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

Richard Gutman - 001081996
Richard Gutman, P.C.
9 Prescott Avenue
Montclair, NJ 07042-5029
973-744-6038 (voice & fax)
rickggg@yahoo.com
Attorney for Plaintiff John Paff

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I. Prosecutor's Ad Hominem Attack on Plaintiff John Paff and His Attorney Richard Gutman is Irrelevant

The Prosecutor asserts that "it is unclear" whether Plaintiff John Paff has profited and has recovered legal fees as a result of his OPRA litigation. (Db3-4; Halliday Certification, pages 3-4, D2-38.) The Prosecutor insinuates that Plaintiff John Paff and his attorneys, including Richard Gutman, file OPRA lawsuits solely for financial benefit. The Prosecutor's ad hominem attacks are irrelevant. Under OPRA, a public record is public for all members of the public, irrespective of their motivation in seeking access to the public record.

Moreover, the public interest in access to the record at issue here is evident. The video tape sought depicts alleged police brutality during an arrest that resulted in both criminal and disciplinary charges against the arresting police officer. Because society entrusts to the police the unique power to employ force, alleged excessive force by the police is a matter of intense public importance.

II. Regarding the Original Claimed Exemptions of Ongoing Investigation and Internal Affairs Investigation, Prosecutor Ignores Paff's Argument That Those Exemptions Do Not Apply to Records Prepared Apart From the Investigations

In his May 28 letter to the Prosecutor's Office, Paff's attorney noted that the Prosecutor's Office's claimed exemptions, N.J.S.A. 47:1A-3 ongoing investigations and the exemption for the New Jersey Attorney's Guidelines on Internal Affairs Policy and Procedures, did not apply to the security video because the security video was prepared independently from the criminal and internal affairs investigations. The video would have existed even if no investigation had occurred. (Pa4.) Paff's attorney attached a copy of this Court's May 21 decision on this point in Paff v. Township of Little Egg Harbor, OCN-L-949-14 PW. (Pa5-12.) In addition, Paff's June 8 brief expanded on this point. (Pb2-6.)

The Prosecutor's brief has no response to the foregoing argument. The Prosecutor's brief discusses the requirement of the N.J.S.A. 47:1A-3a ongoing investigation exemption that the disclosure of the ongoing investigation be "inimical to the public interest," (Db7-9), but that requirement is independent of the requirement that the exemption excludes "a government record that was open for public inspection, examination or copying before the investigation commenced." Thus, the video is not exempt as an OPRA Section 3 ongoing investigation record because it was created apart from the investigations, irrespective of whether or not the disclosure of the video would be "inimical to the public interest."

Moreover, the Prosecutor's assertions that disclosure would be "inimical to the public interest" are purely speculative and conclusory. (Db8-9.) It has not entered "specific reliable evidence" sufficient to demonstrate that the alleged harm is likely to occur. Courier News v. Hunterdon Cnty. Prosecutor's Office, 358 N.J.Super. 373, 382-83 (App. Div. 2003).

III. Prosecutor Has Waived Newly Claimed Exemptions of Criminal Investigatory Record and Privacy by Not Asserting Them in Denying Access

The Prosecutor's May 28 denial of access cited the N.J.S.A. 47:1A-3 investigation in progress exemption and the exemption for internal affairs matters. (Pa3.) The Prosecutor's June 2 response to Paff's attorney cited the same two exemptions. (Pa13.) Now, for the first time, the Prosecutor cites two additional exemptions, the N.J.S.A. 47:1A-1.1 exemption for criminal investigatory records and the N.J.S.A. 47:1A-1 exemption for privacy.

If the record custodian wishes to deny access to a record, OPRA requires the custodian to indicate the "specific basis" to the record requestor. N.J.S.A. 47:1A-5g. The Prosecutor did not indicate the criminal investigatory records exemption or the privacy exemption to Paff or his lawyer. Therefore, the Prosecutor has waived those exemptions. It would be an unfair burden on the record requestor and the courts to permit record custodians to mislead record requestors as to

the legality of the denial of access.

The following two portions of the brief assume for purposes of argument that the Prosecutor has not waived the two newly claimed exemptions.

IV. “Criminal Investigatory Records” Exemption Does Not Apply to Records That Were Not Prepared as Part of the Investigation

As noted above, OPRA’s exemptions for investigatory records do not cover records not prepared as part of the investigation. That principal also applies to OPRA’s criminal investigatory records exemption, N.J.S.A. 47:1AS-1.1. That was one of the holdings in O’Shea v. Township of West Milford, 410 N.J. Super. 371 (App. Div. 2009), which Paff cited and quoted in his opening brief at pages 4-5. The Prosecutor’s ignores O’Shea and its argument.

V. There is no “Reasonable Expectation of Privacy” for an Arrest in a Public Place

In its brief the Prosecutor’s Office relies on the OPRA exemption for privacy. (Db10-14.) The Prosecutor submits a letter from Wendy Tucker’s lawyer who is suing the Borough of Tuckerton, presumably for excessive force. (Da1.) Although Wendy Tucker is aware of this OPRA lawsuit, she has not attempted to intervene. Nor is the letter addressed to this Court; instead it is addressed to the Prosecutor’s Office, which is allied with Ms. Tucker against the police officer. Nor does the letter explain what “privacy and other related issues” are allegedly involved. Thus, the nature of her privacy concern is unspecified.

OPRA’s privacy exemption states,

a public agency has a responsibility and an obligation to safeguard from public access a citizen’s personal information with which it has been entrusted when disclosure thereof would violate the citizen’s reasonable expectation of privacy. (emphasis added.)

[N.J.S.A. 47:1A-1.]

According to the Prosecutor’s brief, the video at issue depicts a police dog biting Ms.

Tucker while she was being arrested. (Pb8,13.) The Prosecutor has not denied that the video depicts a public area. Because the public agency bears the burden of proof under OPRA, N.J.S.A. 47:1A-6, one must assume for purposes of this lawsuit that the videotape depicts a public area.

Particularly in this time of ubiquitous security cameras, dramatized by the identification of the Boston Marathon bombers and the executioners of Mahmoud Al-Mabhouh by means of security camera videos, there is no “reasonable expectation of privacy” in public places. As the Supreme Court has stated, “[m]atters exposed to public view may be disclosed without implicating privacy interests.” Doe v. Poritz, 142 N.J. 1, 82 (1995).

Nor can there be a “reasonable expectation of privacy” regarding an arrest. Under OPRA, and prior to OPRA under the 1985 Executive Order No. 123 (Kean), the “following 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: . . . 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). N.J.S.A. 47:1A-3b. Thus, arrests are public information even if they occur in non-public locations.

The Prosecutor cites its Law Division victory in Asbury Park Press v. Ocean County Prosecutor’s Office, 374 N.J.Super. 312 (Law Div. 2004) in which the trial court denied access to a 911 tape. (Db10-11.) But the 911 tape did not depict events that occurred in a public place. Nor did it depict an arrest.

In addition, the OPRA privacy exemption is limited to “a citizen’s personal information with which [the public agency] has been entrusted.” OPRA is referring a private citizen’s personal information that the citizen gives to the government for a limited purpose. Ms. Tucker

did not give the Prosecutor or any other public agency the video. The Borough gave its video to the Prosecutor. For this reason also, the OPRA privacy exemption does not apply.

The Prosecutor also asserts the alleged privacy right of the police officer. (Db13-14.) Government employees have no right to privacy in exercising their official governmental functions.

VI. Paff Has a Common Law Right to the Security Camera Video

In his opening brief, John Paff had claimed that the public's need for information regarding police misconduct outweighed the need for secrecy. As regards the public's need for access, the Prosecutor asserts that a "particularized need" (emphasis is original), is required. (Db16-17.) But the Prosecutor acknowledges in the same sentence that he is referring to situations where the records are "privileged." The cited Wilson case involved records that qualified for the Executive Privilege. The cited McClain case found that the records were "confidential investigatory records." The records in the case at bar are not privileged and are not "confidential investigatory records." Therefore, no "particularized" need for public disclosure is required.

Next, the Prosecutor asserts that there is no public need to see the video because the fact that "a second-degree charge has been brought against this official and the facts underlying the charge have been published in both newspapers and electronic form." (Db17.) But if "a picture is worth a thousand words," than a video is worth fifty thousand words. Only the video, not the written phrase "a police dog bit a woman," can communicate to the public the context and manner in which the event occurred so that the public can make a judgment as to the significance, if any, of the incident.

Plaintiff Paff takes issue with the Prosecutor's application of the Loigman factors. (Db20-21.)

(1) “the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government;”

The Prosecutor asserts that this factor “weighs heavily against disclosure.” (Db20.) Quite the contrary. The record requested is from a security camera. It is not information from a citizen informant. Disclosing the security tape will in no way indicate that informant information is insecure.

(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;”

The Prosecutor admits that the second factor “is not applicable to this case.” (Db21.) That is another way of stating that no such harm will result from disclosure of the security camera video.

(3) “the extent to which agency self-evaluation, program improvement, or other decision-making will be chilled by disclosure;”

The Prosecutor’s assertion that agency self-evaluation would “absolutely be chilled” by disclosure is unfounded. The Loigman court was referring to the Deliberative Process Privilege. Education Law Center v. New Jersey Department of Education, 198 N.J. 274 (2009). The security camera video does not disclose the Prosecutor’s Office’s internal decision making.

The Prosecutor’s supposition of a “public outcry against the accused officer,” is speculation, not evidence. The Prosecutor’s assumption that such a public outcry would “surely” taint the ongoing investigation indicates a surprising lack of confidence in the professionalism of his own Office.

(4) “the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers;”

The Prosecutor asserts that “factual data” is “inapplicable to a video.” On the contrary, a security camera video is pure factual data. No “evaluation” or opinion is included.

(5) “whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency;”

Although five months have passed since the activity depicted on the video, there have as yet been no “findings of public misconduct” which could have been “insufficiently corrected.”

(6) “whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials.”

It is too early to determine whether the current investigations will circumscribe the need for the material. However, it is unlikely that any of the current investigations will result in the video being publicly disclosed. Internal affairs disciplinary investigations are completely confidential. As for the criminal investigations, only a small percentage of criminal investigations result in public trials.

In conclusion, the first four factors weigh in favor of access while the last two factors weigh against access. However, a careful consideration of the factors indicates that they are listed in order of declining importance. The more important four factors for transparency greatly outweigh the less important two factors for secrecy.

Respectfully submitted,

Richard Gutman