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FILED

JUL 13 2010

KATHRYN A. BROCK
J.S.C.

JOHN PAFF,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION, CIVIL PART
Plaintiff,	:	UNION COUNTY UNN-L-1089-10
	:	DOCKET NO.
v.	:	
	:	
BOROUGH OF GARWOOD,	:	Civil Action
Defendant.	:	
	:	ORDER

This matter being opened to the Court by Richard Gutman, attorney for Plaintiff John Paff, by way of an order to show cause summary action, on notice to Palumbo & Renaud attorneys for Defendant Borough of Garwood, and the Court having

considered the papers submitted by the parties, and having heard oral argument on April 30, 2010 and June 25, 2010, and for good

cause appearing for the reasons set forth in the Letter Opinion which accompanies this Order;

IT IS on THIS 13th day of July 2010 ORDERED as

follows:

1. Within 45 days of service of this order upon it, the Borough of Garwood shall supply John Paff with a copy of the requested DVD of police officer Gennaro J. Mirabella's activities in the Garwood Municipal Clerk's Office on August 19, 2009 *based upon the common law right of access to records;*

2. Plaintiff Paff shall submit any bill of costs or

under the common law right of access to public records
petition for attorney's fees within 20 days of service of this

order; and defense counsel may file & serve papers in opposition
to the application within 10 days of receipt of a copy of the plaintiffs
app 1.2

3. ~~John Paff shall serve a copy of this order upon the~~

~~A filed copy of this Order is being served by the~~
~~Borough of Garwood within 10 days of service of this order.~~
sent on both counsel together with the Letter Opinion

Kathryn A. Brock
Judge Kathryn A. Brock, J.S.C

Opposed X

Unopposed _____

NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

July 13, 2010

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Re: John Paff v. Borough of Garwood
Docket No. UNN-L-1089-10

LETTER OPINION

Dear Counsel:

This is an action brought by the plaintiff John Paff pursuant to the Open Public Records Act, N.J.S.A. 47:1A-1 to -13 (“OPRA”) and the common law right of access to public records to obtain a copy of a DVD from the defendant Borough of Garwood (“the Borough”). The matter proceeded in a summary manner as required by the statute and the facts are not in dispute. Based on the papers filed, the in camera review of the DVD and the oral argument on April 30 and June 25, 2010, the court has entered an order granting the plaintiff’s request for the reasons set forth below.

A. PROCEDURAL HISTORY AND FINDINGS OF FACT.

On September 3, 2009, the Garwood Borough Municipal Court issued two complaints against Garwood police officer Gennaro Mirabella (“Mirabella”) for two disorderly persons offenses.

Complaint 2006-S-2009-000015 charged Mirabella with a violation of N.J.S.A. 2C: 17-3(a)(2), criminal mischief for tampering with the currency-to-coin changers of a laundromat in the Borough on August 18, 2009. The stated probable cause for issuing the complaint was that the defendant was captured by store video surveillance tampering

with the machines. Complaint 2006 --S-2009-000016 charged him with a violation of 2C:18-3(a), unlicensed entry of structures, for trespassing into the locked Garwood Clerk's office by using a master building key while on duty on August 19, 2009 and opening the desk drawers of the Garwood Chief Financial Officer. The stated probable cause for issuing the complaint was that the officer had been captured by video surveillance of the Clerk's office.

On September 23, 2009, the Borough and Mirabella entered into a Settlement Agreement and Release. Mirabella agreed that he would resign "in good standing," and the Borough agreed to dismiss all disciplinary actions pending against him. On October 14, 2009, the complaints issued by the Borough against Mirabella were dismissed. On the Request to Approve Plea Agreement with regard to these complaints is written, "State elected not to prosecute in interest of justice. Stip to PC."

On February 5, 2010, Plaintiff John Paff submitted an OPRA request to the Borough's custodian of records for "any police reports, incident reports or other writings pertaining to incidents involving Gennaro T. Mirabella." On February 9, 2010, the custodian responded by email, attaching various documents which included copies of the complaints, related correspondence from the Union County Prosecutor's Office in August of 2009 determining not to authorize the filing of any indictable complaints against Mirabella, but explaining that a disorderly complaint for trespass and disciplinary charges might be considered with respect to the incident in the Clerk's office, correspondence from Mirabella's attorney regarding representation in the disciplinary charges filed against him, correspondence from the attorney for Jumbo Wash Laundry, a memo from Captain DeStefano to Chief Legg in September of 2009 regarding a meeting with Mirabella's attorney and the attorney for Jumbo Wash about a

proposed disposition of the criminal complaints, Mirabella's letter of resignation and the resolution accepting his resignation, and the Settlement Agreement and Release.

On February 9, 2010, John Paff and Tina Renna submitted an OPRA request and a request under the common law right of access to the Borough's custodian of records requesting copies of the video referred to in each of the complaints.

On February 12, 2010, the custodian of records granted Paff access to the videotape of the incident in the laundromat, but denied access to the videotape of the incident in the Clerk's office on the grounds that:

The video surveillance mentioned in complaint S-2009-000016 is a criminal investigatory record as provided in N.J.S.A. 47:1A:1.1 for which disclosure may jeopardize security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software or both and therefore is denied.

On February 15, 2010, Mr. Paff wrote to the custodian of records challenging the legality of the denial, and asking with respect to the security issues relied upon, whether the video camera in the Clerk's office was permanent or installed in response to allegations of misconduct, and if the latter, what misconduct was alleged. Paff also asked when the camera had been installed and if it was still up.

On February 17, 2010, the custodian acknowledged receipt of Paff's request, and replied that the response she had provided on February 12, 2010 to his OPRA request was her complete response.

On February 25, 2010, plaintiff's attorney wrote to the custodian of records arguing that the OPRA exemption for "criminal investigatory records" should not apply because Mirabella was prosecuted for disorderly persons offenses, not crimes. Counsel further argued that because the description of the video surveillance in the Clerk's office had already been disclosed in the

complaint, access should not be denied under the OPRA exemption for "security measures and surveillance techniques, which, if disclosed, would create a risk to the safety of persons, property, electronic data or software." Counsel also asked for a response from the custodian to Paff's request for access to the DVD based on the common law right of access to public records.

On March 1, 2010, the custodian sent the following response to counsel:

It is my understanding that a criminal investigation is a criminal investigation regardless of what specific offense may ultimately be charged and regardless of whether any offense at all is ever charged. Additionally, disorderly persons and petty disorderly persons offenses are contained in the Code of Criminal Justice, which would tend to support the proposition that records which ultimately result in disorderly persons charges are criminal investigatory records. With respect to "security measures and surveillance techniques," a further discussion of this issue would be inimical to the purpose of the exemption. With respect to the common law, whatever interest Mr. Paff may have in the requested records does not outweigh the need for confidentiality.

On March 5, 2010, the Hon. Joseph P. Perfilio, J.S.C. entered an Order for Expungement pursuant to N.J.S.A. 2C:52-1 et seq. granting Mirabella's Verified Petition to expunge the criminal records related to the two complaints issued against him by the Borough of Garwood and transferred to the Westfield Municipal Court. The Order directs the Clerk of the Westfield Municipal Court, the Union County Criminal Clerk, and any law enforcement agency which had been noticed of the pendency of the action, which included the Police Department of the Borough of Garwood, to remove all records in its possession related to the two charges or to the detention or conviction of the petitioner, including but not limited to photographs, fingerprints, rap sheets, index or docket entries, reports (including lab reports) and statements, pursuant to N.J.S.A. 2C:52-15 and place such information in the control of a person designated to retain control over expunged records.

The Order further directs that, "The expunged records or the information therein shall not be released for any reason except as authorized by law," and that, "Except where otherwise authorized by law, in response to requests for information or records, the court office or the law enforcement agency shall reply with respect to the arrest which is the subject of this Order, that there is no record."

On March 16, 2010, John Paff filed a verified complaint and request for an order to show cause seeking a declaration that the defendant Borough has violated OPRA and the common law right of access by refusing to provide him with a copy of the requested videotape, an order granting his access to it, and an award of attorney's fees and costs. The Order to Show Cause was signed on March 16, 2010 and made returnable before this Court on April 16, 2010 which was carried by consent to April 30, 2010.

On April 1, 2010 the Borough filed a brief in opposition to the relief requested and the Certification of Borough Police Chief William Legg explaining the reasons why he was opposed to the plaintiff's request and attaching a copy of the Order of Expungement of March 5, 2010. Although this Certification did not contain the language required by R. 1:4-4(b), Chief Legg subsequently amended his Certification to contain the required language. In addition to the reasons for denying access relied upon by the custodian of records in February of 2010, Chief Legg relied upon the fact that he had been served on March 15, 2010 with a copy of the attached Order for Expungement of the complaints issued against Mirabella dated March 5, 2010, and stated his understanding of the statute to be that he is not permitted to release any records pertaining to this case unless an order is issued under N.J.S.A. 2C:52-9.

In the course of the oral argument on April 30, 2010, this Court accepted the invitation of Borough counsel to view the DVD in camera in the presence of both counsel, plaintiff's counsel

having agreed that he would not disclose the details of what he observed pending the court's ruling.

This Court then ruled for the reasons summarized below, and more fully set forth on the record, that the DVD is a "criminal investigative record" as defined in N.J.S.A. 47:1A-1.1 and therefore exempt from access, subject to receipt of the amended certification from Chief Legg. However, after viewing the DVD this Court found that the other statutory exemptions relied upon by the Borough for security reasons do not apply to this DVD under the circumstances of this case.

In a Case Management Order entered on April 30, 2010, this Court reserved decision as to whether the Borough violated the common law right of access to public records by refusing to provide a copy of the DVD requested by the plaintiff pending additional submissions and argument. The court also directed that notice of the plaintiff's application should be given to Mirabella and his attorney in the related criminal matter.

The matter was rescheduled for final argument on June 25, 2010, and during the interim, this Court asked counsel to take note of the article in the *New Jersey Law Journal* of May 3, 2010, "Court to Decide if Report of Conviction That's Been Expunged is Defamation," with respect to the decision of the New Jersey Supreme Court to grant the petition for certification in G.D. v. Bernard Kenny and The Hudson County Democratic Organization, Inc., 411 N.J. Super. 176 (App. Div. 2009), and to review that decision as well as the others mentioned in the article. Counsel did make additional submissions which have been read and considered.

At oral argument on June 25, 2010, the court noted that plaintiff's counsel had contacted Mr. Mirabella's attorney in the criminal matter during the interim period, and been informed that the attorney no longer represented Mr. Mirabella, did not have his new address, and referred plaintiff's counsel to his previous employer, the Borough of Garwood. Defense counsel had then provided the new address for Mr. Mirabella. Plaintiff's counsel submitted a certification that on May 5, 2010, he served copies of the Verified Complaint, Order to Show Cause, supporting and opposing papers, and this Court's Case Management Order of April 30, 2010 on Mr. Mirabella together with a letter advising him to contact the court if he wished to participate in the lawsuit. Service was made on May 6, 2010. Mr. Mirabella did not contact the court.

At the end of oral argument on June 25, 2010, this Court reserved decision on the plaintiff's request for access to the DVD under the common law right of access, and the effect of the Order for Expungement, if any, on the plaintiff's request for access to a copy of the DVD.

B. LEGAL DISCUSSION.

1. The Plaintiff's Request for Access under OPRA.

On April 30, 2010, after hearing oral argument and considering the papers filed, this Court found that the DVD, which was obtained during a surveillance of the Clerk's office initiated by Chief Legg based upon information he received, is a "criminal investigatory record" as defined in N.J.S.A. 47:1A-1.1 and therefore exempt from access under OPRA. Although the reasons for the ruling are more fully set forth on the record, this Court accepted the Borough's argument that while the offenses with which Mirabella was charged were disorderly persons offenses, said offenses are included in the Code of

Criminal Justice. Further, when the criminal investigation was undertaken by Chief Legg based upon his duty to investigate information provided to him, it was not known whether the investigation would lead to a person being charged with an indictable offense or a lesser offense, or perhaps no offense at all, and therefore, a record created as part of a criminal investigation does not lose its exempt status under the OPRA statute, if at the end of the investigation, no one is charged with a crime.

Although plaintiff's counsel would have liked to know more about the information available to Chief Legg when he initiated the surveillance, there was no evidence presented that would have undercut the Chief's credibility that he initiated the surveillance to detect possible criminal activities in an area of the municipal building which is not open to the public based on information received, and the representation of Borough counsel that the camera was subsequently removed from the office.

In the case relied upon by plaintiff's counsel, Glen Blue, for Labor Management Concepts, Inc. v. Wall Township Police Department Custodian of Record, GRC Complaint No. 2002-47 (August 14, 2003), the Government Records Council was careful to point out that since the police department records sought were solely related to Title 39 Motor Vehicle violations neither punishable as crimes nor related to a pending criminal investigation, they were not "criminal investigatory records" exempt under OPRA. In determining that the records sought should be provided to the requestor, subject to OPRA allowed redactions, the Council specifically made the following distinction which distinguished its holding from the facts of this case:

It must be noted that in the few cases where the Legislature has stated that a Title 39 violation is punishable as a crime, records related to such charge would fall within the criminal investigatory records exemption. A similar result would apply where the Title 39

charge is connected with a criminal investigation or prosecution, such as a fatal motor vehicle accident. However, neither of these situations is presented here.” (Slip op. at 3).

Therefore, the custodian of records of the Borough has met the burden of proving that the denial of access is authorized by law. N.J.S.A. 47:1A-6.

With respect to the Borough’s alternative argument that the exemptions included in N.J.S.A. 47:1A-1.1 for “emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein,” and “security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software,” the court accepted the offer of Borough counsel to review the DVD in camera with counsel for both parties, plaintiff’s counsel having agreed that he would not disclose the details of what he observed pending the court’s ruling.

In his certification, Chief Legg stated that, “One viewing the DVD would easily see where and how video surveillance was established and could, thereby defeat same. Additionally, the Borough’s safe, in which important records and other materials are kept, is depicted in the video. This is something which, if disclosed, would also jeopardize the security of the building and create a risk of safety.”

The DVD shows Officer Mirabella walking into the office, turning on a light and walking around, and looking at what appear to be papers. The office contains typical office furniture and file cabinets. This Court was unable to locate any safe until Borough counsel said where it was, which this Court finds, was not in plain view on the DVD. In addition, there is no access to this office from outside the building. Anyone approaching the office from the public portion of the building would not know where to go inside the office to access the safe. While a viewer would

learn where the camera was placed when the surveillance was occurring, it is over now, the camera is down. The fact that at some future time, the police department might want to put up another camera in that office in the same spot to conduct a future surveillance is just too speculative to defeat the overarching public policy in favor of a citizen's right of access under OPRA. See, Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373, 382-383 (App. Div. 2003).

In that case, the Appellate Division found that the concern of defendant Hunterdon County Prosecutor's Office that media coverage might make it more difficult to select a fair and impartial jury was not a basis to deny the newspaper's request for access to the tape of the emergency 911 telephone call made in connection with the death, nor was its fear of potential jury confusion. Having requested but not received specific evidence in support of defendant's assertion, the court concluded that:

Under OPRA, a public agency seeking to restrict the public's right of access to government records must produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality. Absent such a showing, a citizen's right of access is unfettered. Moreover, in assessing the sufficiency of the proofs submitted by the public agency in support of its claim for confidentiality, a court must be guided by the overarching public policy in favor of a citizen's right of access. N.J.S.A. 47:1A-1. Here, defendant's fears of potential jury confusion are purely speculative and fail to meet the statutory burden of proof. Ibid.

In this case, for similar reasons, this Court found after viewing this DVD in camera, that the Borough's fear that the location of the safe would be revealed was unjustified, and that the other concerns about a potential future surveillance were insufficient to deny access based on the two security exemptions in N.J.S.A. 47:1A-1.1 relied upon by the Borough.

Therefore, this Court finds that the only exemption which applies in this case under OPRA is that the DVD is a "criminal investigative record."

2. The Police Chief's Reliance on the Provisions of the Order for Expungement to Deny the Plaintiff's Request for Access to the DVD.

In order to give Mr. Mirabella the opportunity to raise any concerns he may have had about the release of this DVD, this Court directed that he be notified of the plaintiff's request, that he be given copies of the papers filed in support of and in opposition to the request, including Chief Legg's reliance upon the provisions of the Order for Expungement of March 5, 2010 to deny the plaintiff's request for access to the DVD, and an opportunity to be heard on the second return date. Mr. Mirabella has now been served, and he has not expressed any interest in being heard.

The questions raised are whether the DVD is covered by the provisions of the Order for Expungement, whether it should not be covered by the Order because the request for access to it was made prior to the entry of the Order, and if the DVD is covered by the Order, whether the application for access to it must be made pursuant to N.J.S.A. 2C:52-19, which permits inspection of records or release of information which are the subject of an order of expungement upon motion for good cause shown and compelling need based on specific facts.

With respect to whether this DVD is covered by the Order, the statute defines expungement and expunged records as follows:

N.J.S.A. 2C:52-1. Definition of Expungement.

(a) Except as otherwise provided in this chapter, expungement shall mean the extraction and isolation of all records on file within any court, detention or correctional facility, law enforcement or criminal justice agency concerning a person's detection apprehension, arrest, detention trial or disposition of an offense within the criminal justice system.

(b) Expunged records shall include complaints, warrants, arrests, commitments, processing records, fingerprints, photographs, index cards, "rap sheets," and judicial docket records.

Further, the statute makes the following provision with respect to how the records covered by the Order shall be removed and controlled, which is relied upon by Chief

Legg in his Certification:

N.J.S.A. 2C:52-15. Records to be Removed; Control.

If an order of expungement of records of arrest or conviction under this chapter is granted by the court, all the records specified in said order shall be removed from the files of the agencies which have been noticed of the pendency of petitioner's motion and which are, by the provisions of this chapter, entitled to notice, and shall be placed in the control of a person who has been designated by the head of each such agency which, at the time of the hearing, possesses such records. That designated person shall, except as otherwise provided in this chapter, insure that such records or the information contained therein are not released for any reason and are not utilized or referred to for any purpose. In response to requests for information or records of the person who was arrested or convicted, all noticed officers, departments and agencies shall reply, with respect to the arrest, conviction or related proceedings which are the subject of the order, that there is no record information.

This Court notes that only those types of records which are described in the statute may be expunged, that "photographs" are the only type of record in the list which could conceivably include this DVD, and that the statute does not specify whether it is referring to photographs taken in connection with an arrest as distinguished from photographs taken as part of the evidence gathered, in this case, to detect and prove the offense.

At oral argument, this Court raised the issue of whether generally speaking, evidence related to an arrest or conviction in the possession of the police department is

kept apart from the type of records described in the expungement statute which the custodian must remove from the agency's files and keep separate based upon an order for expungement, and specifically whether this DVD has been kept in an area where the police department stores its evidence, rather than in the file with the records which the custodian set aside under the Order for Expungement in this case. Defense counsel acknowledged that the DVD was not stored with the records removed by the custodian in this case, but rather with other evidence stored by the police department. However, defense counsel argued that evidence which is in fact a visual record, such as a photograph or DVD, should still be covered by the expungement statute, pointing out that releasing the DVD to the plaintiff to be potentially posted on the internet will have a much greater impact than the release of the complaint or the other records of the arrest which are specifically covered by the expungement statute.

The provisions of the expungement statute are to be narrowly construed. In re D.A.C., 337 N.J. Super. 493, 498 (App. Div. 2001) (other citations omitted).

The fact that in this case, the DVD, which is the evidence gathered by the Police Department upon which it relied as probable cause for the complaint against Mirabella, has not been removed from the files of the Police Department and placed in the control of the custodian of records of the Borough pursuant to the Order for Expungement, and the fact that N.J.S.A. 2C:52-1(b) does not specifically include within the definition of expungement any types of visual or auditory records gathered by law enforcement which provided probable cause for the complaint, strongly supports the conclusion that this DVD gathered as evidence is distinguishable from the "photographs" included in N.J.S.A. 2C:52-1(b) along with fingerprints, and other processing records, which are

related to the arrest. Therefore, this Court finds that the DVD is not the type of “photograph” included in N.J.S.A. 2C:52-1(b), and is not covered by the Order for Expungement of March 5, 2010.

In reaching that conclusion, this Court is mindful of the argument raised by defense counsel that this DVD, if released to plaintiff and then posted on the internet, will have a much greater impact on the public than reading the contents of the complaint, which was released shortly after plaintiff made the OPRA request. However, although the remedy of expungement is intended to provide relief to the one-time offender who has led a life of rectitude and disassociated himself with unlawful activity, the expunged records are not destroyed, they are removed from the files of the agencies notified of the application, and placed in the control of the person designated by the head of each agency, and the records can be used in certain contexts listed in the statute. See, G.D. v. Bernard Kenny and the Hudson County Democratic Organization, Inc., supra, 411 N.J. Super. at 188-189, citing various sections of the expungement statute.

In that case, the Appellate Division found that the plaintiff’s successful expungement of his record did not make the defendants’ statements about that record “false,” and that the fairly accurate information published in a flyer by the defendants did not constitute defamation. The court went on to consider the plaintiff’s claim of invasion of privacy and dismissed that claim for the following reasons:

The fact of plaintiff’s conviction is certainly not private as all criminal arrests and convictions are matters of public record. Furthermore, this claim cannot survive even if this court should rule that the expungement renders the conviction as though it had never occurred. This is because the disclosure of the conviction would not be the disclosure of a private fact as it would be considered to have never occurred and thus cannot be

a private fact. Id. at 196.

See also, Doe v. Poritz, 142 N.J. 1, 81 (1995) in which the New Jersey Supreme Court held that, "Matters of public record, such as criminal background, may be disclosed without impinging on privacy interests," citing Nilson v. Layton City, 45 F. 3d 369, 372 (10th Cir. 1995), in which the court concluded that a sergeant's post-expungement disclosure, in an interview with a television news reporter of the plaintiff's sexual abuse charges and conviction did not violate the right of privacy. Thus this Court's determination with respect to the plaintiff's request for access to the DVD should not be affected by any concerns about impinging on the privacy interests of Mr. Gennaro, whether or not the DVD is covered by the Order for Expungement.

Because this Court has concluded that the DVD is not included in the Order for Expungement, it is not necessary to rule on plaintiff's argument that because he requested the DVD before the Order was entered, he should be allowed to obtain it now despite the subsequent entry of the Order for Expungement. It is important to note however, that the plaintiff did ask for and received a copy of the complaint in this matter under OPRA before the charges were dismissed and the Order for Expungement was entered, and that Order does not affect the use of the copy of the complaint that the plaintiff received. However, if a person asked for a copy of that complaint now, a court would have to determine whether an OPRA request for a copy of the complaint which is included in the Order for Expungement should be granted.

In summary, this Court finds that since the DVD is not included in the Order for Expungement, that Order provides no basis to deny the plaintiff's request for access to a copy of the DVD.

3. The Plaintiff's Argument Based on the Common Law Right of Access to Records.

Counsel for the plaintiff argues that even if access to the DVD is denied under OPRA, this Court should apply the standards governing the common law right of access to public records, conduct the required balancing test, and conclude that access should be permitted since the public interest in the information is greater than the Borough's interest in non-disclosure.

OPRA expressly provides no limit to the common law right of access to a government record, including criminal investigatory records of a law enforcement agency. N.J.S.A. 47:1A-8; O'Shea v. Twp. of West Milford, 410 N.J. Super. 371, 386 (App. Div. 2009). As the appellate court pointed out, "The requestor does not have to meet both OPRA and the common law right of access. Documents that are not available under one approach may be accessed by another." Id. at 387. In further explaining the distinction between the two types of access to public records, the court stated:

Historically, the common law makes a much broader class of documents available than (OPRA), but on a qualified basis. Under the common law, public records available for inspection include any records made by public officers in the exercise of their functions. As such, they include almost every document recorded, generated, or produced by public officials, whether or not required by law to be made, maintained, or kept on file. (internal citations omitted). Id. at 386-387.

However, in order to gain access to this broader class of records under common law, the requestor must meet a two-pronged test: that person must establish an interest in the subject matter of the material, and the requestor's right of access must be balanced against the State's interest in preventing disclosure. Ibid., citing Mason v. City of Hoboken, 196 N.J. 51, 67-68 (2008) (quoting Keddie v. Rogers, 148 N.J. 36, 50 (1997)).

In Loigman v. Kimmelman, 102 N.J. 98, 113 (1986), the New Jersey Supreme Court established that a court engaging in the required balancing test may consider:

- 1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government;
- 2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed;
- 3) the extent to which agency self-evaluation, program improvement, or other decisionmaking will be chilled by disclosure;
- 4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers;
- 5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and
- 6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials.

In the O'Shea case, the appellate court rejected the defendant's arguments that the trial court should have considered the test for access to the reports of Use of Force Reports ("UFRs") of the Township's police department under the common law, holding that because the trial court had found that the plaintiff was entitled to access to the UFRs under OPRA, it should not reach the issue regarding the common law right. Id. at 387.

In this case, this Court has determined that the DVD is a "criminal investigative record" and is thus exempt from the right of access under OPRA. Nevertheless, the public might be able to obtain documents under common law tests that it could not obtain through OPRA. See, Bergen County Improvement Authority v. North Jersey Media Group, Inc., 370 N.J. Super. 504, 510 (App. Div. 2004), certif. denied, 182 N.J.143 (2004).

The parties do not dispute that the DVD qualifies as a public record under the common law right of access. The definition of “public record” in the context of the common law right to inspect public records is broader than under OPRA. Under the common law a public record is:

(O)ne required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office (internal citations omitted). Shuttleworth v. City of Camden, 258 N.J. Super. 573, 582 (App. Div. 1992), certif. denied, 133 N.J. 429 (1992).

In the Shuttleworth case, the City of Camden conceded that internal police records and reports were public records under the common law, but they contended that the plaintiffs, a reporter and a newspaper, lacked sufficient interest to obtain access when the need for confidentiality was considered. The appellate court flatly rejected that argument pointing out that the press is acting on behalf of a citizen and a personal interest need not be proven in order to satisfy the common law standing requirement (internal citations omitted). Id. at 583. Rather, the real issue in Shuttleworth was whether the public’s interest in the disclosure of police files related to the shooting of a prisoner while in custody, including autopsy photos, was outweighed by the government’s need for confidentiality. Id. at 584.

In this case, this Court has found that the DVD is a “criminal investigative record” as defined in N.J.S.A. 47:1A-1.1, because it was obtained during a surveillance of the Clerk’s office initiated by Chief Legg based upon information he received. The DVD also qualifies as a public record under the common law right of access. See, e.g., Higgins v. Township of Hopewell, Township of Hopewell Police Department and Mercer County

Prosecutor, Docket No. A-5394-05, May 4, 2007, a case in which the plaintiff sought a security camera videotape which became part of a police investigation of an alleged theft, which was not released until after the prosecutor's office had completed its investigation. The Appellate Division found no basis to disturb the finding of the trial judge prior to the completion of the investigation, that the videotape was subject to the exception for a "criminal investigatory record" under OPRA, and that under the common law, the document was properly withheld because of the ongoing criminal investigation.

The common law interest of the requestor can be either a personal interest or a public interest. Rosenberg v. State Department of Law and Public Safety, 396 N.J. Super. 565, 578 (App. Div. 2007). Our courts have relied upon the common law to grant public access to records of possible misconduct by police officers. See, e.g., Asbury Park Press v. Lakewood Township Police Department, 354 N.J. Super. 146 (Law Div. 2002) (finding that disclosure of tape records of a 911 call was warranted under the common law right of access), and Asbury Park Press, Inc. v. Borough of Seaside Heights, 246 N.J. Super. 62 (Law Div. 1990) (finding that newspaper had a common law right of access to police reports concerning alleged beating of citizen by law enforcement officers).

As Judge Serpentelli wrote in the latter case:

Public officials whether elected or appointed are fiduciaries of the public weal and are under an obligation to serve with the highest fidelity. They need to be free from corrupting influences and the public must be able to judge their work. In short, a public office is a public trust and it is only through knowledge that the public can know whether its trust has been properly served. (internal citations omitted). Id. at 72.

In this case, the complaint against Officer Mirabella involves his actions while on duty in the office of the Borough Clerk. The complaint for trespassing, while a disorderly persons offense, clearly charges the officer with misconduct, and the related disciplinary charges were dismissed as the result of an Agreement entered into between Officer Mirabella and the Borough. The reason given for the dismissal of the disorderly persons complaint was because "the State elected not to prosecute in the interest of justice."

Applying the first prong of the test for access to a public record under the common law, this Court finds that although the plaintiff does not have a specific personal interest in the DVD, he is asserting his right as a member of the public for information about police misconduct by Officer Mirabella and how it was handled by the Borough.

In this case, the complaint filed against Officer Mirabella states that the probable cause for the disorderly persons complaint charging him with trespassing into the locked Garwood Clerk's office while on duty and opening the desk drawers of the Garwood Chief Financial Officer was the DVD to which the plaintiff seeks access. The Settlement Agreement and Release entered into between Officer Mirabella and the Borough on September 23, 2009, about a month after the complaint was filed, provides that Mirabella would resign in "good standing" and that the Borough would dismiss all disciplinary charges pending against him. Officer Mirabella did resign and the complaints were dismissed. The Request to Approve Plea Agreement states, "State elected not to prosecute in interest of justice. Stip to PC."

Plaintiff's counsel has submitted proof in the form of contemporaneous news articles in *The Star Ledger* daily newspaper, *the Westfield Leader* weekly newspaper and

various blogs on the internet that supports the conclusion that the complaints filed against Officer Mirabella, his Agreement with the Borough, the dismissal of the complaints and Officer Mirabella's application for expungement of the complaints were the subject of public interest, particularly because during the relevant time period, Officer Mirabella's brother was a Union County Freeholder.

This Court finds that there was public concern about the basis for the complaint issued against Officer Mirabella for trespassing in the Clerk's Office, and the reasons given for why the charges were dismissed. If the plaintiff were granted access to the DVD, which this Court has seen in camera, he and other interested members of the public could see for themselves what formed the basis for the complaint which was subsequently dismissed. The DVD is in fact the best evidence of what occurred, which is why the complaint specifically refers to the DVD as the basis for probable cause to file the complaint. Without the opportunity to view the DVD, the public can only speculate about what it shows.

There is an important purpose to be served by providing transparency about the details of the offense which caused the Borough to file the complaint against the officer in the first place, and the decisions made subsequently about how to resolve that complaint. Therefore, this Court finds that the plaintiff has established a public interest in the subject matter of the material.

With respect to the second prong of the test, the balancing of the requestor's right of access against the State's interest in preventing disclosure, this Court turns to a consideration of the Loigman factors. Because the DVD was made pursuant to an investigatory surveillance set up by the Chief of Police, there are no citizens who

provided information in reliance that their identities would not be disclosed or who would be discouraged from providing information to the government. This Court has not been provided with any information that this DVD is part of any self-evaluation, program improvement, or other decisionmaking which would be chilled by disclosure. Therefore, the first three Loigman factors all weigh in favor of disclosure.

The DVD provides factual data as opposed to evaluative reports of policymakers which weighs in favor of disclosure under the fourth Loigman factor.

With respect to whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency, in this case, Officer Mirabella agreed to resign "in good standing," and the Borough agreed to dismiss the disciplinary charges pending against him. In addition, the complaint for which the DVD provides the probable cause was dismissed based on the State's representation that such a dismissal would be in the interest of justice even though probable cause was stipulated.

In this case, this Court finds that this Loigman factor weighs in favor of disclosure, so that that members of the public can see for themselves the actions of the officer which were captured on the videotape, and form their own opinion about how the Borough handled the officer's conduct, from the filing of the complaint in the first instance to the entry into an Agreement to accept the officer's resignation and the request that the complaint be dismissed.

With respect to the sixth Loigman factor, whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials, in this case, the investigation has been completed, and the

complaint which was based upon the actions of the officer depicted in the DVD has been dismissed. The need for confidentiality is obviously greater in pending matters than in closed cases. Rosenberg v. DCJ, *supra*, 396 N.J. Super. at 579, citing Keddie v. Rogers, 148 N.J. 36, 54(1997).

Counsel for the Borough asks this Court to place on defendant's side of the scale the Borough's interest in keeping criminal investigatory records confidential, and the security grounds expressed by the Chief of Police. This Court has concluded that the DVD is exempt under OPRA as a criminal investigatory record, but no specific reason has been offered as part of the weighing process under the common law right of access as to why this particular criminal investigative record should not be disclosed now that the investigation has been completed and the complaint has been dismissed.

This Court has already cited the important interest that the public has to see what the officer actually did that formed the basis for the complaint that resulted in an agreement that he should resign. Absent a specific reason offered by the defendant to keep this DVD confidential at this point, this Court finds that the public's interest in disclosure outweighs the Borough's interest in confidentiality of the contents of the DVD now that the investigation and the judicial process have been completed.

With respect to the security grounds raised by the defendant, this Court found, after viewing the DVD in camera, that the OPRA exemption for "emergency or security information or procedures for any building or facilities which, if disclosed, would jeopardize security of the building or facility or persons therein," and "security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data, or software," did not apply because the DVD does not

show the safe in plain view in the Clerk's office, there is no access to this office from the outside of the building, the surveillance camera that was placed in the office for purposes of this investigation has been removed, and the possibility of a future need to place a surveillance camera in that office to conduct another surveillance is too speculative to defeat the overarching public policy in favor of a citizen's right of access.

All of the arguments raised by the defendant must again be considered as part of the weighing process under the common law right of access, but no additional arguments have been specifically raised in support of the Borough's argument in this context as distinguished from the arguments made in support of a security exemption under OPRA. This Court finds that the public interest in viewing the actions of the police officer which caused the Borough to issue a complaint against him for trespassing in that office, in the context of how the Borough ultimately dealt with his conduct substantially outweighs the concerns raised by the Borough about the effect of the disclosure on the security of the Clerk's office.

For these reasons, this Court finds that although the DVD is exempt as a criminal investigative record under OPRA, as a result of the weighing process required by the common law right of access, the plaintiff is entitled to access to a copy of the DVD.

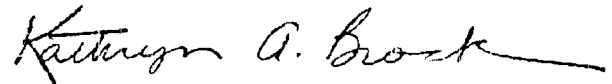
The proposed form of Order presented by counsel for the plaintiff provides that the Borough shall supply Mr. Paff with a copy of the DVD within 45 days of service of the order, which would permit the Borough to file a notice of appeal if they wish to do so, and this Court will enter the Order under those terms.

The proposed form of Order also provides for an application for attorneys fees and costs. Since access to the DVD under OPRA was denied, the application may not be

made under that statute. However, plaintiff's counsel may submit an application for counsel fees and costs under the common law right of access to public records within 20 days of service of this Order. See, Mason v. City of Hoboken, supra, 196 N.J. at 79. Defense counsel may file and serve any papers in opposition to the application within 10 days of receipt of a copy of the plaintiff's application, and the court will set a time for oral argument on the application.

A filed copy of the Order is enclosed.

Yours very truly,



KATHRYN A. BROCK, J.S.C.

Encl.