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Attorney for Plaintiff John Paff

JOHN PAFF,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION, CIVIL PART
Plaintiff,	:	OCEAN COUNTY
	:	DOCKET NO.
v.	:	
	:	
OCEAN COUNTY PROSECUTOR'S	:	Civil Action
OFFICE,	:	
	:	
Defendant.	:	
	:	VERIFIED COMPLAINT

Plaintiff John Paff, by way of complaint against the Ocean County's Prosecutor's Office, states as follows:

1. This is an action under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-6, and the common law right of access to public records, seeking public access to a videotape.
2. John Paff is an individual residing at 1605 Amwell Road, Somerset, New Jersey.
3. The Prosecutor's Office, located in Ocean County, is a political subdivision of the State of New Jersey.
4. John Paff requested the following records from the Ocean County Prosecutor's Office pursuant to the Open Public Records Act and the common law right of access to public records:

Background:

I read in the April 12, 2014 Asbury Park Press that Cpl. Justine Cherry of the Tuckerton Police was charged with official misconduct and aggravated assault after an incident involving a police dog and a woman in Barnegat. I understand that the police dog's interaction with the woman may have been captured by a video camera that is owned or under the control of Barnegat Township.

Record Requested :

1. I would like a copy of the video of this incident.
2. I would like copies of any summonses issued against the woman who was bitten by the dog in this incident. (Paff Cert., Page 1a.)
5. The Prosecutor's Office denied access to the summons on the grounds that it did not possess them. (Paff Cert., Page 3a.)
6. The Prosecutor's Office denied access to the video recording "as it involves a criminal investigation in progress, pursuant to N.J.S.A. 47:1A-3 as well as an internal affairs matter, pursuant to the New Jersey Attorney General's Guidelines on Internal Affairs Policy and Procedures." (Paff Cert., Page 3a.)
7. Mr. Paff's attorney wrote the Prosecutor's Office noting that OPRA Section 3a regarding ongoing criminal investigations expressly states "that 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." (Paff Cert., Page 4a.)
8. Mr. Paff's attorney also noted regarding internal affairs investigations that Ocean County OPRA Judge Vincent J. Grasso had recently, ruled that the OPRA exemption for internal affairs investigation does not apply to records that were public before the internal affairs investigation began. (Paff Cert., Page 4a.) Mr. Paff's attorney enclosed a copy of Judge Grasso's May 21, 2014 decision in John Paff v. Township of Little Egg Harbor, OCN-L-949-14 PW. (Paff Cert., Pages 4a-12a.)
9. The Prosecutor's Office responded to John Paff's attorney by disclosing the requested summons. (Paff Cert., Pages 13a-18a.)
10. As regards Mr. Paff's request for the videotape, the Prosecutor's Office repeated it

denial of access on the same grounds it previously relied upon. It did not respond regarding Mr. Paff's attorney's quotation from OPRA Section 3a or citation of the Little Eagle Harbor decision. (Paff Cert., Page 13a.)

**First Count
(Denial of Open Public Records Act Access)**

10. Plaintiff repeats the allegations stated above as if set forth at length herein.

11. The Defendant Prosecutor's Office's denial of access to the videotape violated OPRA.

WHEREFORE, Plaintiff Paff demands judgment against the Prosecutor's Office as follows:

A. A declaration that the Prosecutor's denial of access to the videotape violated OPRA.

B. An order that the Prosecutor's Office grant Paff access to the videotape;

C. An award of costs and attorney's fees; and

D. Such other relief as the Court deems equitable and just.

**Second Count
(Denial of Common Law Access)**

12. Plaintiff repeats the allegations stated above as if set forth at length herein.

13. The public's need for access to the requested videotape of alleged police misconduct is greater than the Prosecutor's Office's need for secrecy.

14. The Defendant Prosecutor's Office's denial of access to the requested videotape violated the common law right of access to public records.

WHEREFORE, Plaintiff Paff demands judgment against Defendant Prosecutor's Office as follows:

A. A declaration that the Prosecutor's denial of access to the videotape violated the common law right of access to public records;

- B. An order that the Prosecutor's Office grant Paff access to the videotape;
- C. An award of costs and attorney's fees; and
- D. Such other relief as the Court deems equitable and just.

Respectfully submitted,

June 5 2014

Richard Gutman

Certification Pursuant to R. 4:25-4

Plaintiff designates Richard Gutman as trial counsel in this action.

Certification Pursuant to R. 4:69-4

There are no necessary transcripts of local agency proceedings in the cause.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

June 5, 2014

Richard Gutman

JOHN PAFF,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION, CIVIL PART
Plaintiff,	:	OCEAN COUNTY
	:	DOCKET NO.
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OCEAN COUNTY PROSECUTOR'S	:	Civil Action
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Brief of Plaintiff John Paff

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June 8, 2014

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STATEMENT OF FACTS

John Paff requested the following records from the Ocean County Prosecutor's Office pursuant to the Open Public Records Act and the common law right of access to public records:

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I read in the April 12, 2014 Asbury Park Press that Cpl. Justine Cherry of the Tuckerton Police was charged with official misconduct and aggravated assault after an incident involving a police dog and a woman in Barnegat. I understand that the police dog's interaction with the woman may have been captured by a video camera that is owned or under the control of Barnegat Township.

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Mr. Paff's attorney wrote the Prosecutor's Office noting that OPRA Section 3a regarding ongoing criminal investigations expressly states "that 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." (Paff Cert., Page 4a.)

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Grasso's May 21, 2014 decision in Paff v. Township of Little Egg Harbor, OCN-L-949-14 PW. (Paff Cert., Pages 4a-12a.)

The Prosecutor's Office responded to John Paff's attorney by disclosing the requested summons. (Paff Cert., Pages 13a-18a.) As regards Mr. Paff's request for the videotape, the Prosecutor's Office repeated its denial of access on the same grounds it previously relied upon. It did not respond regarding Mr. Paff's attorney's quotation from OPRA Section 3a or citation of the Little Egg Harbor decision. (Paff Cert., Page 13a.)

ARGUMENT

I. Paff Has an OPRA Right to the Requested Videotape

A. OPRA Section 3a, Ongoing Investigation Exemption, Does Not Apply to the Requested Videotape Because That Exemption Expressly Excludes Records That Were Public Before the Investigation Began

In both its May 28 and June 2 letters, the Ocean County Prosecutor's Office denied access to the videotape on the grounds that it "involves a criminal investigation in progress, pursuant to N.J.S.A. 47:1A-3." (Paff Cert., Pages 3a,13a.) That exemption does not apply to the factual situation here because N.J.S.A. 47:1A-3a expressly excludes from the ongoing investigation exemption records that were created prior to the investigation. Those records do not expose the investigation.

The public agency has the burden of proving that a particular OPRA exemption applies to the requested record. N.J.S.A. 47:1A-6. Thus, the Prosecutor's Office has the burden of disproving the facts in this case as requestor John Paff understands them, which are the following: On January 29, 2014, Tuckerton Police Corporal Justin Cherry attempted unsuccessfully to stop a vehicle. Instead of stopping, the vehicle drove to the Barnegat municipal building parking lot. (Paff Cert., Page 14a.) Corporal Justin Cherry used a police dog to attack and bite the driver, a

57-year-old woman, Wendy Tucker. The dog attack was filmed by a security video camera on the outside of the Barnegat municipal building. Corporal Cherry was later arrested and charged with aggravated assault for the dog attack and official misconduct for falsifying his police reports. (Paff Cert., Page 1a.) He also became the subject of an internal affairs investigation. (Paff Cert., Page 3a.) Ms. Tucker was charged with attempting to elude arrest, reckless driving, failure to give proper signal, driving while suspended and driving without insurance. (Paff Cert., Pages 14a-18a.)

Because Corporal Cherry's dog attack against Ms. Tucker sparked the criminal investigation of Corporal Cherry, the security videotape of the dog attack preceded that criminal investigation. As Mr. Paff's attorney informed the Prosecutor's Office, the OPRA exemption for ongoing investigations expressly states, "that 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-3a. The purpose of OPRA's ongoing investigation exemption is to protect the confidentiality of investigations during the investigations. It does not protect records that pre-existed the investigation and were merely used during the investigation. Unlike investigative records, the disclosure of records that predated the investigation would not reveal the nature of the investigation and therefore their disclosure would not harm the investigation.

Absent OPRA's provision excluding pre-existing records from the ongoing investigation exemption, a public agency could immunize any record from public access merely by investigating that record. Under OPRA, if a public agency investigates the payment of an invoice, the records of the investigation are confidential during the investigation, but the invoice itself remains public. As the Appellate Division has stated, "[a]cceptance of defendant's argument

would seal every government record associated with a criminal investigation until the trial has been completed and all potential appeals have been exhausted. Such a prospect would directly contravene the citizen's right of access to government records embodied in OPRA.” Courier News v. Hunterdon County Prosecutor’s Office, 358 N.J.Super. 373, 381 (App. Div. 2003).

The courts have repeatedly recognized that information that later forms the basis of an investigation does not retroactively become exempt from OPRA’s disclosure requirements. In Serrano v. South Brunswick Township and Middlesex County Prosecutor’s Office, 358 N.J. Super. 352 (App. Div. 2003), an individual made a 911 emergency call to the police. A few hours later a homicide occurred, and the caller was later prosecuted for the homicide. Serrano requested a copy of the 911 police tape, and the Township denied access on the grounds that the police tape was being used in the 911 caller’s ongoing homicide prosecution. Id. at 355. The Appellate Division, however, ruled that the 911 police tape was not exempt as a record of an ongoing investigation because it was created prior to the start of the criminal investigation. Id. at 366.

Similarly, in O’Shea v. Township of West Milford, 410 N.J.Super. 371 (App. Div. 2009), the Township denied access to Use of Force Reports on the grounds, among others, that the reports might later be used in internal affairs investigations or criminal investigations. Id. at 376-77. The trial court rejected the Township’s arguments and the Appellate Division affirmed primarily for the reasons stated by the trial judge. Id. at 376. As the Appellate Division explained, the trial judge,

said that the UFRs at issue did not qualify as criminal investigatory records both because they were not created as part of an investigation and because defendant had merely speculated that the documents sought would ever be used in an investigation.

The judge drew an “analog[y]” between a UFR and

an accident report that a police officer fills out. While [the document] may ultimately at some point become part of a criminal investigation and even a civil lawsuit, it is not done as a criminal investigatory action initially.

* * *

Photos of an accident scene may be looked at as part of . . . a criminal investigation. That doesn't mean they're criminal investigatory records.

The judge's "interpretation of a criminal investigatory record is a record created while a criminal investigation is going on[.]" or "the work product of . . . the people investigating."

As to the internal nature of UFRs, Judge Brogan said:

I understand they certainly can be used internally but that does not, in my opinion, preclude it from being a public record obtainable under OPRA.

[Id. at 378.]

Here, Paff's did not request records describing the criminal investigation of Corporal Cherry. (Paff Cert., Page 1a.) Because the requested videotape was created independent of the criminal investigation, the Prosecutor's Office erred in denying public access.

B. OPRA'S Internal Affairs Investigation Exemption Does Not Apply to the Requested Videotape Because it Was Public Before the Internal Affairs Investigation Began

In addition to the ongoing investigation exemption, the Prosecutor's Office's May 28 and June 2 letters denied access to the videotape on the grounds of the "Attorney General's Guidelines on Internal Affairs Policy and Procedures." (Paff Cert., Pages 3a, 13a.) But as John Paff's lawyer informed the Prosecutor's Office, Judge Vincent J. Grasso has previously held that the OPRA exemption for internal affairs investigations does not apply to records that were public before the internal affairs investigation began. Judge Grasso had based his decision on the published Appellate Division decision, O'Shea v. Township of West Milford, 410 N.J. Supp. 371 (App. Div. 2009), which applied the same reasoning to both the ongoing investigation exemption

and the internal affairs investigation exemption. (Paff Cert., Pages 5a-12a.)

C. Irrespective of the Ongoing Investigation Exemption and the Internal Affairs Investigation Exemption, OPRA Section 3b Expressly Requires Disclosure of Information Regarding an Arrest, Including Police Use of a Weapon

Irrespective of OPRA's ongoing investigation and internal affairs investigation exemptions, the requested videotape is a public record because OPRA expressly requires the public disclosure of information regarding arrests.

OPRA Section 3b expressly states that notwithstanding OPRA's other provisions, "information concerning a criminal investigation shall be available to the public within 24 hours or as soon as practicable, of a request for such 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" (emphasis added). The Attorney General's Use of Force Policy includes "canine physical contact with a subject," in the same category as use of a baton and chemical spraying. (Paff Cert., Page 19a.)

Thus, even if the videotape of the dog attack were a record pertaining to an ongoing criminal investigation under OPRA Section 3a or an internal affairs investigation, it would be a public record under OPRA Section 3b because it depicts the circumstances surrounding the arrest of Wendy Tucker, including a police officer's use of a dog as a weapon.

II. Paff Has a Common Law Right to the Requested Videotape Because the Public's Need for Information Regarding Police Misconduct Outweighs Need for Secrecy

Assuming *arguendo* that the Prosecutor's Office satisfies its burden of proving that the requested videotape is exempt under OPRA, John Paff should be awarded access under the com-

mon law right of access to public records. “Nothing containing in [OPRA] 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. See similar provision at N.J.S.A. 47:1A-1.

The common law right is determined by balancing the requestors’ need for the record versus the government’s need for secrecy. Michelson v. Wyatt, 379 N.J. Super. 611, 624 (App. Div. 2005). The common law interest of the record requestor can be either a personal interest or a public interest. Rosenberg v. State Department of Law and Public Safety, 396 N.J. Super. 565, 578 (App. Div. 2007). “[I]n furtherance of good government the right of interested citizens and taxpayers to inspect public records should be broadly recognized.” Taxpayers Association of Cape May v. Cape May, 2 N.J. Super. 27, 31, (App. Div. 1949). Here, the public’s need for the requested records outweighs any need for secrecy.

The need for public access is considerable. The requested videotape depicts police activity that was the basis for a prosecution of a police corporal for aggravated assault and official misconduct. (Paff Cert., Page 1a.) Police officers play a unique role in society. They have the power to arrest and to use deadly weapons. With such authority comes a critical need for public oversight. For that reason, New Jersey courts have repeatedly applied the common law to grant public access to records of alleged misconduct by police officers. Shuttleworth v. City of Camden, 258 N.J. Super. 573 (App. Div. 1992); Asbury Park Press, Inc. v. Borough of Seaside Heights, 246 N.J. Super. 62 (Law Div. 1990). The public has a need to know the nature of Police Corporal Cherry’s alleged misconduct in order to determine whether the severity of his punishment is appropriate.

CONCLUSION

The Court should order the Prosecutor's Office to grant John Paff access to the videotape of Corporal Cherry's use of a dog during an arrest.

Respectfully submitted,

Richard Gutman