

NOT TO BE PUBLISHED WITHOUT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

Shabsi Ganzweig,

Plaintiff,

v.

Township of Lakewood, Mary Ann
Del Mastro in her official capacity as
Records Custodian and Township
Clerk of the Township of Lakewood,
Office of the Prosecutor of the County
of Ocean and Marc E. Roessler in his
official capacity as Assistant
Prosecutor of the County of Ocean,

Defendants.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION

OCEAN COUNTY

DOCKET NO. OCN-L-1292-14

CIVIL ACTION

OPINION

Argued: August 20, 2014

Decided: October 2, 2014

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

Walter M. Luers, Esq. appearing on behalf of the plaintiff, Shabsi Ganzweig (Walter M. Luers, LLC)

Mathew B. Thompson, Esq. appearing on behalf of the defendants Township of Lakewood, et al. (Law Offices of Berry, Sahradnik, Kotzas & Benson)

Summary

The matter before the court comes by way of order to show cause and verified complaint alleging that defendants 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 challenges defendant Township of Lakewood (Township) and defendant Office of the Prosecutor of the County of

Ocean's (Prosecutor's Office) denial of access to the police dash cam audio and video recordings of two traffic stops that occurred in Lakewood and involved the same vehicle. Plaintiff also challenges defendants' denial of access to police reports from the traffic stops. Finally, plaintiff seeks a declaratory judgment that defendants' policy of forwarding OPRA requests to the prosecutor violates a 2006 consent order entered in Jacobs v. Harvey, MER-L-3319-04. The Township moves to dismiss all counts. A novel issue addressed in this opinion is whether a police car's dash cam video and audio recording of a traffic stop is exempt under OPRA as a "criminal investigatory record" within the meaning of N.J.S.A. 47:1A-1.1.

Background

By way of background, on August 31, 2013 Lakewood Township police officer Jeremy Felder stopped a motor vehicle after the driver violated N.J.S.A. 39:4-123 by making an illegal left hand turn. The driver and passenger of the vehicle told Felder their names and were released without any summons. After letting them go, Felder became suspicious that the driver might have violated N.J.S.A. 2C:29-3 by giving him a fictitious name and initiated a second stop. He then searched the vehicle and allegedly found controlled substances. He issued the driver municipal summonses under N.J.S.A. 39:4-49.1 and N.J.S.A. 39:4-123 for drug possession by a motor vehicle operator and making an illegal left hand turn. The driver and passenger were also charged with disorderly persons offenses, use or possession with intent to use a controlled dangerous substance, N.J.S.A. 2C:36-2, possession or distribution of hypodermic syringe or needle, N.J.S.A. 2C:36-2, as well as for criminal offenses, for hindering apprehension, N.J.S.A. 2C:29-3, and for possession of a controlled dangerous substance, N.J.S.A. 2C:35-10(a)(1). On November 11, 2013, an Ocean County Grand Jury indicted the driver and passenger with violating N.J.S.A. 2C:29-3 and N.J.S.A. 2C:35-10(a)(1).

After the indictment of the driver and passenger, information came to light that Felder may have illegally searched the vehicle and falsified his police report to conceal his wrongdoing. The case against the driver and passenger was later dismissed by the Prosecutor's Office. Felder was charged with official misconduct and the Prosecutor's Office asserts that this investigation is still pending.

Several months after the stop, on March 7, 2014, plaintiff sent an e-mail to the Township clerk requesting certain documents under OPRA. Specifically, it requested:

Audio, video from traffic stops conducted by officers Felder badge # 338 and Reina badge # 341 on August 31 2013, I would also like all reports regarding these traffic stop [sic]. My request includes all communication to dispatch and watch commander. I would also like the same information from any other officer that was involved in the above traffic stops.

Just over an hour later, the Township clerk replied by e-mail to inform plaintiff that, "[his] request has been received."

On March 12, 2014, plaintiff amended his request to encompass:

Audio, video from the traffic stop conducted by officers Felder badge # 338 and Reina badge # 341 on August 31 2013. ****WHICH LED TO DRUGS BEING FOUND IN VEHICLE**** I would also like all reports regarding these traffic stop. My request includes all communication to dispatch and watch commander. I would also like the same information from any other officer that was involved in the above traffic stop.

The next day, on March 13, 2014, Lakewood Police Chief Robert C. Lawson e-mailed plaintiff, advising that, "per Assistant Ocean County Prosecutor Marc E. Roessler's instruction to [him], your OPRA request of March 7, 2014 has been forwarded to Roessler for his review and response." The e-mail then gave Roessler's contact information.

Roessler denied plaintiff's amended OPRA request by letter dated March 21, 2014. In that letter, Roessler gave three reasons for the denial. First, he opined that the requested records

did not constitute “government records,” but instead constituted “criminal investigatory records” per N.J.S.A. 47:1A-1.1. He explained that,

While the criminal case against the two occupants of the motor vehicle has been dismissed, there is a pending criminal matter against Officer Jeremy Felder which arises from this motor vehicle stop. Moreover, the requested documents “pertain” to the pending criminal case against Officer Felder. Additionally, unlike a 911 tape, I am not aware of any law which requires the requested documents “to be made, maintained or kept on file”.

Second, Roessler’s March 21, 2014 letter indicated that the requested records were also exempt from disclosure because they fell under the so-called “ongoing investigation” exception, N.J.S.A. 47:1A-3(a). Roessler asserted that, the investigation “will continue right up to the day of trial” and that “it would be inimical to the public interest to release the requested records.” Lastly, Roessler asserted that “the requested records form the basis of an internal affairs investigation. The Attorney General’s Internal Affairs Policy and Procedures provide that ‘[t]he nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential.’ Page 47.”

Roessler also denied plaintiff access to the requested records under the common law right of access. Specifically, his letter indicated his belief that plaintiff lacked a “personal or particular interest in the material sought.” Asbury Park Press v. Lakewood Twp. Police Dept., 354 N.J. Super. 146, 154 (Law Div. 2002). Roessler stated that the records pertained to an ongoing investigation that would continue until the date of trial. Also, he “note[d] that Officer Felder has not even received the requested records in criminal discovery yet.”

On March 26, 2014, plaintiff’s counsel wrote Roessler to inform him that plaintiff has referred your March 21, 2014 OPRA response to this office for our review and potential action.” Additionally, plaintiff’s counsel wrote: It would assist me a great deal in my evaluation of the merits of the Prosecutor’s denial if the specific records being withheld are identified by date, type of document and author. Please provide us with that information.

On the return date, the court determined that the record lacked sufficient clarity for the court to decide on the propriety of the Prosecutor's Office's denial of plaintiff's records request. For example, counsel for plaintiff advised that he had recently obtained the Lakewood Police Department Policy and Procedures via a separate OPRA request. Plaintiff maintains that the regulations required the Lakewood police to have "made, maintained or kept" the police dash cam video. N.J.S.A. 47:1A-1.1. Accordingly, the Lakewood Police Department Policy and Procedures carry the force of law within the meaning of N.J.S.A. 47:1A-1.1, and that the police dash cam video did not come within the "criminal investigatory records" exemption. Plaintiff also clarified that he was only seeking records from both the first and the second traffic stops, which was not the understanding of the Prosecutor's Office, the Township, or the court. The record before the court on the return date did not disclose which documents the Prosecutor's Office had in its possession, or the specific basis for its denial of those documents.

As a result, the court carried the return date and ordered the Prosecutor's Office to furnish a Vaughn index that itemized each document requested by plaintiff and articulated the specific basis for its denial of each item.¹ The court also allowed the parties to brief the question of whether the Lakewood Police Department Policy and Procedures carry the force of law which would remove the police dash cam video from the definition of criminal investigatory records within the meaning of N.J.S.A. 47:1A-1.1.

¹ A Vaughn index is "a detailed affidavit correlating the withheld documents with the claimed exemptions." Cozen O'Connor v. United States Dep't of Treasury, 570 F. Supp. 2d 749, 765 (E.D. Pa. 2008) (citing Vaughn v. Rosen, 484 F.2d 820, 827 (D.C. Cir. 1973)). "To pass muster, a Vaughn index must consist of one comprehensive document, adequately describe each withheld document or redaction, state the exemption claimed, and explain why each exemption applies." Afshar v. Dep't of State, 702 F.2d 1125, 1144-45 (D.C. Cir. 1983) (quoting Founding Church of Scientology, Inc. v. Bell, 603 F.2d 945, 949 (D.C. Cir. 1979)). Recently, New Jersey courts have adopted this procedure in the context of OPRA requests. E.g., Hausmann v. N. Valley Reg'l Bd. of Educ., No. BER-L-7151-13 (Law Div. Nov. 7, 2013).

The Prosecutor's Office submitted its Vaughn index on August 1, 2014. The Vaughn index lists several government records that are covered by plaintiff's OPRA request: (1) two arrest reports "pertaining to the Investigation and arrest of Robert Amogretti and Terrance Rush"; (2) a seven-page officer report; (3) a seven-page property report; (4) an audio and video recording from the police dash camera that captured the arrest of Robert Amogretti and Terrance Rush; and (5) a transcript of a portion of the video prepared by the Ocean County Prosecutor's office on March 12, 2014.

According to the Vaughn index, the Prosecutor denied plaintiff access to all records in their entirety. With respect to the first arrest report, the Vaughn index states:

Arrest Record pertaining to the Investigation and arrest of Robert Amogretti and Terrance Rush for possible violation of N.J.S.A. 2C:35-10, N.J.S.A. 2C:29-3b(4) N.J.S.A. 2C:36-and pertaining to the Investigation and arrest of officer Jeremy Felder for official misconduct represents Criminal Investigatory Records N.J.S.A. 47:1A-1.1; See Asbury Park Press, Inc. v. Borough of Seaside Heights, 246 N.J. Super. 62, 67 (Law Di v. 1990)). Kovalcik v. Somerset County Prosecutor's Office, 206 N.J. 581, 590 (2011) State v. Marshall, 148 N.J. 89 (1997) Further, the release of this record maintained by a law enforcement agency is not required under an OPRA as they pertain to a criminal investigation or related civil enforcement proceedings. N.J.S.A. 47:1A-3(a).

The Prosecutor's Office justified its denial of the second arrest report, the officer report, and the seven-page property report with a "see above" comment, referring to the above-quoted language. Similarly, the Prosecutor's Office denied access to the audio and video recording by asserting that it constitutes an

Arrest Record pertaining to the Investigation and arrest of Robert Amogretti and Terrance Rush for possible violation of N.J.S.A. 2C:35-10, N.J.S.A. 2C:29-3b(4) N.J.S.A. 2C:36-and pertaining to the Investigation and arrest of officer Jeremy Felder for official misconduct represents Criminal Investigatory Records N.J.S.A. 47:1A-1.1; See Asbury Park Press, Inc. v. Borough of Seaside Heights, 246 N.J. Super. 62, 67 (Law Di v. 1990)).

Kovalcik v. Somerset County Prosecutor's Office, 206 N.J. 581, 590 (2011) State v. Marshall, 148 N.J. 89 (1997)

Finally, the Prosecutor's Office explained its denial of access to the transcript. It explained that:

Transcript prepared solely in conjunction with the Investigation and arrest of Offer Jeremy Felder for official misconduct represents Criminal Investigatory Records N.J.S.A. 47:1A-1.1; See Asbury Park Press, Inc. v. Borough of Seaside Heights, 246 N.J. Super. 62, 67 (Law Di v. 1990)). Kovalcik v. Somerset County Prosecutor's Office, 206 N.J. 581, 590 (2011) State v. Marshall, 148 N.J. 89 (1997)

Findings

Plaintiff brings this summary action under OPRA pursuant to N.J.S.A. 47:1A-6 and R. 4:67-5 as well as the common law right of access. Count one of the verified complaint seeks a declaration that defendants violated OPRA when they denied plaintiff's March 7, 2014 and March 12, 2014 records requests. Count two pleads a common law right of access claim to the same records. Count three seeks a declaratory judgment that defendants' policy of forwarding OPRA requests to the Ocean County Prosecutor's Office violates a 2006 consent order entered in Jacobs v. Harvey, MER-L-3319-04. Defendants have defended each denial of plaintiff's OPRA requests.

OPRA manifests this 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" or "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 needs 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 County 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.

Initially, the court finds that plaintiff’s request for audio and video recordings constitutes a request for government records within the meaning of N.J.S.A. 47:1A-1.1 because they constitute information stored electronically. Additionally, reports from the August 31, 2013 traffic stop, except for the transcript, also constitute government records because they would constitute “document[s] . . . made . . . in the course of . . . official business” under N.J.S.A. 47:1A-1.1. Because plaintiff did not complain the denial of access to the transcript, the

court is not going to address it. The only question, therefore, is whether these four (4) types of government records fall under any of the statutorily recognized exemptions.

Arrest Reports, Officer Report, and Property Report

Initially, the Prosecutor's Office asserts that these reports are either criminal investigatory records as defined by N.J.S.A. 47:1A-1.1, or fall within the ongoing investigation exception N.J.S.A. 47:1A-3(a). The court does not agree with this argument because the language of the statute requires disclosure of these reports, subject to redaction. Specifically, the statute provides, in relevant part, that,

b. Notwithstanding the provisions [OPRA], as amended and supplemented, 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:

... if an arrest has been made, information as to the defendant's name, age, residence, occupation, marital status and similar background information and, the identity of the complaining party unless the release of such information is contrary to existing law or Court Rule;

information as to the text of any charges such as the complaint, accusation and indictment unless sealed by the court or unless the release of such information is contrary to existing law or court rule;

information as to the identity of the investigating and arresting personnel and agency and the length of the investigation;

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.

[N.J.S.A. 47:1A-3(b).]

However, the statute further provides that a law enforcement agency need not provide this information if, "it shall appear that the information requested or to be examined will jeopardize

the safety of any person or jeopardize any investigation in progress or may be otherwise inappropriate to release.” N.J.S.A. 47:1A-3(b).

Here, the Prosecutor’s Office does not articulate a reason for why it should not release the defendants’ “name, age, residence, occupation, marital status and similar background information and, the identity of the complaining party,” “information as to the text of any charges such as the complaint, accusation and indictment,” “identity of the investigating and arresting personnel,” and “information of the circumstances immediately surrounding the arrest.” Presumably, an arrest report, or the officer, or property reports contain some or most of this information, though the court notes that the record contains almost no information about the nature of these reports or their substance. If any of these reports contained more information than enumerated in N.J.S.A. 47:1A-3(b), the Prosecutor’s Office enjoyed the right to redact it if it fell under another one of OPRA’s exceptions.

The court rejects defendants’ argument that N.J.S.A. 47:1A-3(b) only required it to release “information.” The implication of their argument is that the custodian would now have to perform research to find the “information” by reviewing various documents, such as arrest reports, officer reports, and property reports. The custodian would then have to either create a new document containing the information and make it available to the requestor for inspection or orally tell the requestor the findings of the custodian’s research. Well-settled OPRA law runs contrary to defendants’ arguments. See MAG Entertainment, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546–47 (App. Div. 2005) (“OPRA does not require record custodians to conduct research among its records for a requestor and correlate data from various government records in the custodian’s possession.”) (quoting Reda v. West Milford, GRC Complaint No. 2002-58 (January 17, 2003)). The court therefore finds that the

Prosecutor's Office should not have denied plaintiff access to the arrest reports, the officer report, or the property report in their entirety. Records containing the information permitted under N.J.S.A. 47:1A-3(b), with redactions as needed, should be provided to the requestor.

Police Dash Cam Video

1. Criminal Investigatory Record Exemption

Defendants argue that the dash cam video with audio is a "criminal investigatory record" under N.J.S.A. 47:1A-1.1. 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 the Lakewood police force to capture or maintain the dash cam video; and (2) the dash cam video must pertain to a criminal investigation.

As to the first prong of this test, the court finds that Officer Felder was 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" failed the first prong of criminal investigatory record requirement because it carried the force of law for police forces).

Furthermore, in keeping with this state's tradition of maintaining local control, the Legislature has delegated police rulemaking to the municipalities, who may delegate that authority to the police force itself. N.J.S.A. 40A:14-118. Plaintiff points out that the Township police force's official Policy and Procedures require the use of a dash cam and also require the police force to maintain the video and audio as records. Specifically, Policy Number 201.2, which became effective on October 18, 2013, governs the use of dash cams, also known as Digital Mobile Video Recorders or DMVRs, by the Lakewood Police Department. In substance, this policy states that it is "mandatory" for the police to operate their dash cams in certain circumstances, including "[t]raffic stops," "[c]riminal motor vehicle stops," "[m]otor vehicle pursuits," "[v]ehicle searches," "[m]otorist interviews," as well as other circumstances. The policy recites that the dash cam will be activated whenever the emergency lights are turned on, when the car reaches 80 miles per hour, or when the officer turns it on. The policy also mentions that, "[m]obile video recordings are considered public records." According to N.J.S.A. 2C:28-7c, a person commits a crime of the fourth degree if that person tampers with the dash cam. Additionally, the police are required to submit their dash cam videos for records retention.

The policy provides a retention schedule in accordance with the State of New Jersey Record Retention Schedules. For example, dash cams which capture Title 39 stops are to be kept for one year, videos depicting searches are to be kept for ten years, arrest videos are to be kept for ten years, or 75 years if they are for first- or second-degree crimes. When the video depicts an incident from which the police recovered no evidence, the dash cam video is required to be kept for 90 days. Otherwise, the policy provides a comprehensive set of procedures for the retention and classification of dash cam videos. However, the retention policy alone is not dispositive.

The court finds that Policy 201.2 binds the Lakewood police in its “day-to-day administration of the law enforcement process.” O’Shea, supra, 410 N.J. Super. at 383–82. The use of DMVRs, or dash cams is not optional for the Lakewood police. Officers who do not follow it may be reprimanded. Officers who tamper with dash cam video may even face criminal prosecution for tampering with dash cam videos. For these reasons, the court finds that the Lakewood Police Department’s Policy 201.2 has the force of law within the meaning of N.J.S.A. 47:1A-1.1, and therefore removes the dash cam video and audio recordings from the protection of the criminal investigatory records exception.²

The court understands the O’Shea case to mean that the question of whether a record pertains to an investigation is “one of fact for the fact-finder in OPRA matters.” O’Shea, supra, 410 N.J. Super. at 385; North Jersey Media Group, Inc. v. City of Garfield, 2012 N.J. Super. Unpub. LEXIS 578 (Law Div. Mar. 16, 2012). Here, even if the video pertains to an investigation, because it is required to be made by law, it cannot qualify as a criminal investigatory record.

The court finds that the contemporaneous recording of a traffic stop by a police dash cam that was required to be maintained and activated is not exempt as a criminal investigatory record within the meaning of N.J.S.A. 47:1A-1.1. Moreover, during a typical motor vehicle stop, the police dash cam captures nothing more than that which would be visible to members of the public or other motorists in the vicinity of the stop. That is not to say that all police dash cam recordings necessarily fall outside the definition of a criminal investigatory record under N.J.S.A. 47:1A-1.1. The court can conceive of various scenarios where a recording was

² On September 10, 2014, New Jersey Governor Chris Christie signed into law a bill that “requires certain new or used municipal police vehicles that are purchased, leased, or otherwise acquired on or after the bill’s effective date to be equipped with cameras. Specifically, municipal police vehicles that are primarily used for traffic stops are required to be equipped with a mobile video recording system.” P.L. 2014, c. 54, Assemb. 2280.

developed by law enforcement as its work product following the commencement of a criminal investigation. Under the circumstances here, the fact that Officer Felder effectuated a second traffic stop because he suspected he was given false information was a continuation of the officer's initial traffic stop. In sum, the video here captured one of the events mandated by the Lakewood Police department to be recorded by the vehicle's dash-cam.

2. Ongoing Investigation Exemption

Defendants argue that the dash cam video falls under the ongoing investigation exemption under N.J.S.A. 47:1A-3. This section 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.]

Here, the Assistant Ocean County Prosecutor Michel Paulhus has certified that, “[t]he subject matter of the underlying request for records is the basis of an active investigation of the Ocean County Prosecutor’s Office into Lakewood Township Police Officer Felder’s actions during two motor vehicle stops of the same vehicle occurring on August 31, 2014.”

Furthermore, he certifies that:

[T]he investigation in the actions of Officer Felder is still pending. The investigation will continue up until trial. The reports by the officers during the motor vehicle stop as well as the audio and video recording are the foundation of the official criminal charges pending against Officer Felder. The release of the criminal investigatory records at this stage of the investigation would impair the ongoing investigation and have a detrimental impact on the pending criminal proceeding.

Finally, Paulhus certifies that:

The Ocean County Prosecutors Office often handles criminal allegations involving police officers. These cases often rely on information obtained from sources who wish to have their identities protected for fear of retribution. The fear of retribution is especially prevalent where the allegations do not rise to a criminal level or where the investigation does not yield sufficient evidence to prosecute. The Ocean County Prosecutor's Office relies heavily upon information obtained from cooperators who wish to remain anonymous. Releasing criminal investigatory records related to investigations of police officers under OPRA would further fuel these fears and would chill the reporting of police misconduct and be harmful to bona fide law enforcement purpose.

Here, the court finds that defendants should have made the requested records available for inspection pursuant to N.J.S.A. 47:1A-3, because the records were available for inspection prior to the investigation of Officer Felder. N.J.S.A. 47:1A-3 specifically provides that 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 ongoing investigation of Felder began after the traffic stop of August 31, 2014. Under the circumstances at hand, OPRA does not permit the subsequent investigation of Felder to render those government records confidential retroactively.

Moreover, the court finds that the prosecutor's conclusory assertion of harm to the ongoing investigation falls well short of satisfying its burden to produce specific and reliable evidence. Courier News, *supra*, 358 N.J. Super. at 382-83; see Serrano v. South Brunswick, 358 N.J. Super. 352, 367 (App. Div. 2003) ("This government record does not become cloaked with confidentiality simply because the prosecutor declares it so."). Defendants' certifications do not suggest any specific harm to the public interest that would arise if plaintiff were allowed to review the requested documents. Nothing in the record suggests that the requested documents

reveal the existence of an anonymous cooperator. The prosecutor's certification expresses only vague speculation of "chilling the reporting of police misconduct." The court finds that the ongoing investigation exception does not apply here.

3. Internal Affairs Investigation

Finally, defendants argue that they properly denied plaintiff's OPRA request because the Attorney Generals' Internal Affairs Policy and Procedures Guidelines (IAPP) required them to do so during the pendency of Felder's internal affairs investigation. Defendants point to page 47 of that document, which provides that, "[t]he nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information." The Township urges that this case differs Ganzweig v. Lakewood, No. OCN-L-2392-13 (Law Div. Sept. 26, 2013) (slip op. at 5-7), in which the court rejected a similar argument advanced by the Township. Specifically, they argue that this case implicates an ongoing internal affairs investigation whereas the previous case implicated an internal affairs investigation that had terminated.

The court disagrees and finds that its reasoning in the previous case applies to the facts of this case. 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. Stated differently, the IAPP does not retroactively render an otherwise open government record confidential because it may later form the basis of an internal affairs investigation.

To summarize, the court finds that defendants improperly denied plaintiff's OPRA documents requests and that the dash cam video and audio recording of the first and second traffic stops are not exempt under OPRA.

Motion to Dismiss

The Township moves to dismiss plaintiff's verified complaint under R. 4:6-2(e) for failure to state a claim in its entirety. In light of the court's disposition of count one, the court denies the Township's motion as to count one and count two and only decides count three.

In evaluating R. 4:6-2(e) motions to dismiss, the court considers only the legal sufficiency of the facts in the complaint. Rieder v. N.J. Dept. of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987) (citing P. & J. Auto Body v. Miller, 72 N.J. Super. 207, 211 (App. Div. 1962)). For this purpose, the court deems as true all facts alleged in the complaint and all reasonable inferences therefrom. Smith v. Newark, 136 N.J. Super. 107, 112 (App. Div. 1975). The court should search the complaint in depth and with liberality to determine if a cause of action exists. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). The court should only dismiss the complaint if the factual allegations are "palpably insufficient to support a claim upon which relief can be granted." Rieder, supra, 221 N.J. Super. at 552. A complaint fails as palpably insufficient where it relies on conclusory or vague allegations. Glass v. Suburban Restoration Co., 317 N.J. Super. 574, 582 (App. Div. 1998).

Here, plaintiff's third count challenges the Township's policy of forwarding OPRA requests to the prosecutor. Plaintiff's complaint alleges that a consent order entered into by the Attorney General in Jacobs v. Harvey, MER-L-3319-04: (1) provides that, "each municipality shall exercise its own discretion in determining whether to release documents sought through OPRA requests;" (2) binds defendants in this case; and (3) therefore forbids the Township from

forwarding OPRA requests to the prosecutor to either grant or deny. The court agrees with the prosecutor that plaintiff's complaint lacks a factual context against which to review the consent order. There is no language contained in the consent order which would provide plaintiff a basis to claim that a municipality is forbidden from forwarding its OPRA request to the county prosecutor's office. Quite the contrary, the core language of the consent order permits the municipality to exercise its own discretion in determining whether to release documents sought through OPRA requests. The Ocean County Prosecutor's Office advances a fair argument that it is the policy within this county to permit the Ocean County Prosecutor's Office to address requests for records pertaining to any act of criminal investigation within their office. Affording plaintiff every reasonable inference and indulgence, the court cannot find that count three sets forth a cause of action or claim upon which relief can be granted. Accordingly, the township's motion to dismiss under R. 4:6-2(e) is granted as to count three.

Therefore, judgment is entered in favor of plaintiff as to count one. The court holds that the Prosecutor's Office violated OPRA when they denied plaintiff's access to the arrest reports, the officer report, the property report to the extent permitted for disclosure under N.J.S.A. 47:1A-3(b). The police car's dash cam video and audio recordings of the two traffic stops shall be released to plaintiff. The court therefore does not address count two regarding plaintiff's cause of action that arises under the common law right of access. The court grants defendant's motion to dismiss of count three. Counsel need to confer and advise the court on the issue of counsel fees and costs. Mr. Luers is to prepare the order.