

NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

Terence Jones,

Plaintiff,

v.

SUPERIOR COURT OF NEW JERSEY
GLOUCESTER COUNTY
LAW DIVISION
DOCKET NO. GLO-L- 1360-11

Paulsboro Police Department, and

Christine M. Dudlick, in her official capacity

as Records Custodian of the Paulsboro

Police Department,

Defendants.

OPINION

Decided: January 12, 2012

Walter M. Luers, Attorney for Plaintiff (Walter M. Luers, LLC, attorneys)

Todd J. Gelfand, Attorney for Defendants (Barker, Scott, Gelfand, & James, attorneys)

CURIO, A.J.S.C.

This is an action by Plaintiff Terence Jones under the Open Public Records Act, N.J.S.A. 47:1A-1, et seq. (hereinafter OPRA) and, in the alternative, under the common law right of access to documents. Plaintiff seeks disclosure of (1) a surveillance video taken outside the Paulsboro Police Department on May 5, 2011 and (2) unredacted Use of Force reports prepared by the Paulsboro Police Department from January 1, 2009 through May 24, 2011.

Plaintiff contends that the video contains "potentially exculpatory evidence and evidence that may be relevant in a potential civil matter" stemming from an alleged altercation that occurred outside of the Paulsboro Police Department between officers and two private citizens.

On May 24, 2011, Plaintiff requested copies of Use of Force reports prepared by the Paulsboro Police Department from January 1, 2009 through May 24, 2011. On June 2, 2011, the Use of Force reports were sent to Plaintiff but with redactions of the names and ages of individuals who had been subjected to force. Upon inquiry of the records custodian, Plaintiff was informed via email on June 21, 2011 that the redactions were made "upon the advisement of our Borough solicitor."

On June 14, 2011, Plaintiff requested a DVD or VHS copy of surveillance video taken outside the Paulsboro Police Department on May 5, 2011 which Plaintiff contends contains information relating to two arrests. Plaintiff specifically requested, "all video footage that relate (sic) to the arrest of Shavon and Artavius Mears, outside of the Paulsboro Police Department." On June 21, 2011, Plaintiff's request for the video was denied and the records custodian informed Plaintiff that the video was considered part of a criminal investigation.

Plaintiff asserts he is seeking the surveillance video and Use of Force reports because he was asked to do so by Shavon and Artavius Mears who claim to have been in an altercation on May 5, 2011 with members of the Paulsboro Police Department.

On or after May 5, 2011, Shavon Mears was arrested and charged with disorderly conduct and resisting arrest and Artavius Mears was arrested and charged with disorderly conduct. On July 12, 2011, Shavon and Artavius Mears filed criminal complaints against members of the Paulsboro Police Department for simple assault and harassment and, according to Plaintiff, are contemplating filing civil complaints. Plaintiff maintains the video he is seeking

is necessary for both the prosecution of the criminal complaints, which have already been filed, and for any potential civil action which may be filed.

Defendants filed a Motion to Dismiss claiming Plaintiff is not entitled to the surveillance video or the unredacted Use of Force reports under either OPRA or, alternatively, the common law right of access. Defendants also argue that Plaintiff has engaged in the unauthorized practice of law and/or detective work because he has no personal interest in the information which he has requested and is illegally acting on behalf of others. The Court has received no communication from Artavius and Shavon Mears joining in Plaintiff's request or taking a position in the matter.

Plaintiff has cross-moved for summary judgment seeking an Order directing the release of the requested unredacted Use of Force reports, to include names and ages, and the surveillance video of May 5, 2011.

Use of Force Reports

The Use of Force reports are public records subject to disclosure under OPRA. On June 2, 2011, Defendants emailed copies of the requested Use of Force reports with names and ages of the individuals subjected to force having been redacted.¹

The redaction of names and ages made by Defendants is inappropriate. OPRA allows for the release of such information to a records requestor absent a specific basis for keeping the information confidential. OPRA does provide for certain information to be kept confidential including "that portion of any document which discloses the social security number, credit card number, unlisted telephone number or driver license number..." N.J.S.A. 47:1A-1. Such

¹ At oral argument, there was a suggestion by Defendants' counsel that the addresses of those against whom force was used was provided to the requestor in the redacted reports. Counsel has since confirmed that no such addresses of the individuals were provided, only the address at which the use of force occurred. The only known redactions to the Use of Force reports were names and ages of those against whom force was used.

redactions are authorized and would provide a specific basis for the Custodian to withhold such information but that is not the case here. In this case, names and ages were redacted and no specific basis was advanced by the Custodian for doing so: OPRA does mandate that the public agency is obligated to protect certain personal information including protecting such information "when disclosure thereof would violate the citizen's reasonable expectation of privacy..."

N.J.S.A. 47:1A-1. Again, that is not the case here. There is no reasonable expectation of privacy attached to reports of this nature.

The court in O'Shea v. Twp of West Milford, 410 N.J. Super. 371 (App. Div. 2009) dealt with a request for Use of Force reports and made clear that such reports do not qualify as criminal investigatory records, are not internal affairs documents, and that the Attorney General's Guidelines concerning confidentiality of such records is not applicable to Use of Force reports.

As to the redactions of the names and ages on the Use of Force reports, the Custodian has failed to meet her burden of proving that the denial of access to the information is authorized by law in accordance with N.J.S.A. 47:1A-6. There is no mandate in OPRA that such information be kept confidential. Accordingly, Plaintiff's request for the unredacted Use of Force reports, to include names and ages, is granted.

Surveillance Video of May 5, 2011

Mr. Jones, on June 14, 2011, requested a DVD or VHS of "all video footage (May 05, 2011) that relate (sic) to the arrest of Shavon and Artavius Mears, outside of the Paulsboro Police Department." This request was made pursuant to OPRA, or, alternatively the common law right of access. The video was created by a surveillance camera focused on the exterior of the

Paulsboro Police Department. On June 21, 2011, Defendants denied the request for the video stating, "Any video possessed by this department pertaining to an investigation is part of a criminal investigation and as such, the department will not release such videos."

The Open Public Records Act, at N.J.S.A. 47:1A-1, states that:

"government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions for the protection of the public interest, and any limitations on the right of access...shall be construed in favor of the public's right of access."

When access to requested records is denied, the Custodian of those records bears the burden of proving that denial of access to the records is lawful. N.J.S.A. 47:1A-6. When a Custodian denies access following an OPRA request, the Custodian must "indicate the specific basis therefore" to the requestor. N.J.S.A. 47:1A-5(g)

OPRA specifically provides an exemption for criminal investigatory records, which are defined as "a record which is not required by law to be made, maintained, or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding." N.J.S.A. 47:1A-1.1. Further, N.J.S.A. 47:1A-3 enumerates the exemptions for access to records under OPRA, including records of investigations which are in progress at the time of the request. The court in Asbury Park Press v. Lakewood Twp. Police Dept., 354 N.J. Super. 146, 158 (Law Div. 2002), wrote "In order to find a basis to deny access...the court must find both that they pertain to an investigation in progress and that their release would be inimical to the public interest."

It is undisputed that certain charges arose out of interaction between citizens and police officers of the Paulsboro Police Department on May 5, 2011 and that the video in question may include evidence of that event. The investigation into the alleged criminal activity on that date is currently pending. The investigations are related to the charges against Artavius and Shavon

Mears filed by the police and the charges against police officers filed by Artavius and Shavon Mears. Additionally, the Police Department has been conducting its own related internal affairs investigation since May 10, 2011.

The DVD of the police department surveillance video is a "criminal investigative record" as defined in N.J.S.A. 47:1A-1.1 and is thus exempt from disclosure to Plaintiff under OPRA. Additionally, it is afforded protection as a confidential record by the Attorney General's Guidelines on Internal Affairs Policy & Procedures.²

Under the Attorney General's Guidelines, the confidentiality of internal affairs is of the utmost importance and release of such records is permitted in specific "exceptional circumstances." The Attorney General's Internal Affairs Policy and Procedures Guidelines states "The nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information."³ The Guidelines, revised in May 2011, state "The nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information."⁴ The court in Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373, 382-383 (App. Div. 2003) wrote,

"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, it is clear that the video falls within the Guidelines for confidentiality as it is currently being utilized in an ongoing internal affairs investigation.

² Available at: <http://www.nj.gov/oag/newsreleases11/050611-IA-Policy.pdf>

³ Available at: <http://www.nj.gov/oag/newsreleases11/050611-IA-Policy.pdf>

⁴ Available at: <http://www.nj.gov/oag/newsreleases11/050611-IA-Policy.pdf>

Beyond the surveillance video being a criminal investigatory record and thus exempt under OPRA, the video is provided an additional layer of protection from disclosure by the Attorney General's Guidelines while being used for an ongoing internal affairs investigation.

Plaintiff has argued that because the video was created before an investigation actually began, the video should be disclosed. N.J.S.A. 47:1A-3 provides that the "provision shall not be construed to allow any public agency to prohibit access to a record of that agency which was open for public inspection, examination, or copying before the investigation commenced." There is no indication that the surveillance video from outside the police department was ever available to the public. There has been no showing of any statute or regulation that exists within New Jersey that mandates the making of exterior surveillance videos of police departments. The surveillance video at issue here differs from other materials found in case law which are maintained by law enforcement agencies, such as 911 tapes, which are required to be created and stored.

As the court in Keddie v. Rutgers, 148 N.J. 36, 54 (1997) wrote, "The trial court should consider whether the requested documents relate to pending or closed cases. Obviously, the need for confidentiality is greater in pending matters than in closed cases." The video at issue fits squarely within the statutory definition of "criminal investigatory record," is therefore confidential, and exempt from disclosure under OPRA. Indeed, the video is pertinent to an active, open criminal investigation and an internal affairs investigation and its release would prematurely interfere with those ongoing investigations and as such should remain confidential.

Common Law Right of Access

Having found that the video is not to be disclosed under OPRA, the Court is required to engage in an analysis of the common law right of access. The common law right of access to records is greater than the access afforded by OPRA, and may allow access to criminal investigatory records which are otherwise inaccessible under OPRA. N.J.S.A. 47:1A-8.

The common law provides that records to be disclosed will "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." O'Shea v. Twp of West Milford, 410 N.J. Super. 371, 386 (App. Div. 2009), citing Daily Journal v. Police Dept. of City of Vineland, 351 N.J. Super. 110 (App.Div. 2002).

For records to be disclosed under the common law, requestors "must make a greater showing than required under OPRA, specifically: (1) "the person seeking access must 'establish an interest in the subject matter of the material'" ; and (2) "the citizen's right to access 'must be balanced against the State's interest in preventing disclosure.'" Mason v. City of Hoboken, 196 N.J. 51, 67-68 (2008), citing to Keddie v. Rutgers, 148 N.J. 36, 50 (1997).

A requestor must establish an interest in the record he is seeking. Whether Plaintiff's motivation is believed to be suspect, as posited by Defendants, is beside the point.⁵ It is well settled that the interest of the requestor may be either personal or public. See Loigman v. Kimmelman, 102 N.J. 98, 104 (N.J. 1986), S. Jersey Pub. Co. v. N.J. Expressway Auth., 124 N.J.

⁵ Defendants have argued Plaintiff is engaging in the unauthorized practice of law under R. 1:21-1(a) and/or is in violation N.J.S.A. 45:19-8 et seq. which governs private detectives. The question as to whether Mr. Jones is the agent of or acting in some representative capacity on behalf of the Mears brothers is not determinative of the issues presented. Mr. Jones, as a member of the public has the right to seek the documents he has requested. The Court makes no findings or conclusions relative to Defendants' allegations and the parties are left to pursue, or not, those ancillary matters in the appropriate forum.

478 (N.J. 1991), Rosenberg v. State Dept. of Law and Public Safety, Div. of Criminal Justice, 396 N.J. Super. 565 (App. Div. 2007). Mr. Jones, as a member of the public, has the right to seek the documents he has requested and has demonstrated the requisite interest.

The court in Asbury Park Press, Inc. v. Borough of Seaside Heights, 246 N.J. Super. 62, 72 (Law Div. 1990), a case dealing with a request for documents of alleged police misconduct spoke to the public interest in such records in these terms:

“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.” (citations omitted).

Nevertheless, the court in Asbury Park Press v. Lakewood Twp. Police Dept., 354 N.J. Super. 146 (Law Div. 2002) wrote “...when the interest in confidentiality is greater, the citizen’s right of access must be qualified. In those circumstances, more than a citizen’s status and good faith are necessary to require production of the documents...a clear showing of a public need does not exist merely because a citizen claims that there may be something corrupt which should be exposed for the benefit of the public. There is also a need to focus upon any negative effect that disclosure may have upon the public good.” (citing to Loigman v. Kimmelman, 102 N.J. at 104-106, 108 (1986)).

In carrying out the required balancing test, the New Jersey Supreme Court, in Loigman v. Kimmelman, 102 N.J. 98, 114 (1986), provides that the court may consider:

“(1) the extent to which disclosures 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 decision making 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 police 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."

Analysis requires consideration, and weighing, of each of the Loigman factors:

Releasing the surveillance video would not discourage citizens from providing information to the government as no such information was provided;

Disclosing the video would not identify any confidential informant or witness to the alleged altercation;

Disclosing the video in this matter may chill agency decision-making as there is an ongoing internal affairs investigation being conducted which could potentially lead to actions being taken within the Paulsboro Police Department. Prematurely releasing the video to the public may interfere with the Police Department's reasoned evaluation of the events and actions of its officers and the video, which may prove to be critical evidence in that investigation, could lead to potential discipline of officers or dismissal of internal affairs charges;

The video is believed to be a recording of an entirely factual situation and not to contain any type of evaluation of policymakers, however the information could conceivably impact future policies and departmental procedures;

There is an ongoing internal affairs investigation of officers of the Paulsboro Police Department and so the sufficiency of remedial action, if deemed necessary, is not yet ripe for assessment.

Clearly, agency investigatory proceedings have arisen which may circumscribe the requestor's need for the material. Likewise, such need is further circumscribed by the availability of this information to Artavius and Shavon Mears in defending the criminal charges pending against them.⁶

The court in Loigman noted that "there was no fixed rule for determining whether disclosure is appropriate. A court should balance, in each case, the individual's right to the information against the public interest in the confidentiality of the file." (citations omitted) Loigman v. Kimmelman, 102 N.J. 98, 104 (1986). Evaluating the foregoing factors, the court concludes that the first two are inapplicable to the situation before the Court and the remaining four factors, in varying degrees, weigh in favor of nondisclosure of the surveillance video. In particular, factor six (6) weighs heavily in favor of confidentiality while the internal affairs investigation is pending.

Here, there is a greater interest in non-disclosure of the video while there are two pending investigations, criminal and internal affairs, which outweigh the Plaintiff's or public's interest in disclosure.

Accordingly, for the foregoing reasons, Defendant's Motion to Dismiss Plaintiff's Complaint as to the request for the May 5, 2011 surveillance video is granted.

⁶ At oral argument, counsel for Defendants asserted that the video has been offered to Artavius and Shavon Mears, and their counsel, for viewing.