

FILED

MAR 03 2011



Carol E. Higbee, P.J.Cv

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OPINIONS**

**SUPERIOR COURT OF NEW JERSEY
COUNTIES OF
ATLANTIC AND CAPE MAY**

CAROL E. HIGBEE, P.J.Cv.

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MEMORANDUM OF DECISION ON MOTION
Pursuant to Rule 1:6-2(f)

CASE: Charles W. Cain, Jr. v. Township of Hamilton
DOCKET #: ATL-L-872-11
DATE: March 3, 2011
MOTION: Order to Show Cause - OPRA
ATTORNEYS: Louis M. Barbone, Esq. – Plaintiff
Marc Friedman – Defendant, Township of Hamilton
Andrew J. D’Arcy – Defendant, The Press of Atlantic City

Having carefully reviewed the moving papers and any response filed, I have ruled on the above Motion as follows:

The issue in this case is whether the Open Public Record Act, N.J.S.A. 47:1A-1 et seq., (hereinafter referred to as OPRA) requires the release to the press of the video recording of an individual arrested for driving under the influence of alcohol. The videotape was made at the time of the motor vehicle stop from a camera mounted on the police car’s dashboard. It depicts the plaintiff being stopped by an officer, being questioned, getting out of his car, performing some sobriety tests and being arrested and placed in the police vehicle. It has both audio and video. The plaintiff is an elected official. This fact makes the arrest more interesting to the public and the press than it would be otherwise.

The Atlantic City Press requested the video recording pursuant to the provisions of the OPRA and the plaintiff, Charles W. Cain Jr., was notified of the request. At that time, the plaintiff had not been provided a copy of the recording. The plaintiff filed an Order to Show Cause (OTSC) and complaint against the Township of Hamilton to prevent release of the recording. This court, after a phone conference with counsel for plaintiff and counsel for the defendant, entered an order scheduling oral argument and ordered the defendant to not release the tape to third parties until a decision was made by the court. The recording was subsequently provided to the plaintiff's counsel before the return date of the OTSC. The Township did provide the Atlantic City Press with copies of the written reports related to the arrest with personal information, such as the plaintiff's social security number and address, redacted. Plaintiff has been charged with driving under the influence under N.J.S.A. 39:45-50. This case has not yet gone to trial. It will be heard in a municipal court without a jury.

The plaintiff argues that the recording is a criminal investigatory record exempt from access under N.J.S.A. 47:1A-1.1. There are no published judicial decisions that address this issue, which is surprising considering the widespread use of video by the news media. By coincidence nearly the exact same issue presented here was presented a few weeks ago in February 2011 in Burlington County Superior Court. The tentative decision in that case was provided to the court by counsel for the Atlantic City Press. Since it is an unpublished decision at this point, it is not precedent and should not be cited by the court, however, I have reviewed and considered that well written opinion.

There is no dispute that the video recording is a government record, and, therefore, should be available to the public unless there is a legal exception to the general requirement that all government records should be open and available for review. There is a specific exception

for any record that must "not be required by law to be made, maintained or kept on file" and that must be "held by a law enforcement agency" and that "must pertain to any criminal investigation or related civil enforcement proceeding." See N.J.S.A. 47:1-1, et. seq.

The court finds that an arrest and charge of DUI under N.J.S.A. 39:45-50 is not a "crime" as defined by statute and by the courts. It is neither an investigation of a criminal proceeding or a civil action related to a criminal proceeding. This exception pertains to investigations of crimes under the criminal code, and the offense charged is not found under that code nor is it a civil action related to a criminal proceeding.

However, there is a second exception to the general rule of open access in OPRA. The Appellate Division in Serrano v. South Brunswick Twp., 358 N.J.Super. 352, 368-369 (App. Div. 2003), quotes the OPRA declaration that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." The New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1975) set forth a balancing test that would be applicable. The court must balance the general policy favoring public access and the requestors needs for access against the reasonable expectation of privacy.

The OPRA provides that all records which are required by law to be made, maintained or kept on file by State and local government agencies are deemed to be public records. It is the policy of the State of New Jersey that citizens should have open access to public records. The statute is written in very broad terms and there is no requirement that the person requesting the records must explain in their request why they want the information. However, the reason may be relevant to the balancing of interests by a court.

Here, the plaintiff is an elected official and therefore, the citizens who elected him have an interest in his conduct in public and his compliance with traffic laws. Since this is a traffic violation and not a crime, the plaintiff has no right to a jury trial so there is little chance of any prejudice to his defense of the charges if the recording is released. In fact, the recording was taken to be used, if necessary, in court. If the recording is played in court, it could be seen by anyone who chooses to attend the hearing. Court proceedings are open to the public except in rare cases. The right of citizens to be informed by the press of the details of the circumstances surrounding the police stop and the interaction between the plaintiff and the law enforcement officers of their municipality far outweigh any claim of privacy rights by the plaintiff.

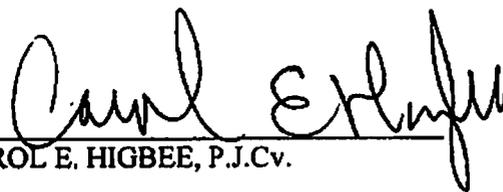
The court requested to see the recording, but it couldn't be played on the court's computer. The parties agreed to waive a review of the recording by the court. If there is within the recording a display, either visually or by audio, of the plaintiff's social security number, driver's license number, address or phone number, this should be deleted.

There is also an audio tape of the dispatcher that is approximately two hours long that could contain personal information about many other people besides the plaintiff. This tape should not be produced unless the Press pays for the time taken by the Township to edit the tape down to the portion limited to the plaintiff's encounter with the police.

In addition, there is a third recording, or a part of the recording, that depicts the plaintiff's passengers being taken home by the police. This should not be produced as their privacy outweighs any right of the public to see their actions or hear their conversations.

The video recording shall be provided at 4:00 p.m. on Friday, March 4, 2011, to the press to allow plaintiff time to file for an emergent review of this decision with the Appellate Division.

Counsel for the Township of Hamilton shall submit an order by 10:00 a.m. tomorrow March 4, 2011, with copies to counsel for the plaintiff and counsel of the Press of Atlantic City.


CAROL E. HIGBEE, P.J.Cv.