

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Paff v. Hudson County Sherriff Department

L-388-14

Return Date: 4/11/14

ORDER TO SHOW CAUSE-OPRA

FACTS

- Plaintiff seeks incident reports prepared by the Hudson County Sherriff's Department regarding Ashley R. Hulse being charged with child neglect and other crimes.
- Plaintiff also seeks audio and visual recordings made in connection with the incident and all audio and video recordings of conversations between Gisele Camillo and any Hudson County Official at about 2:30 p.m. on December 2, 2013 at the Sherriff Department's public window.

PLAINTIFF'S ARGUMENT

- No OPRA exemptions apply to the documents Plaintiff seeks.
- There is no ongoing investigation as this matter has been referred to the Prosecutor's Office.
- The Undersheriff's certification is a net opinion and does not address the appropriate standard for an exemption under OPRA for security procedures.
- The Common Law provides access to the documents and Plaintiff's interest in disclosure outweighs the need for confidentiality now that the investigation is closed.

DEFENDANT'S ARGUMENT

- The records Plaintiff seeks are exempt from disclosure under OPRA.
- Even if the documents are not wholly exempt, Plaintiff may not presently receive them because of an ongoing investigation.
- Disclosure of the video footage would compromise safety in the building.
- The Common Law Right of Access is outweighed by Defendants' need to preserve confidentiality.

ANALYSIS

The Open Public Records Act requires the disclosure of government records. The purpose of OPRA, N.J.S.A. 47:1A-1, is to "make identifiable [non-exempt] government records 'readily accessible for inspection, copying or examination.'" MAG Entertainment, L.L.C. v.

Division of Alcoholic Beverage Control, 375 N.J. Super 534, 546 (App. Div. 2005). Under the Act, all government records are public unless subject to a listed exemption, N.J.S.A. 47:1A-1. The statute defines "government records" broadly to include all documents or other materials, information, or data that may have been made or received by the government in its official business. N.J.S.A. 47:1A-1.1.

The OPRA statute lists twenty four (24) exemptions defining the types of documents that do not constitute government records. The exemptions include such documents as: inter-agency or intra-agency advisory, consultative or deliberative material; certain legislative, medical examiner, criminal investigatory, or victim's records; material subject to attorney-client privilege; materials concerning government security; and sexual harassment complaints filed with a public employer. N.J.S.A. 47:1A-1.1.

A party who is denied access to government records that do not qualify under an exemption is entitled to institute a proceeding against the public entity to challenge denial of access. N.J.S.A. 47:1A-6. If the applicant chooses to file a complaint in the Law Division of the Superior Court, the court will hold a summary hearing pursuant to Rule 4:67, by which it will "make findings of fact, either by adopting the uncontested facts in the pleadings after concluding that there are no genuine issues of fact in dispute, or by conducting an evidentiary hearing." MAG Entm't, 375 N.J. Super. at 551. In such a proceeding, the custodian has "the burden of proving that the denial of access is authorized by law." N.J.S.A. 47:1A-6; see also Gannett N.J. Partners, LP v. County of Middlesex, 379 N.J. Super. 205, 219 (App. Div. 2005) (the custodian of a public record has to state the specific basis for the denial of access).

I. Government Records Subject to Disclosure

As previously noted, N.J.S.A. 47:1A-1.1 contains various exemptions to what is considered a "government record."

Here, Plaintiff requests incident reports from the aforementioned incident, the arrest of Ms. Ashley Hulse on December 26, 2013 at 2 p.m. in front of 257 Cornclison Avenue, Jersey City, New Jersey. Defendants have asserted the "criminal investigatory record" exemption from OPRA applies to these documents.

Criminal investigatory records are defined in the statute 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.

The first question the Court must answer is, therefore, whether there is any law that requires the documents at issue to be made, maintained or kept on file. If the answer to that question is yes, then the documents are government records. If the answer is no, then they may be subject to the exemption.

Plaintiff argues that at least some of the documents are required to be maintained in connection with indictable offenses because N.J.S.A. 53:1-20.2 requires that law enforcement officers “immediately upon the receipt of a complaint that an indictable offense has been committed, to forward to the county bureau of identification and the bureau of identification of the State Police Department all of such information which can at that time be obtained, on forms to be provided for that purpose by the head of the office in which such county bureau of identification is established.”

Defendant contends that N.J.S.A. 53:1-20.2 requires the law enforcement officer to report only information that has already been provided to Plaintiff. Specifically, N.J.S.A. 53:1-20.1 provides a form that the law enforcement officer is required to fill out. That form contains only such information as the offense, the location, and other administrative details rather than the substantive nature of the incident. Id.

The Court notes that in The Daily Journal v. Police Dep’t of Vineland, 351 N.J. Super. 110, (App. Div. 2002) certif. denied, 174 N.J. 364 (2002), the Appellate Division stated that it “found no case holding that criminal investigation reports are public records under the [Right to Know Law]. Indeed, the courts have held to the contrary, on the basis that no law or regulation requires the making, maintaining or keeping on file the results of a criminal investigation by a law enforcement officer or agency.” Id. at 120; see also State v. Marshall, 148 N.J. 89, 272 (1997). N.J.S.A. 53:1-20.2 was enacted in 1939 and has not been amended since then. How N.J.S.A. 53:1-20.2 could, therefore, provide Plaintiff with further relief beyond the information that has already been provided by Defendant has not been shown to the Court.

Alternatively, Plaintiff contends that pursuant to O’Shea v. Township of West Milford, 410 N.J. Super. 371 (App. Div. 2009) (holding that the “Use of Force” Policy promulgated by the Attorney General had the force of law and, therefore, the reports completed pursuant to that policy were not within the criminal investigation exemption), the Division of Archives and

Records Management (DARM) requirement that Defendants retain criminal investigatory records should be applied so as to make investigatory records available through OPRA. Plaintiff avers that the DARM retention schedules are recognized as having the force of law pursuant to the Attorney General's Internal Affairs Guidelines.

Defendant agrees that N.J.S.A. 47:3-16 et seq., the Destruction of Public Records Act, and guidance from DARM regarding that act provides for a retention schedule for incident reports. However, Defendant argues that to interpret the DARM guidance documents as having the force of law would essentially eliminate the "investigatory records" exemption from of N.J.S.A. 47:1A-1.1.¹

Plaintiff, in reply, asserts that an incident report is a clearly identifiable record that is readily distinguishable from the types of records that the exemption seeks to protect.

As a preliminary matter, the Court finds that the policies at issue are facially different. The "Use of Force" Policy in O' Shea required the government to keep a certain type of record. The DARM policies simply require that an entity wait for a period of time before destroying documents. Therefore, to give the DARM policies the force of law would, ultimately, make every document a "government record" and eliminate the exemption for criminal investigatory records written into OPRA.

Moreover, the DARM policies were in effect at the time both The Daily Journal and Marshall were decided. Therefore, like N.J.S.A. 53:1-20, the requirements pre-date judicial determinations that hold there is no law requiring that documents like the one at issue in this case be made.

Therefore, the Court finds that the documents and videos sought are not "government records" because they pertain to a criminal investigation and there is no law requiring that they be made, maintained or kept on file.

II. The Ongoing Investigations Exemption

Even if the documents sought were deemed to be "government records," the Court finds that they would be subject to an exemption.

¹ The Court notes that Defendant relies largely on decisions of the Government Records Council that are not precedential in this Court. N.J.S.A. 47:1A-7(e).

Pursuant to N.J.S.A. 47:1A-3, "where it shall appear that the record or records which are sought to be inspected, copied, or examined shall pertain to an investigation in progress by any public agency, the right of access . . . may be denied if the inspection, copying or examination of such record or records shall be inimical to the public interest." However, "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." N.J.S.A. 47:1A-3(a).

There are three elements a defendant must meet in order to deny access: (1) the record pertains to an investigation in progress by a public agency; (2) disclosure would be inimical to the public interest; and (3) the record was not already open for disclosure before the investigation commenced.

However, two categories of information which must be disclosed are "information as to the identity of the investigating and arresting personnel" and "information of the circumstances immediately surrounding the arrest, including but not limited to the time and place of the arrest, resistance, if any, pursuit, possession and nature and use of weapons and ammunition by the suspect and by the police." N.J.S.A. 47:1A-3(b). Although it is mandated that the above information be disclosed, the statute further provides:

[W]here it shall appear that the information requested . . . will jeopardize any investigation in progress or may be otherwise inappropriate to release, such information may be withheld. This exception shall be narrowly construed to prevent disclosure of information that would be harmful to a bona fide law enforcement purpose or the public safety.

[Id.]

Therefore, certain information may not be disclosed, if such disclosure would either jeopardize someone's safety or an investigation or otherwise be inappropriate.

"Nothing contained in [OPRA] as amended and supplemented, shall be construed as limiting the common law right of access to a government record, including criminal investigatory records of a law enforcement agency." N.J.S.A. 47:1A-8; North Jersey Media Group Inc. v. State, Dept. of Pers., 389 N.J. Super. 527, 537 (Ch. Div. 2006).

Defendant contends that the investigation is ongoing and, therefore, even if the Court were to conclude that these were "government records" they are not subject to OPRA.

In support of that contention, Defendant provides the certification of Leonardo V. Rinaldi, Esq. of the Hudson County Prosecutor's office. Mr. Rinaldi states that the matter is in the pre-indictment stage and that it has not, as of yet, been presented to the Grand Jury. Mr. Rinaldi certifies that "[c]ompelling the State to provide investigation reports while the criminal prosecution of Ashley Hulsc is still in the pre-indictment stage would compromise and prejudice the prosecution of this matter by jeopardizing any ongoing developments in the criminal prosecution."

Based on the certification of Mr. Rinaldi, the Court finds that there is an ongoing investigation and that release of the documents sought would be inimical to the public interest and a bona fide law enforcement purpose. Additionally, the Court finds that the records were not subject to disclosure prior to the investigation, as the creation of the records was done during the Sherriff's investigation, which became the prosecutor's investigation.

Therefore, even if the documents were deemed to be "government records" they would not be subject to disclosure at this time.

III. The Video Tape

Plaintiff seeks surveillance camera footage from a public building.

For the reasons already stated with respect to the incident reports, the video tape footage shall not be disclosed at this time as the Court finds it is not a "government record." Specifically, there is no law advanced to the Court that requires surveillance footage to be made, maintained or kept on file such that it should be treated as a government record.

Even if the video tape was deemed to be a "government record," it clearly pertains to an ongoing criminal investigation that is underway in the Prosecutor's Office regarding the incident.

Defendant also specifically argues that N.J.S.A. 47:1A-1.1 exempts:

emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein; [and]

security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software

Defendant initially submitted a certification of Undersheriff Andrew Conti, who stated that the camera in question is disguised to blend in with the features of the building. Mr. Conti asserted that it is his opinion that if the footage were released, individuals would know how to approach the Family Services Office without being seen by camera.

Plaintiff asserted that Mr. Conti's certification is a net opinion, because it lacks supporting data and is purely speculative. Koruba v. Am. Honda Motor Co., 396 N.J. Super. 517, 525 (App. Div. 2007); Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App. Div. 2002).

Plaintiff argued that Mr. Conti's "personal knowledge" is insufficient to render the opinion and that there is no indication Mr. Conti is a specialist in building security or video surveillance. Moreover, Plaintiff indicates that Mr. Conti has only opined that there would be a "negative impact" on the ability to provide security rather than articulating the standard required by N.J.S.A. 47:1A-1.1, which is a "risk to the safety of persons, property, electronic data or software."

The Court agrees that Mr. Conti's first certification did not explain the "why and wherefore" of his opinion and only asserted his opinion on the possibility that disclosure would impair security measures. That certification is, therefore, a net opinion. Rosenberg, supra.

However, in connection with the Court's in-camera review of the surveillance footage, a second certification was submitted which stated that there have been past incidents of violence and threats of physical harm at areas covered by the camera. Because the area is accessible 24 hours a day, according to Mr. Conti, there is a risk to individuals who work at the facility that someone may lay in wait outside the view of the camera in an attempt to harm them.

Based on Undersheriff Conti's second certification, and the Court's in-camera review of the surveillance tape, the Court finds that the disclosure of the location of the camera, and the scope of its coverage, would create a risk to the safety of persons at the facility and also jeopardize the security of the building.

Therefore, Plaintiff's request for disclosure of the video tape is DENIED.

IV. Common Law Right of Access

Under the common law, a broader class of documents are available than what is available under OPRA, albeit on a "qualified basis." Daily Journal v. Police Dep't of Vineland, 351 N.J. Super. 110, 122 (App. Div.) certif. denied, 174 N.J. 364 (2002). Records available for inspection

are "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." Ibid. (internal citations omitted).

It is the requestor who bears the burden of demonstrating entitlement to public documents under the common law. Home News v. State Department of Health, 144 N.J. 446, 454-55 (1996).

The common law right of access to public records is not absolute. There is a two prong standard to determine if the entity must comply with a citizen's request for records. Ibid. First, the requestor must have standing, and establish an interest in the subject of the material. The interest may be as 'one citizen or taxpayer out of many, concerned with a public problem or issue.' Id., supra, 141 N.J. at 71 (quoting Irval Realty Inc. v. Board of Public Utility Com., 61 N.J. 366, 372 (1972)). Second, the interest in public records must be balanced against the public entity's interest maintaining confidentiality. Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35, 46 (1995). This standard is flexible. Loigman v. Kimmelman, 102 N.J. at 98, 103 (1986). In weighing the interests, the Supreme Court has instructed trial courts that the following factors may be considered:

- 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 decision making will be chilled by disclosure;
- 4) the degree to which the information sought includes factual data as opposed to evaluative reports of policy makers;
- 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 individuals' asserted need for the materials.

Loigman v. Kimmelman, 102 N.J. at 113. Further, "the trial court must examine each document individually and make factual findings with regard to why [a party's] interest in disclosure is or is not outweighed by [the State's] interest in non-disclosure." Keddie v. Rutgers, 148 N.J. 36, 50 (1997).

It is clear that the incident reports are subject to release under the common law as documents generated by a public official. Moreover, as 9-1-1 tapes generated by law enforcement are available under the common law, the Court finds that video tapes generated by law enforcement should be treated similarly. See Asbury Park Press v. Lakewood Twp. Police Dep't., 354 N.J. Super. 146, 163 (Law Div. 2002)

Plaintiff argues that the Court should find that the factors articulated in Loigman, supra, weigh in favor of disclosure because he reports on the use of force and, if force was used appropriately, it may show that the officer acted reasonably under the circumstances. Plaintiff argues that Defendants have not disclosed any factor weighing against disclosure, as the criminal investigation is now closed. See Shuttleworth v. City of Camden, 258 N.J. Super. 573, 586 (App. Div. 1992).

Defendant argues that its interest in keeping the material confidential outweighs the interests in production to Plaintiff.

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." Loigman v. Kimmelman, 102 N.J. 98, 112 (1986).

Notably, the Appellate Division has stated that "[w]hile there is a real need to deny access where there is an ongoing law enforcement investigation, or where the protection of witness information or a witness's identity is at stake, the same values do not survive a balancing after the investigation is closed." Shuttleworth v. City of Camden, 258 N.J. Super. 573, 585 (App. Div. 1992). For example, in Courier News, supra, the court explicitly rejected an argument by a defendant that would "seal every government record associated with a criminal investigation until the trial has been completed and all potential appeals have been exhausted."

However, this is not a request to seal records until trial is completed and appeals exhausted. As noted supra, Mr. Rinaldi, on behalf of the Hudson County Prosecutor, certifies that the matter is in the pre-indictment stage and that it has not, as of yet, been presented to the Grand Jury. Moreover, he certified that production at this "stage would compromise and prejudice the prosecution of this matter by jeopardizing any ongoing developments in the criminal prosecution."

Based on the certification of Mr. Rinaldi, the Court finds that there is an ongoing investigation and that release of the incident reports and surveillance footage sought would be inimical to the public interest as such release would be prejudicial to a criminal investigation.

Here, the first five Logiman factors carry little, if any, weight as their relevance is questionable. It is the sixth enumerated criterion that requires the Court to deny access.

The Prosecutor has certified that the production of the incident reports at this time would compromise and prejudice an ongoing criminal investigation. Plaintiff has not demonstrated that his interest in making the information public, at this time, outweighs the Prosecutor's interest in keeping the information confidential.

With respect to the video tapes, they are also part of the same ongoing criminal investigation. In addition, the Undersheriff has certified that their release would create a risk to the safety of persons at the property and jeopardize the security of the building.

Therefore, as of this point in time, the Court finds that Plaintiff's interest in the incident reports and video tape does not outweigh that of the State. This does not mean that the record shall be sealed forever. Shuttleworth v. City of Camden, 258 N.J. Super. 573, 585 (App. Div. 1992). However, at present, no disclosure may be ordered.

Therefore, access under the common law is also DENIED.

Since the Plaintiff's OPRA request was rightfully denied by Defendant, the Plaintiff cannot be considered as the prevailing party and is not entitled to attorney's fees.