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## **CPLR 3101(a): Court Denies Discovery of Police Records to Avoid Interference with an Ongoing Criminal Investigation**

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package of amendments protecting the borrower-purchaser.<sup>69</sup> The main thrust of this package is contained in the new CPLR 503(f) which specifies that venue in an action arising out of a "consumer credit transaction"<sup>70</sup> must be laid in the county wherein the defendant resides, if he is a New York resident, or where the transaction took place, if within New York.<sup>71</sup> CPLR 305(a) was changed<sup>72</sup> to provide that the summons in such an action must prominently display at its head (1) that it is based on a consumer credit transaction, (2) the county of residence of any New York resident defendant, and (3) the county, if within the state, where the transaction took place. These requirements are designed to aid in implementing the new CPLR 513<sup>73</sup> which directs court clerks to reject a summons in a consumer credit transaction where it appears on its face that it is sought to be filed in an improper county. After a rejection, service is complete ten days after the plaintiff files in the proper county. This new filing must include proof of service of the original summons and proof of service by certified mail of a notice specifying (1) the proper county, (2) the date the summons was filed in the proper county, (3) the date by which the defendant must answer or appear, and (4) where the defendant must file his answer or notice of appearance.

These provisions eliminate the hardship to which a defendant with limited funds was formerly exposed when forced to travel to a remote county either to defend an action or simply to transfer it when the plaintiff had specified an improper county.<sup>74</sup>

#### ARTICLE 31 — DISCLOSURE

*CPLR 3101(a): Court denies discovery of police records to avoid interference with an ongoing criminal investigation.*

With certain qualifications,<sup>75</sup> a party bringing action against the state is entitled to disclosure of all evidence "material and necessary"<sup>76</sup>

<sup>69</sup> L. 1973, ch. 238, at 317, eff. Sept. 1, 1973.

<sup>70</sup> This is defined by the new CPLR 105(f), also added by L. 1973, ch. 238, as any transaction whereby credit is extended to an individual, and the subject of the transaction is to be used primarily for personal, family or household purposes.

<sup>71</sup> If no defendant resides within the state and the transaction did not occur there, normal venue provisions apply. CCA 301(a) has been changed similarly by L. 1973, ch. 238 for transactions taking place in, or involving residents of, New York City.

<sup>72</sup> L. 1973, ch. 238, at 317, eff. Sept. 1, 1973.

<sup>73</sup> *Id.* at 318.

<sup>74</sup> See McLaughlin, *New York Trial Practice*, 170 N.Y.L.J. 9, July 13, 1973, at 1, col. 1.

<sup>75</sup> CPLR 3102(f) provides that the state may not be compelled to answer interrogatories or to make admissions. Whereas disclosure against a private litigant is obtainable on notice, a court order is necessary to compel disclosure by the state.

<sup>76</sup> CPLR 3101(a) requires "full disclosure of all evidence material and necessary in the prosecution or defense of an action . . ."

"as if the state were a private person."<sup>77</sup> When the evidence sought is also the subject of a criminal investigation, however, there is a basic conflict of policy considerations. Although the courts have adopted a liberal policy regarding inspection of governmental records,<sup>78</sup> they have held state information to be privileged and therefore unobtainable when disclosure would betray a confidence or harm the public interest.<sup>79</sup>

In *Nunziata v. Police Department of the City of New York*,<sup>80</sup> the widow of a New York City Police Detective, whom the Department claimed shot himself in an apparent suicide, sought to establish that the death was actually a homicide, thus entitling her to line-of-duty pension benefits. The Supreme Court, New York County, granted her motion for discovery and inspection of the bullet and firearm which killed the detective together with the clothes worn at the time of his death. Discovery was temporarily denied as to a signature card from the Police Property Clerk's office and all memoranda and reports prepared by the police concerning the manner of his death. The court considered that disclosure of these items might hamper an impending investigation by Deputy Attorney General Maurice Nadjari and the police into narcotics stolen from the Property Clerk's office.<sup>81</sup> The denial of the motion was without prejudice to a renewal after completion of the investigation. While acknowledging the continuing trend favoring inspection of state records,<sup>82</sup> the court reasoned that the Police

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<sup>77</sup> CPLR 3102(f). This section was amended in 1967 to allow disclosure against the state in all courts, thus at least partially implementing the original intent of the Advisory Committee on Practice and Procedure to treat the state as any other litigant. See THIRD REP. 390; 3A WK&M ¶ 3102.30. Disclosure against the state has since been generally allowed. See, e.g., *Lakeland Water Dist. v. Onondaga County Water Authority*, 24 N.Y.2d 400, 248 N.E.2d 855, 301 N.Y.S.2d 1 (1969); *State v. DeGroot*, 35 App. Div. 2d 240, 315 N.Y.S.2d 310 (3d Dep't 1970); *Head v. State*, 32 App. Div. 2d 999, 301 N.Y.S.2d 657 (3d Dep't 1969) (mem.); *Diamond v. Allegheny Ludlum Indus., Inc.*, 67 Misc. 2d 854, 324 N.Y.S.2d 658 (Sup. Ct. Albany County 1971).

<sup>78</sup> See *Egan v. Board of Water Supply*, 205 N.Y. 147, 98 N.E. 467 (1912); *Kruger v. County of Nassau*, 53 Misc. 2d 166, 278 N.Y.S.2d 28 (Sup. Ct. Nassau County 1967) (police records); *Scott v. County of Nassau*, 23 Misc. 2d 648, 252 N.Y.S.2d 135 (Sup. Ct. Nassau County 1964) (police records).

<sup>79</sup> CPLR 3101(b) provides that privileged matter shall not be obtainable in disclosure proceedings. See *Wilson v. State*, 36 App. Div. 2d 559, 317 N.Y.S.2d 546 (3d Dep't 1971) (mem.) (stating that the state has a common law privilege to withhold information where disclosure would be against the public interest); *Goergen v. State*, 6 App. Div. 2d 974, 176 N.Y.S.2d 582 (3d Dep't 1958) (mem.) (acknowledging state's right to withhold names of sources of confidential information); *Langert v. Tenney*, 5 App. Div. 2d 586, 173 N.Y.S.2d 665 (1st Dep't 1958), *appeal dismissed*, 5 N.Y.2d 875, 155 N.E.2d 870, 182 N.Y.S.2d 25 (1959) (Commissioner of Investigation for the City of New York held to have privilege justifying refusal to disclose the name of an informant and the content of his communication in a civil defamation action).

<sup>80</sup> 73 Misc. 2d 29, 341 N.Y.S.2d 22 (Sup. Ct. N.Y. County 1973).

<sup>81</sup> The genuineness of the detective's signature on several of the receipts was in question. *Id.* at 32, 341 N.Y.S.2d at 26.

<sup>82</sup> 73 Misc. 2d at 31, 341 N.Y.S.2d at 25, *citing Egan v. Board of Water Supply*, 205

Department's interest in secrecy outweighed the benefits of prompt and full disclosure.

Privileges which allow the state to avoid disclosure ought to be narrowly construed so as to prevent unnecessary prejudice to the private litigant.<sup>83</sup> In *Nunziata*, the court made no specific finding that the information was either privileged matter under CPLR 3101(b) or material prepared for litigation under CPLR 3101(d).<sup>84</sup> Discovery was denied without inquiry into how the release of the information which led the police to conclude that the detective's death was suicide would hamper the investigation of the stolen narcotics. While there is little doubt that upon inquiry a connection could reasonably be drawn, caution must be exercised where one of the investigating bodies is a party to the action in which disclosure is sought.<sup>85</sup> In such cases, the mere recital that the matter is the subject of a confidential investigation should not be sufficient to defeat discovery.<sup>86</sup>

*CPLR 3117(a)(3)(v): Provisions of the CPLR used to approximate proceeding under the Uniform Support of Dependents Law.*

A party entitled to support from an ex-spouse is subject to serious hardship if recovery of periodic support payments cannot be accomplished without travel to a distant jurisdiction. To remedy this problem, the fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands have enacted uniform support acts<sup>87</sup> substantially similar to New York's Uniform Support of Dependents Law.<sup>88</sup> These laws permit a verified petition to be filed in a court in the jurisdiction wherein the petitioner seeking support resides.<sup>89</sup> The petition is then

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N.Y. 147, 98 N.E. 467 (1912); *Kruger v. County of Nassau*, 53 Misc. 2d 166, 278 N.Y.S.2d 28 (Sup. Ct. Nassau County 1967).

<sup>83</sup> See 3A WK&M ¶ 3101.41.

<sup>84</sup> CPLR 3101(d) provides that "material prepared for litigation" is qualifiedly privileged. See *Jansen v. State of New York*, 53 Misc. 2d 1005, 280 N.Y.S.2d 445 (Ct. Cl. 1967) (permitting discovery of photographs and reports made by the Bureau of Criminal Investigation Division of the Department of State Police where these materials did not qualify as material prepared for litigation and no contention was made that disclosure would hamper any prosecution).

<sup>85</sup> Where the government itself is a party, reliance on the [governmental privilege to withhold confidential information] may require a finding against the government on a disputed issue or fact which might have been disproved had the evidence been available.

3A WK&M ¶ 3101.41, citing *People v. Ramistella*, 306 N.Y. 379, 118 N.E.2d 566 (1954); *United States v. Cotton Valley Operators Committee*, 9 F.R.D. 719, 721 (W.D. La. 1949), *aff'd mem.*, 339 U.S. 940 (1950).

<sup>86</sup> See *Scott v. County of Nassau*, 43 Misc. 2d 648, 252 N.Y.S.2d 135 (Sup. Ct. Nassau County 1964).

<sup>87</sup> See 12 J. ZETT, M. EDMONDS, M. BUTTREY & M. KAUFMAN, *NEW YORK CIVIL PRACTICE* at 12-3 (Matthew Bender 1972).

<sup>88</sup> DRL art. 3-A.

<sup>89</sup> See DRL 37(1).