

Superior Court of New Jersey

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JUDGE VINCENT I. GRASSO
ASSIGNMENT JUDGE

(732)-929-2176

OCEAN COUNTY COURT HOUSE
P.O. BOX 2191
TOMS RIVER, NJ 08754-2191

September 27, 2013

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Re: Ganzweig v. Township of Lakewood, et al
Docket No. L-2392-13

Dear Counsel:

This case comes before the court by way of a verified complaint and order to show cause filed September 10, 2013. Plaintiff Shabsi Ganzweig seeks to compel defendants Township of Lakewood (Township) and its Township Clerk, Mary Ann Del Mastro in her capacity as the Township's custodian of records under the Open Public Records Act, N.J.S.A. § 47:1A-1-13 (OPRA), as well as the common law, to produce:

- (1) [A]ll telephone calls to & from Lakewood Police department dispatch & watch command" and "[a]ll radio, audio, video and records including log of incident" relating to a "parking and traffic situation in the area on [5th Street and 6th Street] between Madison Ave & Forest Ave" on July 2, 2013 between 3 p.m. and 4:30 p.m.; and
- (2) [a]ll police transmissions, videos and phone recordings made in connection with a pedestrian who was struck by a car on June 19, 2013 on Hope Chapel and South Lake in Lakewood.

This is a summary proceeding brought pursuant to Rule 4:67 and there are no material facts in dispute.

Factual Background

Plaintiff Shabsi Ganzweig filed an OPRA request by e-mail dated June 19, 2013 with the Township Clerk. The e-mail read: "Can you please provide me with all transmissions and videos (including Phone recording) of pedestrian struck on Hope Chapel and South Lake on June 19 2013 @ appx 836 AM."

The Township Clerk, Ms. Del Mastro, responded by letter to this request. The letter explains that, "[t]he information requested is denied, as it is part of an Internal Affairs Investigation." The letter recites that:

Because complaints against police officers can be the basis for discipline and other personnel decisions, the complaints are considered confidential personnel information and exempt from disclosure because they contain information generated by or on behalf of public employers or public employees in connection with any grievance filed by or against an individual pursuant to N.J.S.A. 47:1A-1.1.

The letter further recites that:

The requested record contains information regarding complaints filed against police officers and/or reprimands of officers, which is not subject to public access because it constitutes a personnel or pension record containing information related to any grievance filed by or against an individual and is exempt from disclosure pursuant to Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004) and N.J.S.A. 47:1A-10.

Later, plaintiff sent a separate OPRA request on July 3rd by e-mail.

The July 3rd e-mail read simply:

On July 2 2013 from appx 3pm till appx 430pm regarding a parking and traffic situation in the area on 5th st&6th st between Madison Ave & Forest Ave.

- 1) all calls regarding this incident.
- 2)All radio, audio, video and records including log of incident.
- 3)cell phones of the officers involved (#277, #272)

Ms. Del Mastro again responded by letter to plaintiff's July 3rd OPRA request. This letter also explains that the request was denied because "it is an Internal Affairs Investigation." This letter also recited the same legal reasons as the earlier letter.

Findings

New Jersey's Open Public Records Act (OPRA) manifests the State's public policy of transparency in government. See N.J.S.A. § 47:1A-1 ("[G]overnment 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 . . ."). Generally, OPRA requires a public body to disclose any "government record." N.J.S.A. § 47:1A-1. OPRA defines "government record" broadly to mean:

[A]ny 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 . . . or that has been received in the course of his or its official business . . .

N.J.S.A. § 47:1A-1.1.

However, a public body need not disclose a “government record” if that record falls into one of OPRA’s twenty-one categories of documents that fall outside the statute’s reach. N.J.S.A. § 47:1A-1.1. OPRA places the burden of proving such an exception on the public body who wishes to withhold a government record. N.J.S.A. § 47:1A-6. In doing so, the public body’s custodian of record must state the “specific basis” for withholding a government record. Gannett N.J. Partners v. Middlesex, 379 N.J. Super. 205, 215 (App. Div. 2005). Moreover, they “must produce specific reliable evidence sufficient” to prove their asserted “statutorily recognized” exception. Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373, 382–83 (App. Div. 2003). Absent such a showing, a citizen's right of access is unfettered. Ibid.

In evaluating a public body’s decision to withhold information, a court must determine: (1) if the information constitutes a government record; and (2) if the record evidence produced by the public body establishes an exception that shields the government record from disclosure.

In the case at bar, neither party disputes that the information requested constitutes a government record. Instead, the Township asserts that its custodian properly denied Ganzweig’s request for information under OPRA. Initially, in denying plaintiff’s OPRA request, the Township’s custodian of records used general language that alludes to “complaints

against police officers” and “confidential personnel information.” The general language references N.J.S.A. § 47:1A-1.1 and N.J.S.A. § 47:1A-10, but did not specify how plaintiff’s OPRA request implicates these sections. At oral argument, Township counsel conceded that these cited sections do not apply. Therefore, the court does not entertain either statutory basis for denying plaintiff’s OPRA requests.

However, in its brief opposing plaintiff’s order to show cause and at oral argument, Township counsel advances a different reason why plaintiff’s requests should be denied. Specifically, the Township asserts that: (1) after receiving some unspecified complaints from Township residents, the Township has commenced internal affairs investigations for both incidents as required by law; and (2) the records concern the same subject matter as these investigations.

As a threshold issue, the Township’s response to plaintiff’s OPRA request fails to provide sufficient and specific grounds for its denial of plaintiff’s requests. As explained above, OPRA requires a public body to furnish the court with sufficient specific evidence to support its denial of a plaintiff’s information request. Courier News, supra, 358 N.J. Super. at 382–83. Consequently, the Township fails to prove that it properly denied plaintiff’s document requests under any exception recognized by OPRA.

Nevertheless, the Township’s argument fails even if the court were to accept the Township’s assertions as true. Specifically, the Township argues

that “police internal affairs records are confidential and not accessible” as a matter of law.

At oral argument, counsel elaborated on its argument. The Township argued that once an Internal Affairs Investigation has commenced, the Attorney General’s Internal Affairs Policy & Procedures (IAPP) authorizes a police department to subsume all evidence into the investigation, putting that evidence outside OPRA’s reach. The Township cites chiefly to two passages of the IAPP to support this argument. The first passage, located on page 28 of the IAPP, reads:

The investigator should also examine and retrieve all electronic, computer, digital and phone records. These include may [sic] analog and digital records created by radio and telephone recorders, computer aided dispatch systems, mobile data terminals, in-car video systems, video surveillance systems and other forms of audio and video recording. In these cases, the relevant data should be copied to an appropriate medium as soon as possible and retained by internal affairs.

The Township points to a second passage, located on page 47 of the IAPP, that reads: “The nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information.”

Next, the Township further argues that because the IAPP carries the force of law, these two passages together create an exception to OPRA’s disclosure requirement akin to a statutory exception. It draws on a Government Records Council (GRC) decision, Blaustein v. Lakewood Police Department, GRC Complaint No. 2011-102 (June 26, 2012). The Blaustein

decision dealt with a request to produce police mobile video recordings and radio transmissions for two police complaints. The decision cites O'Shea v. West Milford, 410 N.J. Super. 371, 381 (App. Div. 2009) for the proposition that the IAPP carries the force of law. Blaustein, supra, at 6. Moreover, the IAPP classifies the “nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials” as confidential, that the video recordings are also confidential. Id. at 7. By syllogism, therefore, OPRA requires the nature and source of internal affairs investigations to remain confidential. Ibid.

The Township’s reasoning in the case at bar mirrors that of the GRC in Blaustein. The Township’s argument can be summarized as follows: if digital or other recordings come into existence, but an internal affairs investigation—unlike a civil or criminal investigation—subsequently commences based on the recorded events, these recordings and transmissions of the event itself move outside OPRA’s reach per the IAPP guidelines. Therefore, the Township reasons that, under the circumstances at hand, the Internal Affairs Investigation that has been commenced removes the transmissions and recordings sought by plaintiff from OPRA’s reach.

At the outset, the Township reliance on a GRC decision is misplaced. OPRA provides that a decision by the GRC has no precedential value. N.J.S.A. § 47:1A-7(e); see O'Shea v. West Milford, 410 N.J. Super. 371, 381 (App. Div. 2009) (noting that a Superior Court is not bound by the GRC’s

interpretation of OPRA) (citing Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973)). Therefore, the court cannot necessarily rely on Blaustein for the broad proposition that “police internal affairs records are confidential and not accessible” as a matter of law as the Township urges. Instead, the court must evaluate the Township’s argument in light of OPRA’s provisions and binding precedent.

The court disagrees with the Township’s argument. The plain language of the statute makes clear that information that later forms the basis of an investigation does not become retroactively exempt from OPRA’s disclosure requirement. N.J.S.A. § 47:1A-3 (“ . . . this provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced.”); Serrano v. South Brunswick, 358 N.J. Super. 352, 367 (App. Div. 2003) (holding that 911 tape did not become retroactively exempt from OPRA’s disclosure requirement under N.J.S.A. § 47:1A-3 because prosecutor obtained it). Moreover, Appellate Division has made clear that courts should distinguish between those (accessible) documents that prompt the investigation and the (potentially confidential) work-product of the investigation itself. See O’Shea, supra, 410 N.J. Super. at 378–86 (distinguishing “Use of Force” reports from allegations of excessive force and work product of resulting internal affairs investigation).

Likewise, the police transmissions and recordings sought by plaintiff in this case do not automatically fall outside OPRA's reach because they contain the "nature and source of internal allegations." These radio or video transmissions are independent and are to be distinguished from those Internal Affairs records that are created once the investigation has commenced. Here, plaintiffs seek neither the nature, the source, nor the substance of any internal affairs investigation. Plaintiff seeks only the information that was recorded at the time of two separate incidents, but prior to any internal affairs investigation. The fact that an internal affairs investigation may use or mandate the acquisition of the requested records does not change their status as an accessible government record which the court finds is the case at hand. The recordings sought by plaintiff are a record of the events. They are not the internal affairs investigation.

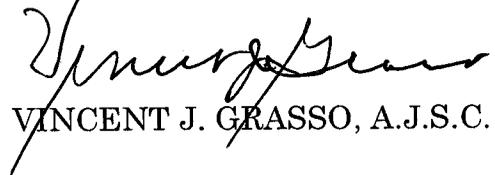
Judgment is entered in favor of plaintiff ordering:

1. Defendants to provide copies to plaintiff of all telephone calls to and from Lakewood Police Department dispatch and watch command and all radio, audio, video, and records including log of incident relating to a parking and traffic situation in the area on 5th Street and 6th Street between Madison Avenue and Forest Avenue on July 2, 2013 between 3 p.m. and 4:30 p.m.
2. Defendants to provide copies to plaintiff of all police transmissions, videos, and phone recordings made in connection with a pedestrian

who was struck by a car on June 19, 2013 on Hope Chapel and
South Lake in Lakewood.

Any award of costs and attorney's fees will abide further application to
the court. Mr. Luers is to prepare the order that comports with the court's
ruling. The Township shall comply with plaintiff's request within seven days
of its receipt of the signed order.

Respectfully submitted,



VINCENT J. GRASSO, A.J.S.C.

VJG:dfm
Encs. (1)