

FILED

AUG 21 2014

NELSON C. JOHNSON, J.S.C.

COURT INITIATED

Richard Gutman, Esq.
9 Prescott Ave.
Montclair, NJ 07042

JOHN PAFF,

PLAINTIFF,

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
ATLANTIC COUNTY
DOCKET NO. CPM-L-265-14

VS.

ORDER

CAPE MAY COUNTY PROSECUTOR'S
OFFICE,

DEFENDANT.

THIS MATTER having been opened to the Court by Richard Gutman, Esquire, attorney for the Plaintiff John Paff by way of orders to show cause, on notice to Assistant County Counsel James B. Arsenault, Jr., attorney for Defendant Cape May County Prosecutor's Office; and the Court having considered the papers submitted by the parties and having heard oral argument on July 2, 2014; and for the reasons set forth in the Court's Memorandum of Decision of even date herewith and for good cause shown;

IT IS ON THIS 21st day of August, 2014

ORDERED that the Defendant shall provide Plaintiff with an un-redacted copy of the four letters referenced in the Defendant's Vaughn Index within 21 days of service of this Order; [NOTE: The Defendant has twenty-one (21) days from the date of this Order to decide whether or not it wishes to appeal this decision and submit a proposed form of Order staying the release of these letters to the Plaintiff.]

IT IS FURTHER ORDERED that a copy of this Order shall be served on opposing counsel within seven (7) days of service of this Order.


NELSON C. JOHNSON, J.S.C.



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SUPERIOR COURT OF NEW JERSEY

NELSON C. JOHNSON, J.S.C.

1201 Bacharach Boulevard
Atlantic City, NJ 08401-4527
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MEMORANDUM OF DECISION

TO: Richard Gutman, Esquire
9 Prescott Avenue
Montclair, New Jersey 07042
Attorney for Plaintiff

James B. Arsenault, Jr., Esquire
Cape May County Counsel
4 Moore Road, DN-104
Cape May Court House, New Jersey 08210
Attorney for Defendant

RE: Paff vs. Cape May County Prosecutor's
Office

DOCKET NO. CPM-I-265-14

THIS MATTER was opened to the Court via the filing of a Verified Complaint and Petition of the Plaintiff, John Paff, represented by Richard Gutman, Esquire. Said Complaint was filed on June 11, 2014, and an Order to Show Cause was entered on June 23, 2014. The Defendant Cape May County Prosecutor's Office ("CMCPO") is represented by Cape May County Counsel, Assistant County Counsel James B. Arsenault, Jr., Esquire appearing. The court apologizes for the delay in issuing this ruling. A change of duties of the undersigned and the transition process involved in that change interrupted the review of this matter.

Plaintiff's Petition seeks access to certain public records in the possession of the CMCPO which Plaintiff has termed, "Brady Letters" referencing the U.S. Supreme Court decision in Brady v. Maryland, 373 U.S. 83 (1963). A "Brady Letter" deals with the situation where the prosecution in a criminal proceeding is obligated to provide the defense with information/evidence which "would tend to exculpate the Defendant." The reasons for that

obligation are apparent. Here, Mr. Paff believes that the CMCPD possesses documents regarding the performance of three police officers. Specifically, his OPRA request is as follows:

Records Requested:

I would like all letters (or other forms of notification) made by the Cape May County Prosecutor's Office of such exculpatory or favorable information to defendants concerning the following Wildwood Crest Officers:

1. Chief DePaul
2. Captain Mayer
3. Lt. Hawthorn

At the return date of the Order to Show Cause, the Court conducted oral argument on July 22, 2014 regarding the Plaintiff's demand for release of these records under the Open Public Records Act ("OPRA"). The reply pleadings of the Defendant made little effort to describe the information in the possession of the CMCPD. An example of what the Court is alluding to is at page 4 of Defendant's reply letter brief wherein it stated:

Similarly, any such responsive documents which may exist might be the result of an investigation of matters by the CMCPD for a determination of criminal wrongdoing and may include the CMCPD's findings and analysis thereof.

In what is akin to a mantra, defense counsel asserted that the records sought are "Inter-agency or intra-agent advisory, consultative or deliberative material ... exempt from the definition of government record provided by OPRA." As counsel proceeded through his reply for the Defendant, each of these exemptions was discussed, without regard to the substance of the records, nor any effort to characterize which type of exempt record they might be. Better late than never, at the time of the Show Cause hearing, defense counsel tendered a "Vaughn Index" to his adversary and the Court. [See Attachment "A."] Defense counsel also provided the Court with copies of the correspondence referenced in the Vaughn Index; the same tendered under seal.

Based upon the submissions made and the arguments of counsel, the Court deemed it necessary to conduct an *in camera* review of the disputed documents received under seal. Following a review of counsel's pleading and examination of the disputed records, the Court makes the following Findings of Fact.

FINDINGS OF FACT

1. The inquiry of the Plaintiff was precise and concise; namely, tailored to request “exculpatory or favorable information to Defendants” regarding three named police officers.
2. The initial denial of Plaintiff’s request under cover of letter from First Assistant Prosecutor, Robert W. Johnson, Esquire, dated May 5, 2014, was likewise precise and concise in reciting three categories of documents exempt under N.J.S.A. 47:1A-1.
3. There are four letters listed in the Defendant’s Vaughn Index. The Sender(s), Recipient and Date(s) are incorporated herein by reference. [See Attachment “A.”]
4. None of the four letters are *technically* “Brady Letters” as contemplated by the U.S. Supreme Court in Brady v. Maryland, 373 U.S. 83 (1963).
5. Notwithstanding the preceding finding, the contents of the two letters written by Prosecutor Taylor very pointedly address the legal and public policy concerns enunciated by the Brady Court.
6. In truth, Prosecutor Taylor’s two letters are harbingers of Brady Letters which will be written by his office in the future should either Captain Mayer or Lieutenant Hawthorne be called to testify as witnesses in a criminal case.
7. The four letters in question are exempt under OPRA by virtue of their status as an inter-agency advisory communication between the County Prosecutor and the Mayor of the Borough by virtue of the Prosecutor’s broad supervisory authority over the operation of municipal police departments.
8. The four letters in question are Common Law public records and Court II of Plaintiff’s Complaint seeks said records under the Common Law.

ANALYSIS AND RULING

“New Jersey provides access to public records in three ways: (1) through the citizen’s common law right of access; (2) OPRA; and (3) through the discovery procedures applicable to civil disputes.” Bergen County Imp. Authority v. North Jersey Media Group, Inc., 370 N.J. Super. 504, 515 (App. Div. 2004). As previously stated, *infra*, Plaintiff is not entitled to the four letters under OPRA, because Prosecutor Taylor was writing to inform the Mayor – as Director of Public Safety – that there were major problems with the two mentioned officers ever testifying in a criminal proceeding, and that if they did, Brady Letters would be issued.

However, under the Common Law Right to Access (“CLRA”), “any citizen, without any showing of personal or particular interest, has an unqualified right to inspect such documents if they are, in fact, such public records.” Loigman v. Kimmelman, 102 N.J. 98, 101 (1986). Under CLRA, a public 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.” Keddie v. Rutgers, 148 N.J. 36, 49 (1997). As previously stated, infra, the Court finds the documents sought by Plaintiff in this instance are public records within this definition.

“Ordinarily, only an assertion of citizen or taxpayer status is necessary for production of common-law records, subject to a showing of good faith.” Loigman, 102 N.J. at 104. However, “[a] court should balance, in each case, the individual's right to the information against the public interest in the confidentiality of the file.” Ibid. “[I]f the governmental need in confidentiality is slight or non-existent, citizen-taxpayer status will ordinarily warrant that the matters be disclosed.” Id. at 105. “On the other hand, when the public interest in confidentiality is greater, the citizen's right of access is qualified.” Ibid. In essence, “when reasons for maintaining a high degree of confidentiality in the public records are present, even when the citizen asserts a public interest in the information, more than citizen's status and good faith are necessary to call for production of the documents.” Id. at 105-106.

In deciding whether to disclose a government agency’s investigative materials, the Court may consider the following:

- (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.”

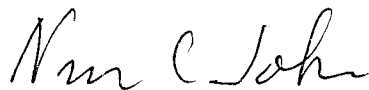
Loigman, supra, 102 N.J. at 113. “Against these and any other relevant factors should be balanced by the importance of the information sought to the plaintiff’s vindication of the public interest.” Ibid.

First, the Court notes that Defendants do not oppose Count II of Plaintiff’s Complaint, which seeks access to the aforementioned documents under the CLRA, nor has the CMCPD asserted the need for confidentiality as to these two police officers. Accordingly, the Court concludes that Plaintiff is entitled to access to the four letters listed in Defendant’s Vaughn Index.

The Court is satisfied that the public’s interest in said letters far outweighs any government interest in confidentiality. Defendants did not set forth any reasons for maintaining a high degree of confidentiality of the letters. Also, disclosure of the letters in question will not impede CMCPD functions, nor will it have a chilling effect on citizens who wish to provide information to the government anonymously.

Additionally, disclosure of the letters will have a minimal impact, if any, on the decision-making of CMCPD. The letters only contain findings of fact, as opposed to an in depth evaluation or analysis, and no disciplinary or investigatory proceedings have arisen, yet. Furthermore, the letters contain findings of public official misconduct, which the public certainly has a heightened interest in knowing.

Accordingly, after careful *in camera* inspection and after balancing the factors elicited in Loigman, supra, 102 N.J. 98, the Court finds that Plaintiff is entitled to the four letters listed in Defendant’s Vaughn index. NOTE: The Defendant has twenty-one (21) days from the date of this Order to decide whether or not it wishes to appeal this decision and submit a proposed form of Order staying the release of these letters to the Plaintiff. An appropriate Order has been entered. Conformed copies accompany this Memorandum of Decision.



NELSON C. JOHNSON, J.S.C.

Date of Decision: 8-21-14