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NELSON C. JOHNSON, J.S.C.

SUPERIOR COURT OF NEW JERSEY

NELSON C. JOHNSON, J.S.C.

1201 Bacharach Boulevard
Atlantic City, NJ 08401-4527
(609) 594-3384

MEMORANDUM OF DECISION ON MOTION

Pursuant to Rule 1:6-2(f)

TO: Daniel J. Gallagher, Esquire
Miller, Gallagher & Grimley
26 South Pennsylvania Ave.
Suite 201
Atlantic City, NJ 08401
Attorney for Plaintiff, City of Wildwood

Barbara Bakley-Marino, Esquire
Office of Cape May County Counsel
4 Moore Road, DN-104
Cape May Court House, New Jersey 08210
Attorney for Defendant, County of Cape May

Robert L. Taylor, Esquire
Cape May County Prosecutor
4 Moore Road, DN-10
Cape May Court House, New Jersey 08210
Attorney for Defendant, Cape May County Prosecutor's Office

Justin R. White, Esquire
Basile & Testa
424 Landis Avenue
Vineland, New Jersey 08360
Attorney for Sgt. Robert N. Regalbuto

RE: City of Wildwood vs. Cape May County

DOCKET NO. CPM-L-656-10

NATURE OF MOTION(S): Obtain Videotape under Open Public Records Act

HAVING CAREFULLY REVIEWED THE MOVING PAPERS AND ANY RESPONSE FILED, I HAVE RULED ON THE ABOVE CAPTIONED MOTION(S) AS FOLLOWS:

The City of Wildwood ("City") seeks Summary Judgment on the pleadings against Cape May County Prosecutor's Office ("Prosecutor") and an Order requesting the release of a video under the Open Public Records Act ("OPRA") and/or the Common Law Right of Access to Public Records Doctrine. Wildwood also seeks an award of Attorney's Fees and costs if it is a prevailing party under N.J.S.A. 47:1A-6.

Findings of Fact

1. The City seeks a video purportedly depicting an incident on December 10, 2000 involving the arrest of an individual known as B.L.C. by members of the Wildwood Police Department, (“P.D.”) including Sgt. Robert N. Regalbuto. (“Regalbuto”) A portion of this confrontation was memorialized on video.
2. The incident on December 10, 2000 had been investigated by both the P.D. and the Prosecutor’s office. Both agencies reviewed the video. No disciplinary action was taken against Regalbuto.
3. No Complaint or charges of any kind were brought against Regalbuto as a result of the incident on December 10, 2000.
4. On July 1, 2010, the City’s labor counsel wrote to the Prosecutor Robert Taylor requesting the subject video. The City wanted to review the tape because of the alleged incidents of police abuse claimed by the Appellate attorneys representing David Romeo. Mr. Romeo was a former Sergeant with the P.D. who was convicted of official misconduct. The Appellate attorneys representing Mr. Romeo are purportedly claiming selective enforcement and prosecution of their client. (Exhibit A, Prosecutor’s pleadings).
5. The Prosecutor declined the aforesaid request and indicated that if Mr. Romeo’s attorneys wanted the video they could seek it by motion in the Criminal Part of the Superior Court of Cape May County. (See Exhibit B, Prosecutor’s pleadings).
6. Thereafter, the City made an OPRA request for the video for a new reason, namely that the City wanted to exercise its oversight authority under N.J.S.A. 40A:14-118.
NOTE: The video was the only item requested by the City in furtherance of its oversight duties.
7. The City’s OPRA request was denied by the Prosecutor on September 17, 2010, on the basis that it was a “criminal investigatory record” pursuant to N.J.S.A. 47:1A-1. The Prosecutor instructed the Chief of the P.D. not to release the video without the Prosecutor’s written approval. (See Exhibit C, Prosecutor’s pleadings).

8. Thereafter, the Prosecutor offered the City and Mayor the opportunity to view the video at the Prosecutor's office and exercise their oversight authority pursuant to N.J.S.A. 40A:14-118.
9. On September 20, 2010, the Mayor, as Commissioner of Public Safety, ordered the Chief of Police to disregard the Prosecutor's directive and deliver the video to him. (See Exhibit D, Prosecutor's pleadings). Thereafter, the Prosecutor's Office assumed physical control of the video now in the Prosecutor's evidence room.
10. In previous litigation against the City and Regalbuto, the Mayor (then a police officer and Plaintiff) sought access to this same video as evidence in his suit for damages against the City.
11. The Attorney General's office has recently assumed control of the David Romeo matter from the Prosecutor. (See Exhibit E, Prosecutor's pleadings). Mr. Romeo's case is an ongoing case with the Appellate Division of New Jersey and the potential exists that it may be remanded back to the Trial Court.
12. The Attorney General Guidelines on Internal Affairs ("A.G. Guidelines") state that in many law enforcement agencies, certain areas have video surveillance for security reasons, such as lobbies, cellblocks, and sally ports. Videos obtained from these sources are applicable to internal investigations. (See Exhibit 3, pg 11-32).
13. The A.G. Guidelines also state that an internal affairs investigation file should contain the entire work product of the investigation, regardless of the author. This includes investigators' reports, transcripts of statements, and copies of all documents relevant to the investigation. The file should also include all related material from other department incidents as may be applicable. (See Exhibit 3, pg 11-45).
14. The A.G. Guidelines also provide that when an internal affairs investigation results in the filing of criminal charges, the internal affairs file shall be made available to the County Prosecutor's office. In these cases, the P.D. must follow the instructions of the County Prosecutor. (See Exhibit 3, pg 11-45).
15. Executive Order No. 69 signed by former Governor Christine T. Whitman on May 15, 1997 provides that "The following records shall not be deemed to be public records subject to inspection and examination ... photographs and other similar

criminal investigation record that are required to be made, maintained or kept by any State or local governmental agency.”

Parties' Contentions

The City contends that the video is not exempt under OPRA because it is not a criminal investigatory record. The City relies upon O’Shea vs. Township of West Milford, 410 N.J. Super 371 (App. Div., 2009). In O’Shea, the Use of Force Reports that were required to be issued were required to be made in accordance with the Attorney General’s “Use Of Force Policy”. Wildwood contends that there is a similar A.G. guideline which requires that the video here be maintained because it is an internal affairs investigation against Regalbuto. The City argues that the A.G.’s guidelines are required under New Jersey law to be followed by law enforcement agencies. Therefore, the City argues that the first part of the definition of a criminal investigatory record is not met.

Moreover, the City contends that the case of Serrano vs. South Brunswick Township, 358 N.J. Super. 352 (App. Div., 2003) applies because the video in that case was not initially a part of the criminal investigation and the question of whether the video was confidential goes to whether it was a part of a criminal investigation at the time it was made. The City argues that the fact that the Prosecutor later determined that the video had some connection to Romeo’s case does not make it part of a criminal investigatory record subject to disclosure. The City also relies upon the language of N.J.S.A. 47:1A-3(a) for the argument that since the video was initially open for public inspection before the investigation occurred, the Prosecutor’s office should not withhold the video because it was not created as a part of a criminal investigation. Therefore, the City argues that part two of the definition of a criminal investigatory record is not met.

The City also contends that it is entitled to the video under the common law right of access to government records. It argues that it has a sufficient interest in the video to invoke the balancing test because of N.J.S.A. 40A:14-118. This grants city officials the authority to review and supervise its police department. Finally, at oral argument, the City’s attorney acknowledged

that the City's refusal to view the video at the Prosecutor's office was attributable to a "power struggle".

In opposition, the Prosecutor contends that the video meets the definition of a criminal investigatory record under O'Shea, because there are no laws or regulations that required the P.D. to videotape activity in their booking room or maintain the tape after it was made. The Prosecutor also argues that O'Shea is distinguishable because the Court there made the point that its ruling was based upon the absence of a factual showing that any of the use of force reports pertained to an actual criminal investigation. The Prosecutor believes that this video is a part of a criminal investigation because it was part of a criminal investigation in December of 2000 and, because the Mayor sought to give it to David Romeo's attorney to assist Mr. Romeo in his selective enforcement defense.

Moreover, the Prosecutor argues that the City should not be able to access the video under the Common Law Right of Access Doctrine because there are limitations and exceptions provided in Executive Order No. 69 of the Governor. The Prosecutor contends that because the City was given an opportunity to view the video, its oversight interest under N.J.S.A. 40A:14-118 can be met by viewing the video. The Prosecutor also argues that the City's citation of N.J.S.A. 47:1A-3(a) does not apply because the video of the booking room was not open for public inspection, examination, or copying before the criminal investigation occurred. Finally, the Prosecutor cites to Executive Order No. 69 to argue that the video is a type of criminal investigation record that should not be deemed to be a public record subject to inspection and examination.

Finally, Regalbuto objects to release of the video. He contends that given the length of time that has elapsed 10(+) years, the City's request has nothing to do with good faith oversight, but rather is the pursuit of the Mayor's personal agenda.

Discussion

Because neither party disputes the video is a government record under OPRA, the Court's inquiry begins with whether this video is exempt as a criminal investigatory record. N.J.S.A. 47:1A-1.1 declares, "[a] government record shall not include" various categories of "information which [are] deemed to be confidential." One such category is "criminal investigatory records," 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." O'Shea v. Township of West Milford, 410 N.J. Super. 371, 380 (App. Div., 2009) (citing N.J.S.A. 47:1A-1.1). The Defendant must meet both prongs of the definition of "criminal investigatory reports" for the documents to be inaccessible to plaintiff under N.J.S.A. 47:1A-1.1. Id. For an individual to gain access to a broader class of records under the common law, a requestor is governed by a two-prong test: that person "must establish an interest in the subject matter of the material;" and, the requestor's right to access "must be balanced against the State's interest in preventing disclosure." Id. at 387 (citing Mason v. City of Hoboken, 196 N.J. 51, 67-68, 951 (2008) (quoting Keddie v. Rutgers, 148 N.J. 36, 50, (1997))).

The Supreme Court of New Jersey has established that the court engaging in the required balancing test may consider: (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 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 v. Kimmelman, 102 N.J. 98, 113, (1986).

Analysis

This particular case presents the unique issue of a public entity seeking the return of a video created by its own police department that is in the possession of the Prosecutor's office. Here, the video in question meets the definition of a criminal investigatory record under OPRA, because there is no specific law or regulation that requires the P.D. to videotape the activity in their booking room or maintain the video after it was made.

The video was evidence considered in the investigation of alleged criminal conduct by Regalbuto. By operation of New Jersey law, the Prosecutor's office controls access to the

disposition of evidence such as the video. Additionally, the destruction of evidence is controlled by law and the Prosecutor has responsibility for proper handling of evidence. Merely because the City at one point purchased the blank video and the equipment to make a video, does not give the City authority to control any information or evidence on the video once it has been tendered to the Prosecutor's office as part of a criminal investigatory record.

The City has not provided an Affidavit or Certification based upon personal knowledge that there was a citizen complaint regarding the incident on or about December 10, 2000. Rather, the City makes unsupported assertions by counsel claiming entitlement to the video. Moreover, the City's initial request and use of this video may be linked to the current case and investigation involving former officer David Romeo. Mr. Romeo's case was recently turned over to the Attorney General's office and is currently before the Appellate Division, with the potential for it to be remanded back to the Trial Court. This video was also a part of another criminal investigation of Regalbuto regarding his confrontation with B.L.C. Thus, the video meets the definition of a criminal investigatory record and is inaccessible by Wildwood under OPRA.

Although this video is a common law record and the City has expressed an interest in reviewing it in connection with its use of force policy, the Prosecutor's (now the Attorney General's office) interest in preventing disclosure of this tape outweighs the City's interest in possessing the video. That is so because the City has made no effort to show *why* or *how* the video is critical to their oversight.

In finding that the Attorney General's interest outweighs the City's, this Court looks to the factors laid out by the New Jersey Supreme Court in Loigman. This Court finds that given the date of the occurrence on the video, i.e., ten(+) years ago, that release of the video to the City serves little-to-no public purpose. The Court is mindful of the fact that in earlier litigation to which he was a party as the Plaintiff, the Mayor sought access to the video to support his various claims against the City. Some time later, apparently at the instruction of the Mayor, the City's Labor Council sought access to the video in connection with the Romeo criminal proceeding.

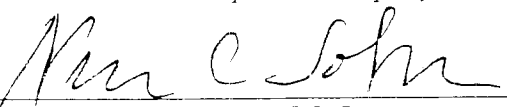
The Court acknowledges the Mayor's persistence but there is nothing in the City's pleadings which demonstrates that the incidents of ten years ago, purportedly captured on the video, are relevant to the City's needs today.

Ten years in the life of any local government can be an eternity. Statutes and Ordinances are adopted and repealed, and elected officials and employees come and go. Absent a detailed proffer of how the video is germane to circumstances in the City today and needed by the City's officials in exercising their duties, there simply isn't sufficient weight to the City's position to tip the scales in its favor. Further, this Court finds the City's attempt to review the matter involving Regalbuto and B.L.C. has the potential for mischief. The investigation into Regalbuto did not result in any disciplinary action or criminal charges brought against him. Any change of a decision regarding Regalbuto's investigation would second guess previous decision makers.

Finally, and more to the point regarding the City's need to exercise oversight, the City was given an opportunity to view the video and to examine its use of force policy in furtherance of its authority under N.J.S.A. 40A:14-118. That offer was rejected and this lawsuit followed. Such truculence by the City in response to a good faith offer of cooperation by the Prosecutor is most disappointing. An offer made in the spirit of comity warrants a more professional response.

There is no reason to believe that the City could not have properly evaluated the contents of the video consistent with its duties by viewing it at the Prosecutor's office. The Court encourages the Prosecutor to renew his offer and make the video available for review consistent with the City's authority under N.J.S.A. 40A:14-118. Hopefully, the City will accept the offer and avoid the need for continuing further litigation between public agencies.

The City's applications to this Court requesting return of the video via an Order to Show Cause and Summary Judgment is hereby DENIED. An appropriate Order has been entered. Conformed copies accompany this Memorandum of Decision.


NELSON C. JOHNSON, J.S.C.

Date of Decision: 4/20/11