with law-enforcement proceedings.” *Id.* at 508, 474 A.2d at 888. This Court permitted the generic determination that disclosure to a defendant of investigatory police reports in a pending criminal proceeding would interfere with law enforcement proceedings because it would substantially alter criminal discovery rules and likely would delay the adjudication of the criminal proceeding. *Id.* at 510, 474 A.2d at 889.

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<sup>2</sup>*Webster's Third New International Dictionary* defines generic as follows: “relating or applied to or descriptive of all members of a genus, species, class, or group: common to or characteristic of a whole group or class: typifying or subsuming: not specific or individual. . .” WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED, at 945 (Philip B. Gove ed., 1961).

Faulk relied on *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978), a case interpreting the federal Freedom of Information Act, 5 U.S.C. § 552 (1976) (hereinafter “FOIA”). The question in *Robbins Tire* was whether, under Exemption 7(A) of FOIA, the N.L.R.B. was required to present particularized evidence showing that the examination of witness statements would interfere with the pending labor proceedings. “The Supreme Court concluded that, when an unfair labor practice proceeding was pending, a particularized factual showing was not required and that a generic determination of interference was appropriate.” *Faulk*, 299 Md. at 499, 474 A.2d at 883. The Supreme Court held that “[w]hile the Court of Appeals was correct that the amendment of Exemption 7 was designed to eliminate ‘blanket exemptions’ for Government records simply because they were found in investigatory files compiled for law enforcement purposes, we think it erred in concluding that no generic determinations of likely interference can ever be made.” *Robbins Tire*, 437 U.S. at 236, 96 S.Ct at 2323-24.

The majority distinguishes *Faulk* on two grounds: first, that the Dental Board is not an enumerated law enforcement agency in the statute and, second, that in *Faulk*, “the agency relied upon a completely different enumerated harm: that the disclosure would ‘interfere with valid and proper law enforcement proceedings.’” Maj. op. at 25. The majority summarily distinguishes *Robbins Tire* “for the same reasons we stated above in our discussion of *Faulk*.” Maj. op. at 26. The majority does not elaborate on the significance of these distinctions, perhaps because there is none.

I disagree with the majority’s analysis because I find no basis to conclude that the

General Assembly intended to require a case-by-case determination of “prejudice” with regard to either named or unnamed agencies that compile investigatory records. *Cf. Faulk*, 299 Md. at 508, 474 A.2d at 888 (“There is nothing in the language or the legislative history of § 3(b)(i)(A) to indicate that the General Assembly intended to require a case-by-case showing that disclosure would reveal the State’s case prematurely, result in delay or otherwise create a demonstrable interference with the particular case, and that generic determinations of interference could never be made.”). I find the reasoning of *Faulk* and *Robbins Tire* to be applicable to enumerated and unenumerated agencies alike. The only distinction between those agencies that are enumerated in §10-618(f)(1)(i), and those agencies not enumerated in §10-618(f)(1)(ii), is that the investigatory records of the named agencies are *presumptively* compiled for law enforcement purposes. *See Superintendent v. Henschen*, 279 Md. 468, 475, 369 A.2d 558, 562 (1977).

Once, however, an unenumerated agency has made a successful showing that the requested records were compiled for law enforcement purposes, there is no rational basis to distinguish between named and unnamed agencies. Nor does the statute reflect any intention on the part of the General Assembly to treat the agencies differently. Subparagraphs (i), (ii), and (iii) of § 10-618(f)(1) are all equally subject to the limitations of § 10-618(f)(2). “Although [the Legislature] could easily have required in so many words that the Government in each case show a particularized risk to its individual ‘enforcement proceedings,’ it did not do so . . . .” *Robbins Tire*, 437 U.S. at 234, 98 S.Ct. at 2323. Indeed, as footnote 15 of *Robbins Tire* recognized, Congress failed to enact proposals which would

have required the government to show a particularized risk to an enforcement proceeding in each case. *Id.* at 234 n.15, 98 S.Ct. at 2323 n.15.

Similarly, there is no evidence that the General Assembly intended to permit a generic determination that disclosure of certain documents would “interfere” with a valid and proper law enforcement proceeding under §10-618(f)(2)(i), and yet simultaneously preclude a generic determination under §10-618(f)(2)(vi) and instead require a particularized case-by-case showing that disclosure would “prejudice” an investigation. *See Lewis v. State*, 348 Md. 648, 660-61, 705 A.2d 1128, 1134 (1998) (recognizing the special emphasis placed upon construing simultaneously enacted statutory provisions in a consistent and harmonious fashion). In *Robbins Tire*, the Supreme Court noted that Exemption 7(A), the provision permitting a federal agency to refuse disclosure of investigatory records only to the extent that they would “interfere with enforcement proceedings,” was distinct from the other exemptions for the following reasons:

There is a readily apparent difference between subdivision (A) and subdivisions (B), (C), and (D). The latter subdivisions refer to particular cases— “a person,” “an unwarranted invasion,” “a confidential source”— and thus seem to require a showing that the factors made relevant by the statute are present in each distinct situation. By contrast, since subdivision (A) speaks in the plural voice about “enforcement proceedings,” it appears to contemplate that certain generic determinations might be made.

*Robbins Tire*, 437 U.S. at 223-24, 98 S.Ct at 2318. The same rationale applies to the Maryland Public Information Act. I find no “apparent difference” between interfering with a law enforcement proceeding under subparagraph (i) and prejudicing an investigation under

subparagraph (vi).

I agree with the majority that the Board had the burden of proving that all of the documents requested were investigatory records compiled for law enforcement purposes. This protects against an agency commingling its file material to avoid disclosure of additional documents. *See Robbins Tire*, 437 U.S. at 229-30, 98 S.Ct. at 2321. If the Board satisfies that burden, however, the Board should be permitted to rely upon a generic determination of prejudice, and need not make a case-specific factual showing that disclosure of each document would actually prejudice an investigation. Courts may make a generalized determination that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally ‘prejudice an investigation.’ *See Robbins Tire*, 437 U.S. at 236, 98 S.Ct. at 2324; *see also Wright v. Occupational Safety and Health Admin.*, 822 F.2d 642, 646 (7<sup>th</sup> Cir. 1987); *Barney v. I.R.S.*, 618 F.2d 1268, 1273 (8<sup>th</sup> Cir. 1980).

Judges Rodowsky and Wilner have authorized me to state that they concur with the views expressed herein.