

Superior Court of New Jersey



CHAMBERS OF
JUDGE VINCENT J. GRASSO
ASSIGNMENT JUDGE
(732)-929-2176

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

May 21, 2014

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Re: John Paff v. Township of Little Egg Harbor
OCN-L-949-14 PW

Dear Counsel:

The matter before the court comes by way of an order to show cause and verified complaint filed by plaintiff John Paff, alleging that defendant Township of Little Egg Harbor (Township) has violated New Jersey's Open Public Records Act, N.J.S.A. 47:1A-1 to -13 (OPRA) and the common law right of access. At issue is whether the Township violated OPRA when it denied Paff's request for telephone recordings, and radio transmissions following the dispatch of police officers to a township residence that later give rise to an internal affairs investigation.

Background

By way of background, the record contains an e-mail sent by Paff on Tuesday, February 18, 2014 at 6:32 p.m. addressed to Detective Kenneth Schilling of the Little Egg Harbor Police

Department. In the e-mail, Paff describes an incident of police harassment and similar misconduct that allegedly occurred that same day around 5 p.m. Paff further asks Schilling to treat his e-mail as an internal affairs complaint and to initiate an investigation into the matter.

Paff's verified complaint alleges that he then requested certain documents from the Township clerk Diana McCracken. The record discloses that Paff requested these documents by e-mail dated February 18, 2014 at 6:36 p.m.—4 minutes after plaintiff e-mailed Schilling to complain of the alleged police misconduct. The documents request read:

On February 18, 2014, at about 4:40 to 5:10 p.m., Little Egg Harbor Police Officer Christopher G. Costa, accompanied by five other officers, visited the home of Edmund Costa at 110 Jefferson Lane and then 114 Jefferson Lane, both addresses being in Little Egg Harbor. I would like:

- a) The entry from the CAD system showing reflecting this dispatch.
- b) All police incident reports arising out of these visits.
- c) Audio of all telephone calls and radio transmission regarding these visits.

Thank you

McCracken's certification forms part of the record here. She certifies that she received Paff's documents request on February 19, 2014 and that she forwarded it to the police records clerk, Joy A. MacDonald that same day. She further certifies that MacDonald typically handles similar requests as well as the redaction of confidential information. Paff's complaint alleges that MacDonald telephoned him to tell him that his records request was denied pending the completion of an internal affairs investigation. The record does not contain any certification by MacDonald.

McCracken certifies that on February 25, 2014, Paff's attorney wrote her a letter. That letter forms part of the record. In the letter, Paff's counsel asks for McCracken to "respond to Mr. Paff's record request in writing, as required by Section 5g of OPRA." Additionally, counsel requested that McCracken provide the specific basis for her denial in writing. Finally, counsel

urged McCracken to comply with Paff's OPRA request, stating that because the records were created prior to any internal affairs investigation, they did not constitute investigative records.

McCracken also certifies that on April 22, 2014, she responded to Paff's request by letter.

That letter also forms part of this record. It reads:

This letter is a written response to your OPRA request of [February 18, 2014].

1. Copy of CAD Repost—copy provided to you by Police records.
2. Police Incident reports—no records responsive to request.
3. Audio of telephone calls and radio transmissions—the records are denied because the report is part of an internal affairs investigation and is required to be maintained and confidential pursuant to the IAPP.

Additionally, the record contains a certification by Lieutenant Troy Bezak, supervisor of the Township Police Department Internal Affairs Unit. In substance, it confirms that Paff filed an internal affairs complaint on February 18, 2014. It states that on February 19, 2014, the Police Department records clerks informed Bezak of the OPRA records request. Bezak certifies that no police incident reports were made in response to the incident that allegedly transpired on February 18, 2014 because they “are typically not written when officers respond to neighbor disputes and no arrests are made or incidents occur.” However, Bezak certifies that the Calls for Service, or CAD entries, were available for Paff to inspect. However, he denied Paff access to the audio recordings, explaining to Paff that, “all other records involved in an internal affairs investigation are confidential until the conclusion of the investigation.” Bezak certifies that the internal affairs investigation concluded on April 9, 2014. Seven days after the conclusion of the investigation, Sgt. James Hawkins transmitted reports and summaries of the findings to the officer allegedly involved in the incident, the prosecutor's office, and the Attorney General's Office. Finally, Bezak certifies that on April 22, 2014, Hawkins sent Paff the “Police Radio

Transmission” he had originally requested because the record was no longer considered confidential.

Findings

Paff filed this verified complaint on April 3, 2014 seeking police incident reports and audio recordings of telephone calls and radio transmissions made by Township police officers after an alleged incident on February 18, 2014. The record discloses that the police did not create any incidents reports for the alleged February 18, 2014 incident. The record also discloses that the Township furnished Paff with the CAD entries he requested as part of his original request. The only issue, therefore is whether the Township properly denied Paff access to the audio recordings of the February 18, 2014 incident.

Count one of the complaint pleads that “[t]he Township violated OPRA by having a police clerk/typist, rather than the municipal clerk, deny Paff’s record request.” Count one seeks declaratory relief, seeking both a declaration that: (1) OPRA precludes a Township clerk from delegating his or her custodial duties to determine OPRA record requests; and (2) Township Code § 276-1B (Section 276-1B) violates OPRA because it authorize the clerk to delegate custodial duties to determine record requests. At oral argument, Paff voluntarily dismissed count one of the complaint after he accepted Township counsel’s representation that going forward, the Township would ensure that its custodian gave the final say in responding to OPRA requests. By stipulation of counsel, the court dismisses count one.

Count two seeks a declaratory judgment that the Township’s denial of access to the requested police incident reports and the audio recordings violated OPRA. Count two also seeks an on order compelling production of these documents and attorney’s fees. Finally, count three pleads a cause of action arising under the common law right of access, alleging that “[t]he

public's need for access to the requested records is greater than the Township's." The court finds that because the Township has given Paff the records he requested, part of the second count and all of the third count of Paff's complaint requesting production of the same documents are now moot.

The court only addresses count two's request for a declaratory judgment that the Township violated OPRA by denying Paff access to the audio recordings. In doing so, the court also addresses the Township's argument that it properly denied Paff's documents request because the Attorney General's Internal Affairs Police and Procedures Guidelines (IAPP) exempted the audio recordings from disclosure. At oral argument, the parties stipulated that no facts are in dispute. Accordingly, the court summarily disposes of count two of plaintiff's complaint arising under OPRA. N.J.S.A. 47:1A-6.

Because count two arises under OPRA, the court finds it necessary to detail its statutory framework. 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 Cnty. 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.

The court finds that the Township violated OPRA when it denied Paff’s document request for the audio recordings of the February 18, 2014 radio transmissions.

See N.J.S.A. 47:1A-1.1 (providing that audio recordings constitute government records). 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 v. West Milford, 410 N.J. Super. 371, 378–86 (App. Div. 2009) (distinguishing “Use of Force” reports from allegations of excessive force and work product of resulting internal affairs investigation). In sum, OPRA does not allow an internal affairs investigation to “reach back” in time to render otherwise available government records confidential, even though those documents may prompt the internal affairs investigation.

Under these principles of law, the court finds that the audio recordings sought by Paff are government records which the Township’s custodian should have made available to Paff after he requested them. With the Township’s initial denial of Paff’s access to these government records, the court finds that the Township violated OPRA and finds in favor of plaintiff as to count two.

The court briefly addresses the arguments raised by the Township. As Paff correctly points out, this court has already addressed the arguments raised by the Township in another opinion addressing a substantially identical documents request. Ganzweig v. Lakewood, No. OCN-L-2392-13 (Law Div. Sept. 26, 2013) (slip op. at 5–7). The court explained that even though the IAPP might have mandated the acquisition of certain requested records, they were nevertheless accessible via an OPRA request because the records were created prior to the internal affairs investigation and were not the work-product of the investigation. Ibid.

Similarly, the court finds defendant’s reliance on Jones v. Paulsboro Police Dept., No. GLO-L-1360-11 (Law Div. Jan. 12, 2012) (slip op. at 8–11) unpersuasive. There, the court found that the documents requested in that case fell under OPRA’s “criminal investigatory record” exception. Id. at 11. The court finds nothing in the record here to suggest that the audio recordings requested by Paff could fall within that exception because nothing in the record suggest that they are records “not required by law to be made, maintained or kept on file” and

“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.

Finally, the court briefly addresses the Township’s argument that McCracken properly relied on the GRC decision in Blaustein and the unpublished Jones case. As a general rule, “[n]o unpublished opinion shall constitute precedent or be binding upon any court,” except that a court may refer to its own cases for consistency. R. 1:36-3. Moreover, OPRA provides that a decision by the GRC has no precedential value. N.J.S.A. 47:1A-7(e); see O’Shea, supra, 410 N.J. Super. at 381 (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 Township should not have relied on Blaustein v. Lakewood Police Department, GRC Complaint No. 2011-102 (June 26, 2012) or Jones as a justification for denying Paff access to government records.

To summarize, the court dismisses count one. The court finds for Paff as to count two because the court finds that the Township denied him access to the audio recordings he requested on February 18, 2014. The court dismisses count three arising under the common law right of access as moot. The court will entertain Paff’s further application for attorney’s fees, should he wish to apply for them. Mr. Gutman is to prepare the order.

Respectfully submitted,


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

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