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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: September 18, 2014

Decided: October 2, 2014

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

Richard Gutman, Esq. appearing on behalf of the plaintiff, John Paff (Richard Gutman, P.C.)

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

Summary

In this action in lieu of prerogative writs, plaintiff John Paff alleges that defendant Ocean County Prosecutor's Office (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, Paff challenges the Prosecutor Office's denial of access to a police dash-camera video, which Paff believes depicts a traffic stop for a motor vehicle violation in Barnegat Township involving a Tuckerton Borough police officer's use of a police dog during the ensuing arrest of the female driver. The incident resulted in charges of aggravated assault and official misconduct against the police officer. At issue is whether the Prosecutor's Office properly denied Paff's request for the

dash-cam video as inaccessible under OPRA. More specifically, the court is required to address the issue of whether a police car's dash cam video 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.

The Prosecutor's Office maintains that its denial is warranted for several independent reasons. First, it maintains that N.J.S.A.47:1A-3 exempts the video from OPRA's disclosure requirement under the "ongoing investigation exception." Second, the Prosecutor's Office maintains that the Attorney General's Internal Affairs Policy and Procedures Guidelines (IAPP) exempts the video from disclosure. Third, it argues 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 without any exceptions under OPRA, the driver's reasonable expectation of privacy justifies its withhold of the video. Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 331 (Law Div. 2004).

The court issued an opinion earlier on July 31, 2014, which addressed the merits of the Prosecutor's Office's reasons for denying Paff access to the video. As to the "ongoing investigation exception" under N.J.S.A. 47:1A-3, the court found that the exception does not apply because the video was made before the investigation commenced and the exception does not work retroactively to render public documents confidential once an investigation starts. Serrano v. South Brunswick, 358 N.J. Super. 352, 367 (App. Div. 2003) As to the IAPP argument, the court found that a video, although may be used as part of an internal affairs investigation, may nevertheless be accessible under OPRA because it was created prior to any internal affairs investigation. Additionally, the court found that the unavailability of the video through criminal discovery does not preclude access via OPRA. MAG Entertainment, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 543 (App. Div. 2005).

As to the “criminal investigatory record” exception, the court found that 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. Specifically, as to the first prong of this test, the court found 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-camera video. The court, therefore, requested the parties to submit supplementary briefs, certification, and evidence on whether the police dash-camera video constitutes a criminal investigatory record under N.J.S.A. 47:1A-1.1’s two-pronged analysis. The court asked the parties 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-camera videos. O’Shea v. Twp. of West Milford, 410 N.J. Super. 371, 384 (App. Div. 2009). Finally, as to the driver’s reasonable expectation of privacy, the court advised it would conduct an *in camera* review of the video in order to determine whether its release would interfere with the driver’s reasonable expectation of privacy.

In summary, the issues that remain outstanding following the court’s ruling are: (1) whether the video constitutes a criminal investigatory record under N.J.S.A. 47:1A-1.1; and (2) whether the video should be withheld to protect the driver’s reasonable expectation of privacy.

Background

The court gave a detailed factual background in its July 31, 2014 opinion. Accordingly, the court does not do so at length in this opinion. Instead, the court will recite only those facts found in the record that are germane to the remaining issues.

On May 20, 2014, Paff requested a copy of the video at issue from the Prosecutor's Office and copies of summonses issued against the driver. The video was captured by a police dashboard camera and it depicted an incident involving a Tuckerton Borough police officer's use of a police dog during the arrest of the female driver following a motor vehicle stop that has resulted in charges of aggravated assault and official misconduct against the police officer. On June 2, 2014, the Prosecutor's Office furnished Paff with the summons, but denied the video request based on N.J.S.A. 47:1A-3 and IAPP. The summons reveal that the driver was charged with two counts of eluding under N.J.S.A. 2C:29-2 and various Title 39 motor vehicle infractions. The Prosecutor's Office also provided a certification by Ocean County Prosecutor's Office Detective, John Halliday, who certifies that the police officer "was charged with aggravated assault third-degree and official misconduct second-degree," but neither the driver, nor the officer had been indicted as of the date of the certification. The Prosecutor's Office also claim a privacy concern with the disclosure of the video to the public which could distress the female driver involved with the matter.

Findings

Burden of Proof

Plaintiff asserts that defendant's conclusory assertion of the requested video as a criminal investigatory record fails to satisfy the burden of proof under OPRA and its case law. Plaintiff argues that defendant must provide sufficient evidence to satisfy his statutory burden of proving that the video is a criminal investigatory record. At the second hearing, defendant advanced the legal argument that OPRA sets up a dichotomy between "government record" and "criminal investigatory record," and, therefore, a "government record" and a "criminal investigatory record" are mutually exclusive. As such, defendant maintains that plaintiff's request of the video,

at the outset, is a request for a criminal investigatory record. According to defendant, plaintiff cannot request the video under OPRA, but under the common law, which places the burden of proof on plaintiff. Therefore, defendant concludes that plaintiff has no right to initiate this court proceeding under OPRA. Nevertheless, at the oral argument, defendant's counsel acknowledged that defendant does have the burden to satisfy the two-pronged test to demonstrate that the video is a criminal investigatory record. The court notes that defendant's "dichotomy" argument at the second hearing fails to reconcile with the argument in its original brief on the return date, in which defendant claimed that "the video is *exempt* as a criminal investigatory record."

The court finds defendant's argument without merit in its assertion that the request at its outset is a request for criminal investigatory record and not properly under OPRA. Defendant's conclusory assertion of the record as a criminal investigatory record fails to properly consider the statutory purpose of OPRA as well as its well-established case law that gives guidance on whether a record is accessible by the public.

The analysis begins with the recognition that OPRA manifests this State's public policy of government transparency. "The purpose of OPRA 'is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005) (quoting Asbury Park Press, supra, 374 N.J. Super. at 329); O'Shea, supra, 410 N.J. Super. at 379. Thus, OPRA directs that

government 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[.]

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

To serve this policy and purpose, OPRA provides that “[t]he public agency shall have the burden of proving that the denial of access is authorized by law.” N.J.S.A. 47:1A-6. As such, the agency “must produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality. Absent such a showing, a citizen’s right of access is unfettered.” Courier News v. Hunterdon County Prosecutor’s Office, 358 N.J. Super. 373, 383 (App. Div. 2003).

To approach an OPRA request, “[t]he first inquiry is whether the requested documents meet the statutory definition of *government record*, and, if so, whether any exemption established in or recognized by any other law bars disclosure of the requested documents.” Wilson v. Brown, 404 N.J. Super. 557, 571 (App. Div. 2009), certif. denied, 198 N.J. 473 (2009) (emphasis added); O’Shea, supra, 410 N.J. Super. at 380.

OPRA defines “government record” or “record” broadly under N.J.S.A. 47:1A-1:

[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.]

N.J.S.A. 47:1A-1.1, however, also declares that “[a] government record shall not include” various categories of “information which [are] deemed to be confidential,” including “criminal investigatory records,” defined 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; O’Shea, supra, 410 N.J. Super. at 380. The broad definition and the exclusion are in *pari materia* and must be read together. Accordingly, the court finds that the Legislature did not set up a dichotomy between “criminal investigatory record” and “government record.” Instead, “criminal investigatory

record” constitutes an exception to the general definition of “government record.” See North Jersey Media Group, Inc. v. City of Garfield, 2012 N.J. Super. Unpub. LEXIS 578 (Law Div. Mar. 16, 2012).

As OPRA places the burden of proof on the government agency seeking to deny access, the court finds that defendant’s mere assertion of criminal investigatory record does not satisfy its obligation under OPRA nor serves its purpose. “[T]he court must always maintain a sharp focus on the purpose of OPRA and resist attempts to limit its scope, absent a clear showing that one of its exemptions or exceptions incorporated in the statute by reference is applicable to the requested disclosure.” Asbury Park Press, supra, 374 N.J. Super. at 329; North Jersey Media Group, supra, 2012 N.J. Super. Unpub. LEXIS 578. When a public agency denies an OPRA based on the “criminal investigatory record” exception, the public agency “must meet both prongs of the definition of ‘criminal investigatory reports’ for the documents to be inaccessible to plaintiff under N.J.S.A. 47:1A-1.1, that is, they must ‘not be required by law to be made,’ and they must ‘pertain[] to any criminal investigation or related civil enforcement proceeding.’” O’Shea, supra, 410 N.J. Super. at 380–81.

Here, the court finds that the video in the instant case falls within the broad definition of “government record” or “record” under N.J.S.A. 47:1A-1.1, because the video constitutes “information stored or maintained electronically” that has been made, maintained, and kept on file in the course of an officer’s official business. In order to prove that the video falls within the “criminal investigatory record” exception, defendant is mandated under OPRA to satisfy the two-pronged test of “criminal investigatory record.”

Criminal Investigatory Record

Plaintiff claims that the requested video was required by law to be made, maintained, or kept on file. Plaintiff argues that the Barnegat Township Police General Order 08-02 (the Order) carries the force of law for Barnegat police officers because the Order was promulgated pursuant to N.J.S.A. 40A:14-118 and the Order employs the mandatory language “shall record.”

Defendant, on the other hand, cites the O’Shea case to support his argument that the Order does not have the force of law to require the video to be made, because the Order is not uniformly applicable throughout the State. Defendant points out that not all the police departments in the State require police dash-camera video recording.¹ Defendant, therefore, concludes that if the court finds that the Order carries the force of law and, hence, allows the video to be disclosed, it will create chaos. Moreover, defendant cites Jones v. Paulsboro Police Dep’t., 2012 N.J. Super. Unpub. LEXIS 234 (Law Div. Jan. 12, 2012) to support the argument that no law mandates the making of the video.

The court disagrees and finds defendant’s interpretation of O’Shea unpersuasive and defendant’s assertion of chaos speculative, at best. At issue here is whether local regulation without uniform application throughout the State has the force of law under the context of “criminal investigatory record” as is the case before this court.

In the O’Shea case, the Appellate Division held that the New Jersey Attorney General’s “Use of Force Policy” that requires the completion of the Use of Force Reports (UFRs) and their maintenance had the force of law for police entities, rendering such documents accessible under OPRA. O’Shea, supra, 410 N.J. Super. at 382. Although the AG’s “Use of Force Policy” is not a

¹ 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.

statute nor an administrative rule, the court held that it has the force of law, because the Attorney General, as the chief law enforcement officer of the State of New Jersey, N.J.S.A. 52:17B-98, is charged with adopting guidelines, directives, and policies that *bind* local police departments in the day-to-day administration of the law enforcement process. Ibid. The AG's guidelines are *binding* and *enforceable* on local law enforcement agencies; and, at a minimum, they are statements concerning the internal management or discipline of an agency. O'Shea, supra, 410 N.J. Super. at 383. The quality, character, and underlying policies of those guidelines lead the court to conclude that those guidelines have the force of law in respect to the *duties* of law enforcement agencies to conform to the *requirements* regarding the use of force and accountability for it, even though they are not administrative rules and, thus, do not require formal promulgation. O'Shea, supra, 410 N.J. Super. at 384. The court concluded that the Attorney General's requirements regarding UFRs sufficiently bind local police departments to satisfy OPRA's "required by law" standard. O'Shea, supra, 410 N.J. Super. at 385. In summary, while cognizing that the Attorney General's guidelines promote uniform enforcement throughout the State, the court in the O'Shea case focused the "force of law" analysis on the guidelines' mandatory and enforceable character and nature on local law enforcement agencies.

Likewise, in view of the binding and enforceable nature of the Barnegat Township Police General Order 08-02 (the Order), the court finds that the Order carries the force of law for the Barnegat police department in creating and maintaining the dash-camera videos. The Legislature has delegated rulemaking to the municipalities, who may "subdelegate to the Chief of Police the power to promulgate orders to the police force." N.J.S.A. 40A:14-118; Rusignuolo v. Orechio, 70 N.J. 330, 336 (1976). N.J.S.A. 40A:14-118 provides that a municipality, "by ordinance, may create and establish . . . a police force" and such ordinance "shall provide . . . 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.” It continues that the chief of police shall be the head of the police force and that he shall “[a]dminister and enforce rules and regulations and special emergency directives for the disposition and discipline of the force and its officers and personnel” and “prescribe the duties and assignments of all subordinates and other personnel.”

Here, the Barnegat Township Police General Order 08-02 “Mobile Video Recording Equipment” was issued by the police chief of the Barnegat Township. The police chief is charged with disciplining the force and its officers and personnel and prescribing the duties and assignments of all subordinates and other personnel. N.J.S.A. 40A:14-118. The orders from the police chief, therefore, bind the Barnegat police department in the day-to-day administration of the law enforcement process. The Order at issue deals with the internal management of the police department in using mobile video recording (MVR) and is binding and enforceable on Barnegat police officers regarding the procedures for using MVR. Specifically, Section II.C., states that “[o]fficers using MVR equipped vehicles *shall* record the following situations: [a]ll traffic stops, criminal enforcement stops . . . [p]olice pursuits” The word “shall” connotes mandatoriness. Additionally, the Order provides a retention schedule. For example, dash-camera videos which are related to a non-indictable or traffic offense will be retained for 60 days, videos related to an indictable crime will be retained for 5 years after the case is closed, videos that are flagged for DWI cases will be retained for 10 years.

Therefore, following the O’Shea court’s rationale, the court finds that the Order has the force of law with respect to the mandate that Barnegat police officers conform to the requirements regarding the use and retention of police dash-camera videos which satisfies OPRA’s “required by law” standard. The Paulsboro case is distinguishable from the instant case

because the Paulsboro case involved a surveillance video outside the police department and there was no law or regulation that mandated the making of exterior surveillance videos of police departments.

Moreover, a careful reading of O’Shea reveals that what the Appellate Division meant is that the UFR at issue in that case may or may not pertain to an investigation and “the question is one of fact for the fact-finder in OPRA matters.” O’Shea, supra, 410 N.J. Super. at 385. The court concurs with Judge Doyne’s analysis in North Jersey Media Group, supra, 2012 N.J. Super. Unpub. LEXIS 578 which held that in the evaluation of accessibility, if the record, in this case the video, is required to be made, it cannot qualify as a criminal investigatory record even if it pertains to a criminal investigation. The court can safely conclude that the use of police dash-camera serves public interest. As importantly, it protects police officers, as the Order states that “[i]t is the policy of this agency to use mobile video recorders in order to protect the members of this agency.” The court’s analysis and disposition apply to the video requested in this instance is based on its particular circumstances. The court understands that a record may vary in type from municipality to municipality. A police dash-camera may not be required currently in every department. If video recordings are not available, then there is simply no record for OPRA request.

In summary, the Order carries the force of law to require that Barnegat police officers create a police dash-camera video recording under specified circumstances. The traffic stop in this case fell under one of the specified circumstances covered under the Order. The court finds that the requested video fails the first prong of the “criminal investigatory record” exception and is not exempted from disclosure under OPRA because it is required to be made. Because the video fails the first prong of the “criminal investigatory record” exception, the court does not

need to address the second prong. As the disclosure is allowed under OPRA, the court needs not to reach the issue regarding the common law right. O’Shea, supra, 410 N.J. Super. at 387.

Privacy Concern

After its *in camera* review, the court finds that the female driver does not have reasonable expectation of privacy to support the withholding of the video and the facts of the present case are distinct from Asbury Park Press v. Ocean County Prosecutor’s Office, 374 N.J. Super. 312 (Law Div. 2004). In Asbury, the plaintiff requested a 911 call made by one of the victims of a double homicide. According to the court in the Asbury case, the dying words of the victim did not contribute to the purpose of OPRA—an informed citizenry or elimination of the evil of secrecy, nor provided insight into the functioning of government. Asbury Park Press, supra, 374 N.J. Super. at 330. The court added that its *in camera* review of the tape was a “chilling, wrenching, and lingering experience even for one not related to the *victim*.” Ibid. The court stated that “the content of the tape would . . . offend and disturb any person of normal sensibilities.” Ibid. The court then concluded that “it is beyond doubt that the victims’ survivors would reasonably expect that they would never have to share their loved ones’ words with an inquisitive media or curious public.” Ibid.

Here, the video depicted an incident involving an arrest following a traffic stop. The content of the video would contribute to the public purpose of OPRA and provide insight into a police officer’s conduct during an arrest. The court’s *in camera* review of the recording does not find it to be so horrific or chilling as to warrant its nondisclosure. In the court’s opinion, the driver does not have a reasonable expectation of privacy in withholding the video, because her face is not even shown in the video. Moreover, it depicts a motor vehicle traffic stop in a public area which militates against any expectation of privacy.

Based on the foregoing, judgment is entered in favor of plaintiff, John Paff, on count one. The court orders the Prosecutor's Office to grant John Paff access to the police dash-camera video requested. Counsel need to confer and advise the court on the issue of counsel fees and costs. The court dismisses count two which seeks the common law right of access to the requested records given the relief granted to plaintiff under count one. Mr. Gutman is to prepare the order.