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TERENCE JONES, :
Plaintiff, : SUPERIOR COURT OF NEW JERSEY
 : LAW DIVISION, CIVIL PART
 : GLOUCESTER COUNTY
 vs. : DOCKET NO. GLO-L-2105-11
 :
 DEPTFORD TOWNSHIP, DINA L. :
 ZAWADSKI in her official :
 capacity as the Clerk and :
 Records Custodian of Deptford :
 Township and DEPTFORD TOWNSHIP :
 POLICE DEPARTMENT, :
 Defendants :
 : OPINION

Decided: August 13, 2012

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

Albert K. Marmero, Attorney for Defendants (Long, Marmero & Associates,
LLP, attorney)

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. Plaintiff seeks
disclosure of a DVD made by surveillance cameras located at the
Deptford Skating and Fun Center, on April 3, 2009. [Page 2]

On October 20, 2011, Mr. Jones made a request, via email, to the
Deptford Township Clerk, Dina L. Zawadski, requesting "DVD format of
all video footage that relate [sic] to the assault on Naomi Thomas
inside of the Deptford Skating and Fun Center on April 3, 2009." On

October 27, 2011, Ms. Zawadski wrote to Mr. Jones, "Your request is denied according to OPRA Exemptions N.J.S.A. 47:1A-1.1 Law Enforcement Records."

The DVD at issue involves an alleged assault upon Naomi Thomas, step-daughter of Plaintiff, while at the Deptford Skating and Fun Center. In the course of the police investigation into the matter, a DVD from private surveillance video owned and operated by the Deptford Skating and Fun Center was obtained. That DVD remains in the custody of the Deptford Township Police Department, having been logged in as evidence.

Mr. Jones has previously viewed the DVD at issue in the presence of Deptford Township police officers at the police station.¹ Following the hearing on June 5, 2012, the Court conducted an in camera review of the DVD. The resolution of the video is not sharp and the DVD is of limited or no evidential value.

Open Public Records Act

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

¹Prior to this suit being filed, Plaintiff was permitted to view the DVD at the Deptford Township Police Department in the presence of officers. Plaintiff argued that because the video was viewed by him, any claim of confidentiality was waived. The video was shown to Plaintiff in a controlled setting as part of what was then an ongoing investigation. There was no intent to waive confidentiality.

construed in favor of the public's right of access," [Page 3]

OPRA defines a "government record" as:

"any paper, written or printed book, document; drawing, map, plan, photograph, microfilm., data processed. or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in. the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof; including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof." N.J.S.A. 47:1A-1.1.

The DVD at issue may be characterized as an "image processed document" or as "information stored or maintained electronically or by sound-recording or in a similar device." To qualify as a "government record", the item would have to be "made, maintained or kept on file in the course of his or its official business by any. . . political subdivision [of the State]." The court is satisfied that the DVD at issue is being "maintained or kept" by the Deptford Township Police Department in the course of its official business and duties and is a "government record" under N.J.S.A. 47:1A-1.1.

When access to requested records is denied, the Custodian of those records bears the burden of proving that denial 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

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requester. N.J.S.A. 47:1A-5(g). In this matter, the Custodian informed Mr. Jones that the DVD was exempted from disclosure as a law enforcement record.

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. Thus, a criminal investigatory record is not subject to disclosure under OPRA. [Page 4]

Plaintiff and Defendant briefed at length the municipal police records retention schedule as issued by the New Jersey Division of Archives and Records Management. Nevertheless, the retention schedule does not control, nor significantly contribute to, the analysis of whether a document is a criminal investigatory record. Rather, the Court's analysis is governed by pertinent statutory language and case law relating to criminal investigatory records.

The DVD requested by Plaintiff pertains to a criminal investigation, which is now considered "closed" or "inactive" by the Deptford Township Police Department. Specifically, in the record before the court, a supplementary investigatory report, dated June 8, 2009, and authored by Detective John Senick states "At this time there is [sic] no further investigative leads for this case. This case is

detective closed at this time." Detective Senick notes in the same report that he contacted Mr. Jones and "advised him of same."

Further, a May 20, 2010 letter from the Chief of Police of the Deptford Township Police Department included a carbon copy to Mr. Jones and concerned the three internal affairs complaints Mr. Jones had filed against officers in the department. In part, that letter reads, ". . . I hope that we can explain to Mr. Jones to a certain degree of reasonableness that we have done all we can and will keep his case in 'inactive status' until new leads are developed to merit its reopening."

Clearly the case is considered to be "inactive" or "closed" by the Deptford Township Police Department. The matter is not being actively pursued.

As the court in *Keddie v. Rutgers*, 148 N.J. 36, 54 (1997) wrote, "The trial court also should consider whether the requested documents relate to pending or closed cases. [Page 5] Obviously, the need for confidentiality is greater in pending matters than in closed cases." However, even if the level of confidentiality may be lessened in a closed case it does still exist. Additionally, the definition of "criminal investigatory record" at N.J.S.A. 47:1A-1.1 does not specifically state that the investigation must be pending and may be read to encompass all criminal investigatory records, whether or not the investigation is in progress or has reached completion.

In this matter, the DVD of the surveillance video footage from the skating rink falls within the definition of a "government record", but is found to be exempt from disclosure to Plaintiff under OPRA because the DVD falls within the definition of "criminal investigatory records" at N.J.S.A. 47:1A-1.1.

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 court in *Josefowicz v. Porter*, 32 N.J. Super. 585, 591 (App. Div. 1954) defined a public record as ". . . one 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. The elements essential to constitute a public record are. . . that it be a written memorial, that it [Page 6] be made by a public officer, and that the officer be authorized by law to make (citing to 76 C.J.S., Records, § 1, p. 112)

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, 386-387 (App. Div. 2009), citing Daily Journal v. Police Dept. of City of Vineland, 351 N.J. Super. 110 (App.Div. 2002).

The court in Keddie v. Rutgers, 148 N.J. 36, 49 (NJ. 1997) provides "A common-law record is one that is made by a public official in the exercise of his or her public function, either because the record was required or directed by law to be made or kept, or because it was filed in a public office." (internal citations omitted)

For records identified as common law public documents to be disclosed, requesters "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).

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. 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 DVD he has requested

and has [Page 7] demonstrated the requisite interest. Nevertheless, the court in *Asbury Park Press v. Lakewood Twp. Police Dept.*, 354 N.J. Super. 146, 155 (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. 104-106, 108 (1986)).

Further, as the court in *Keddie v. Rutgers*, 148 N.J. 36, 51 (N.J. 1997) wrote “Generally, the public’s interest in nondisclosure is based on the need to keep the information confidential. Where a claim of confidentiality is asserted, the applicant’s interest in disclosure is more closely scrutinized. In that context, courts consider whether the claim of confidentiality is ‘premised upon a purpose which tends to advance or further a wholesome public interest or a legitimate private interest.’ However, where the interest in confidentiality is ‘slight or non-existent,’ standing alone will be sufficient to require disclosure to advance a legitimate private interest.” (citing to *Loigman v. Kimmelman*, 102 N.J. 98, 105 (1986))

Here, Defendant has asserted that the DVD's contents should remain confidential. Defendant articulates its confidentiality interest thusly:

"This surveillance video relates to an investigation and there exists the possibility that arrests can be made at a future date. Allowing release of this video to a member of the public would potentially undermine all of the investigatory work that has been done to date on this matter. Also, as Plaintiff has lodged internal affairs complaints against officers involved in this investigation, this video is now also a part of the internal affairs [Page 8] investigatory files. Further, if Defendants are required to release this video to Plaintiff to allow him to pursue whatever his goal is, Defendants would then be required to release any and all investigatory material that is requested by anyone, rendering criminal investigation useless." (Defendant's Brief, un-numbered page 10-11)

This argument as to why the DVD should remain confidential fails to convince the Court that the interest in nondisclosure is greater than Plaintiff's right to access. Defendant's confidentiality claim is slight at best.

The court in *Asbury Park Press v. Lakewood Twp. Police Dept.*, 354 N.J. Super. 146, 154 (Law Div. 2002) writes ". . . the court must engage in a balancing test to determine whether the individual's right to the information outweighs the public's interest in the confidentiality of the material," (citing to *Nero v. Hyland*, 76 N.J. 213, 223, 386 A.2d 846 (1978)). The court in *Asbury Park Press* continued, "The balancing process must be concretely centered upon the

relative interests of the parties in relation to the specific information sought. (internal citation omitted) The process should be 'flexible and adaptable to different circumstances and sensitive to the fact that the requirements of confidentiality are greater in some situations than in others," (citing to McClain v. College Hosp., 99 N.J. 346, 362, 492 A.2d 991 (1985) Further, "when the interest in confidentiality is great, the right of access must be qualified." Asbury Park Press v. Lakewood Twp. Police Dept., 354 N.J. Super. 146, 155 (Law Div, 2002)

The court in Asbury Park Press v. Lakewood Twp. Police Dept., 354 N.J. Super. 146, 158 (Law Div. 2002) made clear "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," In this matter, the investigation is now inactive [Page 9] or closed and Defendant has made no persuasive argument that release would be inimical to the public interest. Similarly, the court in Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35, 46 (N.J. 1995) writes "Unlike a citizen's absolute statutory right of access, a plaintiff's common-law right of access must be balanced against the State's interest in preventing disclosure." (citing to South Jersey Publishing Co. v. N.J. Expressway Auth., 124 N.J. 478 (N.J. 1991)

Disclosure of the requested record is not automatic. Instead the court must engage in a balancing test including consideration of certain factors to determine if the requestor's interest in accessing the record outweighs the interest of the State in not disclosing the record. *Loigman v. Kimmelman*, 102 N.J. 98, 112 (N.J. 1986) This balancing process is fact-specific and conducted on a case by case basis. The balancing of the interests of the public and State is an "exquisite weighing process by the trial judge." *Beck v. Bluestein*, 194 N.J. Super. 247, 263 (App. Div. 1984) The New Jersey Supreme Court, in *Loigman v. Kimmelman*. 102 NJ. 98, 113 (1986), provides a number of factors for the court's consideration in carrying out the required balancing test:

"(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 [Page 10] investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials."

None of these factors weighs in favor of non-disclosure:

Releasing the surveillance video would not discourage citizens from providing information to the government. There may be minor infringement upon the economic or business interests of the skating arena², but providing such evidence is a duty of citizenship and economic infringement, if any, is slight by comparison.

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

Disclosure would not chill agency self-evaluation, program improvement, or other decision making as the three internal affairs complaints filed against the involved officers have been closed;

The video is a recording of an entirely factual situation and does not contain any type of evaluative reports of policymakers;

There is no ongoing internal affairs investigation of officers of the Deptford. Township Police Department, making factors 5 and 6 inapplicable.

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 applicable factors, in

²The Deptford Skating and Fun Center has not come forward to protest release of its video on this or any other basis.

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varying degrees, weigh in favor of disclosure of the surveillance video. {Page 11}

Significantly, the fact that the investigation is closed militates against a need for confidentiality. Public policy favoring disclosure and transparency carries greater weight than Defendant's gossamer claim of confidentiality.

Further, the mandated case by case, fact sensitive analysis answers Defendant's argument that disclosure here will open the floodgates to disclosure of all investigatory materials henceforth.

Conclusion

For the reasons stated. herein, the Court concludes that the video in question is a government record under OPRA, but is exempt from disclosure as an investigatory record. The video in question, is a public record under the common law right of access and under the circumstances of this case, its disclosure to Plaintiff is ordered.