

NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

John Paff, Plaintiff, v. Ocean County Prosecutor's Office, Defendant.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION

OCEAN COUNTY

DOCKET NO. OCN-L-1645-14

CIVIL ACTION

OPINION

Argued: July 11, 2014

Decided: July 31, 2014

Vincent J. Grasso, A.J.S.C.

Richard Gutman, Esq. appearing on behalf of the plaintiff, John Paff (Law Offices of Richard Gutman)

Samuel Marzarella, Esq. appearing on behalf of the defendant Ocean County Prosecutor's Office (Ocean County Prosecutor's Office)

Summary

The matter before the court comes by way of order to show cause and verified complaint alleging that defendant Office of the Prosecutor of the County of Ocean's (Prosecutor's Office) 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. Specifically, plaintiff John Paff challenges the Prosecutor's Office's denial of access to a police dash cam video which Paff believes depicts a traffic stop in Barnegat Township performed by a Tuckerton Borough police officer involving the use of a police dog on a member of the public, resulting in charges of aggravated assault and official

misconduct against the police officer. At issue is whether the Prosecutor's Office properly denied Paff access to the video.

Background

By e-mail and facsimile dated May 20, 2014, Paff sent Miriam Rankin Kelly at the Prosecutor's Office the following records request:

Please accept this e-mail/fax as my request for government records pursuant to the Open Public Records Act and the common law right of access. Please respond to this request and send all responsive documents to me at paff@pobox.com. Thank you. Please be advised that I made a similar request earlier today to Barnegat Township.

Background:

I read in the April 12, 2014 Asbury Park Press that Cpl. Justin 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 control of the Barnegat Township.

Records 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. I specifically requested that the name and address of the defendant named on the summons be left unreacted [sic]. I remind you that N.J.S.A. 47:1A-3 states that "if an arrest has been made, information as to the name, address and age of any victims [shall be released] unless there has not been sufficient opportunity for notification of next of kin of any victims of injury and/or death to any such victim or where the release of the names of any victim would be contrary to existing law or court rule. In deciding on the release of information as to the identity of a victim, the safety of the victim and the victim's family, and the integrity of any ongoing investigation, shall be considered."

On May 28, 2014, assistant prosecutor O. Nicholas Monaco responded by letter and e-mail. Monaco wrote:

I have reviewed your OPRA request wherein you have requested a copy of the summonses involving a Tuckerton Borough police officer. Please be advised

that you will have to contact the Custodian of Records for Tuckerton Borough, as this office is not in possession of any summonses issued to the individual who you identified in your correspondence as “a woman in Barnegat.”

You have also requested a copy of a video recording of the aforementioned incident. Please be further advised that this office cannot release the requested 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.

Later that same day counsel for Paff wrote to Kelly regarding the Prosecutor’s Office’s denial of Paff’s records request. He wrote:

I represent John Paff regarding his May 20, 2014, record request for a video regarding alleged misconduct by Tuckerton Police Cpl. Justin Cherry.

As you may recall, you denied access May 28 on the ground that the video is exempt because it involves a “criminal investigation in progress” and an “internal affairs matter.” However, 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.” As regards the internal affairs investigation, Ocean County OPRA and Assignment Judge Vincent J. Grasso has recently ruled, a copy of which is enclosed, that the OPRA exemption for internal affairs investigations does not apply to records that were public before the internal affairs investigation began.

In order to avoid litigation, please supply me with a copy of the requested video by June 16, 2014.

By letter dated June 2, 2014, prosecutor Monaco advised Paff’s counsel that his office’s denial of Paff’s records request for summonses was a mistake and that they did in fact possess those records. The Prosecutor’s Office furnished Paff with the summons, thereby satisfying Paff’s first request. Those summons reveal that the woman was charged with two counts of eluding under N.J.S.A. 2C:29-2, as well as for various Title 39 motor vehicle infractions.

However, Monaco reiterated that:

As previously indicated to Mr. Paff, this office cannot release the requested recording as it involves a criminal investigation in progress, pursuant to

N.J.S.A. 47:1A-3 as well as internal affairs matter, pursuant to the Attorney General's Guidelines on Internal Affairs Policy and Procedures (IAPP).

The record also contains a certification by Ocean County Prosecutor's Office Detective John Halliday. In relevant part, he certifies that Officer Cherry "was charged with aggravated assault third-degree and official misconduct second-degree." As of his certification, neither the woman, nor officer Cherry had been indicted.

On the return date, the Prosecutor's Office represented for the first time that the video was captured by a police dashboard camera, not a surveillance camera on a Barnegat municipal building as Paff supposed. The Prosecutor's Office produced no evidence or certification to that effect. Moreover, the Prosecutor's Office did not elucidate the substance of the video, its provenance, or any other aspect of the video to the court but did, however, insinuate that its contents could distress the woman if made public.

Findings

Paff challenges the Prosecutor's Office's denial of the video under OPRA and seeks an order compelling production of the video and declaring that the Prosecutor's Office improperly denied him access to the video. The Prosecutor's Office maintains that its earlier denial of Paff's records request was warranted for several independent reasons. First, it still maintains that N.J.S.A. 47:1A-3, sometimes referred to as the "ongoing investigation exception," exempts the video from OPRA's disclosure requirement because disclosure would be inimical to the public interest. Second, the Prosecutor's Office still maintains that the Attorney General's Internal Affairs Police and Procedures Guidelines (IAPP) exempts the video from disclosure. Third, they now argue that N.J.S.A. 47:1A-1.1 exempts the video from disclosure as a "criminal investigatory record." Lastly, the Prosecutor's Office argues that even if no exception applies,

OPRA allows it to withhold access to the video because releasing it would upset the woman's reasonable expectation of privacy. Asbury Park Press v. Ocean Cnty. Prosecutor's Office, 374 N.J. Super. 312, 331 (Law Div. 2004). The court will first outline OPRA's statutory framework, and then decide on the merits of the Prosecutor's Office's reasons for denying Paff access to the video.

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 specifically enumerated 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.

As to the first item, the court finds that the video is a government record under the broad definition set forth in N.J.S.A. 47:1A-1.1. A video is a “document” or “information stored or maintained electronically” that Barnegat Township or Tuckerton Borough captured or “maintained” “in the course of . . . its official business.” Having found that the video meets the statutory definition of “government record,” the court next addresses whether a video captured by a police dash cam falls under any one of OPRA's exceptions.

Initially, the court finds that at this juncture, the Prosecutor's Office has failed to meet its burden of showing that the video constitutes a criminal investigatory record under N.J.S.A. 47:1A-1.1. As it stands now, the record contains almost no evidence about the video itself. While Paff requested a video captured by Barnegat Township, the Prosecutor's Office disclosed for the first time on the return date that it was “the” police officer's dash cam that captured the video. The court cannot conclude from this statement or from this record whether the police dash cam was Tuckerton police officer Cherry's dash cam or another dash cam owned by the Barnegat police force. The court also notes that the Prosecutor's Office cites the criminal investigatory record exception, N.J.S.A. 47:1A-1.1, for the first time in its brief in opposition to Paff's order to show cause, which was not an original basis for its denial.

OPRA gives a two-pronged test for what constitutes a criminal investigatory record and defines it 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. In other words, to constitute a criminal investigatory record: (1) no law could have compelled either the Tuckerton or Barnegat police force to capture or maintain the dash cam video; and (2) the dash cam video must have been made in connection with a criminal investigation. The court finds that the Prosecutor’s Office has so far failed to produce specific, reliable evidence to prove either prong of this test.

As to the first prong of this test, the court finds that the Prosecutor’s Office has not yet produced any evidence that either the Barnegat or Tuckerton police force were not required by law to capture or maintain the dash cam video. The Appellate Division has explained that this first prong does not encompass only statutory or administrative law, but also encompasses “guidelines, directives and policies” that carry the force of law such that they “bind local police departments in the day-to-day administration of the law enforcement process.” See O’Shea v. West Milford, 410 N.J. Super. 371, 383–82 (App. Div. 2009) (explaining that Attorney General’s “Use of Force Policy” that required completion and retention of “Use of Force Reports” satisfied first prong of criminal investigatory record requirement because it carried the force of law for police forces). For example, a municipality may “provide for a line of authority relating to the police function and for the adoption and promulgation by the appropriate authority of rules and regulations for the government of the force and for the discipline of its members.” N.J.S.A. 40A:14-118. Here, the Prosecutor’s Office has not yet demonstrated that no Barnegat or Tuckerton police regulation enacted under N.J.S.A. 40A:14-118, or other statute or regulation that carries the force of law, required the creation or retention of the dash cam video.

As to the second prong, the court finds that the Prosecutor’s Office has not yet produced specific, reliable evidence that the dash cam video was created as part of a criminal investigation.

Again, case law informs this issue. In affirming the “well-considered reasons” of a trial court opinion, the Appellate Division has instructed that not all records created contemporaneously with a criminal investigation constitute criminal investigatory records. See O’Shea, supra, 410 N.J. Super. at 378 (“Photos of an accident scene may be looked at as part of . . . a criminal investigation. That doesn't mean they're criminal investigatory records.”) (citations omitted). Instead, criminal investigatory records encompass “the work product of . . . the people investigating.” Ibid.

By analogy, the video here may have documented some aspects of a traffic stop and Tuckerton police officer Cherry’s arrest of the woman. Even so, it does not follow that the video necessarily constitutes a criminal investigatory record *ipso facto*. OPRA’s criminal investigatory records exception does not render otherwise public government records confidential because they document some aspect of a crime. The Prosecutor’s Office has not produced any specific, reliable evidence that the police dash cam video is the work-product of a criminal investigation of the woman or even any evidence that the video came into existence as a result of a criminal investigation. This record leaves the court to guess as to the circumstances surrounding the woman’s arrest. The court finds that the Prosecutor’s Office has yet failed to carry its burden of producing specific, reliable evidence from which the court can conclude that dash cam video is a criminal investigatory record. Courier News, supra, 358 N.J. Super. at 382–83.

Next, the court finds that the Prosecutor’s Office erred in denying Paff access to the surveillance video under the separate “ongoing investigation” or “investigation in progress” exemption, N.J.S.A. 47:1A-3. The ongoing investigation exception provides that:

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 provided for in [OPRA] as amended and supplemented may be denied if the inspection, copying or examination of such record or records

shall be inimical to the public interest; provided, however, 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-3.]

In other words, the ongoing investigation exemption does not work retroactively to render public documents confidential once an investigation begins. Serrano v. South Brunswick, 358 N.J. Super. 352, 367 (App. Div. 2003) (“Assuming the tape was a public record when created, it did not become retroactively confidential simply because the prosecutor obtained the tape. This result is specifically decreed by the language of OPRA, N.J.S.A. 47:1A-3(a) . . .”). Here, the court finds that the ongoing investigation exception, N.J.S.A. 47:1A-3, does not apply to the facts of the case because the court finds that that any investigation into the woman or Officer Cherry began after the video was made. To paraphrase Serrano, supra, 358 N.J. Super. at 367, the court finds that the dash cam video does not become retroactively confidential because the Prosecutor’s Office obtained it as part of an investigation into Office Cherry or the woman. In light of this finding, the court does not need to address whether disclosure would be inimical to the public interest.

Next, the court briefly addresses the Prosecutor’s Office’s argument that the IAPP required it to deny Paff’s OPRA request. As Paff points out, this court has already addressed the arguments raised by the Prosecutor’s Office in at least one other case. Paff v. Little Egg Harbor, No. OCN-L-949-14 (Law Div. May 21, 2014) (slip op. at 7–8). In that case, the court referred to its earlier decision addressing the same argument now before the court. 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.; N.J.S.A. 47:1A-3; Serrano, supra, 358 N.J. Super. at 367. The court finds that the analysis of both cases applies to the argument raised by the Prosecutor's Office in this case. Specifically, the court finds that although the surveillance video may be used as part of an internal affairs investigation into the actions of Cherry, it is nevertheless accessible via an OPRA request because it was created prior to any internal affairs investigation.

Finally, the court addresses the Prosecutor's Office's argument that disclosure would violate the woman's reasonable expectation of privacy. The Prosecutor's Office points to a letter by the woman's counsel in her criminal matter "object[ing] to the release of any audio or video tapes at this time, because of privacy and other related issues." The Prosecutor's Office further points out that, in accordance with OPRA's legislative findings of "a citizen's reasonable expectation of privacy," N.J.S.A. 47:1A-1, Judge Serpentelli held that the Prosecutor's Office need not disclose a 911 tape that documented a dying man's last words because it would violate that man's "reasonable expectation of privacy." Asbury Park Press v. Ocean Cnty. Prosecutor's Office, 374 N.J. Super. 312, 331 (Law Div. 2004). The court described its *in camera* review of the tape as a "chilling, wrenching, lingering experience" that would "offend and disturb any person of normal sensibilities." Id. at 330. Here, record contains no evidence that the video contains anything as disturbing as that 911 tape. Instead, it discloses that the video presumably captured the woman's actions, as well as Cherry's, during a traffic stop on in a public municipal parking lot at around 11 a.m. Mindful of the woman's objections, the court finds at this juncture, that she enjoyed no reasonable expectation of privacy in the video.

In sum, the court finds that the Prosecutor's Office's conclusory and vague assertions of OPRA exemptions failed to satisfy its statutory burden to state the specific basis of its denial. Gannett N.J. Partners, supra, 379 N.J. Super. at 215. Moreover, the sparse record in this case compels the court to find that the Prosecutor's Office failed to satisfy its statutory burden of providing specific reliable evidence of an OPRA exemption. Courier News, supra, 358 N.J. Super. at 382–83. OPRA contemplates a process whereby the custodian communicates with the requestor so that the requestor can intelligently decide whether to further pursue his or her documents request. See generally N.J.S.A. 47:1A-5(g) (requiring custodian to communicate with the requestor and to state the specific basis for denial). Here, the Prosecutor's Office waited until the return date to advise Paff that the video in question was not a surveillance video, as Paff assumed it was in his submissions, but instead a police dash cam video. It was the Prosecutor's Office's responsibility to apprise Paff of information that might help him decide whether to litigate the matter or to abandon it well in advance of the return date. In light of the Prosecutor's Office's failure to carry its statutory burden, the court finds that the Prosecutor's Office improperly denied Paff access to the video.

As a final matter, the court finds no basis to deny Paff access to the requested video because the Prosecutor's Office has not yet released it as part of criminal discovery. As the Appellate Division has explained, a requestor's right to a document may come from OPRA, discovery, or the common law right of access. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 543 (App. Div. 2005). The requestor's rights to access are not coextensive under each approach and that the unavailability of a document through discovery does not preclude access via OPRA. Ibid.

The court will entertain Paff's further application for attorney's fees, should he wish to apply for them. The court, however, is still left with the question of whether a police dash cam video that depicts a motor vehicle stop and arrest is exempt as a criminal investigatory record under OPRA. The court will continue this matter for thirty (30) days to afford counsel the opportunity to submit supplemental briefs, certifications, and evidence on whether the police dash cam video constitutes a criminal investigatory record under N.J.S.A. 47:1A-1.1's two-pronged analysis. Counsel should review and be prepared to address the issue of whether there are statutes or regulations that "have the force of law in respect to the duties of law enforcement agencies" in their use of dash cam videos. O'Shea, supra, 410 N.J. Super. at 384. Upon the receipt of such materials from counsel no later than September 1, 2014, the court will set down a return date to address this question.

Additionally, the Prosecutor's Office is to submit the police dash cam video for *in camera* review so that the court can determine whether its release would interfere with the woman's reasonable expectation of privacy. If the court determines prior to the return date that the video's release raises a privacy question, it will advise the parties so they can address the issue on the return date.

Mr. Gutman is to submit an Order which comports with the court's decision herein.