

ORDER PREPARED BY THE COURT

JOHN PAFF,

Plaintiffs,

v.

TOWNSHIP OF NEPTUNE and RICHARD
J. CUTTRELL, RMC, in his Capacity as
Records Custodian for the
Township of Neptune,Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – MONMOUTH
COUNTY

DOCKET NO.: MON-L-621-15

ORDER

This matter comes before the Court by way of Plaintiff, John Paff's (hereinafter "Plaintiff"), counsel, CJ Griffin, Esq. (Pashman Stein, P.C.) Action in Lieu of Prerogative Writs alleging that the decision of Defendants, Township of Neptune and Richard Cuttrell (collectively, hereinafter "Defendants") to deny access to police dashboard camera audio/video depicting an arrest of a man charged with "resisting arrest" and "obstruction of justice," violated the Open Public Records Act, N.J.S.A. 47:1A-1, et seq. ("OPRA").

The Court for good cause shown;

IT IS on this 18th day of February 2016;

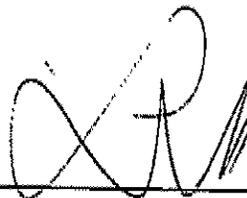
ORDERED that Plaintiff's Action in Lieu of Prerogative Writs is hereby **GRANTED** for the reasons stated on the record on February 18, 2016 and in the attached opinion;

IT IS FURTHER ORDERED that Defendants provide Plaintiff with the copy of the dashboard audio/video within seven (7) days of their receipt of the signed order;

IT IS FURTHER ORDERED that Counsel for Plaintiff and Defendants confer to determine reasonable attorney's fees to which Plaintiff is entitled. Any award of costs and attorney's

fees will abide further application to the Court, which shall be included within the order to be prepared and submitted by Plaintiff's counsel; and

IT IS FURTHER ORDERED that Plaintiff's counts which seek access under the common law right of access are dismissed.

A handwritten signature in black ink, appearing to read 'L.P.T.', is written above a horizontal line.

LISA P. THORNTON, A.J.S.C.

NOT FOR PUBLICATION WITHOUT THE APPROVAL
FROM THE COMMITTEE ON OPINIONS

JOHN PAFF,

Plaintiff,

v.

TOWNSHIP OF NEPTUNE and
RICHARD J. CUTTRELL, RMC, in his
Capacity as Records Custodian for the
Township of Neptune,

Defendants.

SUPERIOR COURT OF NEW JERSEY
MONMOUTH COUNTY LAW DIVISION

DOCKET NO.: MON-L-621-15

OPINION

Decided: January 26, 2016

CJ Griffin for plaintiff (Pashman Stein, P.C., attorneys);

Gene J. Anthony for defendant (The Law Offices of Gene J. Anthony, attorney).

THORNTON, A.J.S.C.

Summary

In this Action in Lieu of Prerogative Writs, Plaintiff, John Paff (hereinafter "Plaintiff"), alleges that Defendants, Township of Neptune and Richard J. Cuttrell (hereinafter referred to collectively as "Defendants"), violated the Open Public Records Act, N.J.S.A. 47:1A-1, et seq. ("OPRA"), and the common law right of access, by denying access to police dashboard camera audio/video depicting an arrest of a man charged with "resisting arrest" and "obstruction of justice." Defendants denied access based on its assertion that the audio and video footage was an exempt "criminal investigatory record" pursuant to "Executive Order 69" (hereinafter "EO 69"). Because the denial of access was not "authorized by law," Plaintiff's request is granted pursuant to OPRA.

To resolve this dispute the Court must address: (1) whether Defendants have carried their burden that denial of access was supported by one of the OPRA exceptions; (2) whether EO 69 is an appropriate basis to deny access under OPRA; and (3) whether the police dash camera audio and video footage in this case is a “criminal investigatory record” as defined by OPRA.

Facts and Contentions

The relevant facts are undisputed. On October 19, 2014, a Neptune Township police officer effectuated a motor vehicle stop of Maurice Mitchell. No police report was provided by the parties, but a “COMPLAINT-WARRANT” signed against Mr. Mitchell reveals that he was charged with resisting arrest and obstruction for “refusing to be handcuffed after being told he was under arrest” and “refusing to comply with [Police Officer Amanda] Espinosa’s commands to exit his vehicle during a DUI police investigation.” It is not clear if Mr. Mitchell was ever issued a summons pursuant to N.J.S.A. 39:4-50. See October 19, 2014 Complaint-Warrant. There is no indication that Mr. Mitchell was charged with anything other than petty disorderly persons offenses. During oral argument, the Court requested more information about the particular circumstances of Mr. Mitchell’s arrest, as well as the substance and current status of the charges against him. Counsel for Defendants was unable to provide further information other than what was contained in the Complaint-Warrant.

On January 7, 2015, Plaintiff requested the police dash camera audio/video footage documenting the motor vehicle stop of Mr. Mitchell, as well as copies of complaints filed against him, pursuant to OPRA and the common law right of access. Plaintiff is a self-professed “open government activist and Chairman of the New Jersey Libertarian Party’s Police Accountability Project.” Plf.’s Verified Compl., ¶2.

On January 13, 2015, Defendants responded to Plaintiff’s request and provided Plaintiff with a copy of the Complaint-Warrant issued against Mr. Mitchell. However, Defendants denied Plaintiff’s request for the police dashboard camera audio/video, claiming it was exempt from access pursuant to

EO 69. Specifically, Defendants provided the following explanation for denying access to the dash camera audio/video:

This is not a public record under [OPRA] as per Executive Order #69 which specifically excludes from release “fingerprint cards, plates and photographs and similar criminal investigation records that are required to be made, maintained or kept by any State or local government agency.” A police Dashboard Video is also excluded from disclosure under the same Executive Order as interpreted by the Superior Court of New Jersey, Appellate Division in the case of North Jersey Media Group, Inc. v. Borough of Paramus (A-5349-10T4) decided by the Court on July 13, 2013 affirming the Lower Court’s decision that “a video may be described as a compilation of many photographs.” Accordingly, “access to the police video recordings may be precluded pursuant to EO No. 69 as disclosure of the information would otherwise be inappropriate.”

[Certification of Gene J. Anthony, supra, Exhibit A, “Government Records Request Response.”]

In support of his application, Plaintiff argues that his request is subject to OPRA because the “police dash cam video/audio” is “made, maintained or kept on file” or “received in the course of ... official business.” Regarding his request pursuant to the Common Law Right of Access, Plaintiff argues that the public’s need for access is greater than Defendant’s need for secrecy. See Plf.’s Verified Compl.

In response to Plaintiff’s request, Defendants maintain that the records are “not a public record under OPRA as per Executive Order 69.” Despite the Court’s urging, counsel for Defendants relied on little else but EO 69 to support Defendants’ position during oral argument.

Law

PUBLIC ACCESS

Access to public records is available “in three distinct ways.” Government records may be obtained through a citizen’s common law right of access, by asserting one’s rights pursuant to OPRA, or by the discovery procedures applicable to civil disputes. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 543 (App. Div. 2005) (citing Bergen County Imp.

Auth. v. North Jersey Media Group, Inc., 370 N.J. Super. 504, 515 (App. Div. 2004), certif. denied, 182 N.J. 143 (2004)). OPRA replaced the Right to Know Act of 1963 (hereinafter “the RTKL”). See Serrano v. South Brunswick Tp., 358 N.J. Super. 352, 363 (App. Div. 2003); see also, Asbury Park Press v. County of Monmouth, 406 N.J. Super. 1, 6 (App. Div. 2009) (holding that “OPRA superseded the Right to Know Law.”).

OPRA

A. Generally

OPRA was enacted “to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.” Mason v. City of Hoboken, 196 N.J. 51, 64-65 (2008) (quoting Asbury Park Press v. Ocean County Prosecutor’s Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). Pursuant to OPRA, “government records” are to be “readily accessible for inspection, copying, or examination.” N.J.S.A. 47:1A-1. The Statute directs that “all government records shall be subject to public access unless exempt” and that “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-1.1 (emphasis added).

B. Government records

OPRA greatly expanded the definition and scope of government records available for public access. The RTKL narrowly defined “government records” as those “required by law to be made, maintained or kept on file.” By contrast, OPRA defines “government records” as those enumerated documents that have been “made, maintained or kept on file” regardless of whether the documents were “required by law to be made” or “maintained,” if made in the course of official government business. N.J.S.A. 47:1A-1.1.

C. OPRA Exemptions

1. **Criminal Investigation Records:** The common law right of access, the RTKL and

OPRA are evidence of New Jersey's long history favoring the public's right to be informed of government actions. However, the public's right to inspect documents is not without limitations. Criminal investigatory records have generally been excluded from access to protect the integrity of criminal investigations and the rights of victims. The court notes that the definition of "criminal investigatory records" has evolved over time.

- ***Required by Law (EO #69)***

Executive Order 69, signed by Governor Christine Todd Whitman on May 15, 1997, "clarified" provisions of the RTKL and prior executive orders, and defined "criminal investigation records" as "fingerprint cards, plates and photographs and similar criminal investigation records that are required to be made, maintained or kept by any State or local governmental agency." Exec. Order No. 69, ¶2.

- ***Not Required by Law (OPRA)***

OPRA defines "criminal investigatory record" as a record "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.

2. **Investigation In Progress:** Records may be excluded from access if they "pertain to an investigation in progress" and access would be "inimical to the public interest." N.J.S.A. 47:1A-3(a). However, this exclusion does not apply to records that were not created as a result of an investigation. Simply stated, if the dashboard audio/video footage was "public" at the time it was created, it remains accessible even if it is relevant to a criminal investigation and release may be inimical to the public interest. Serrano v. South Brunswick Tp., 358 N.J. Super. 352, 366 (App. Div. 2003).

D. Burden of Proof

When a public agency denies a request for records, it "shall have the burden of proving that the denial of access is authorized by law." N.J.S.A. 47:1A-6; see also Courier News v. Hunterdon

County Prosecutor's Office, 358 N.J. Super. 373, 379 (App. Div. 2003). 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, 358 N.J. Super. at 382-83. A court's analysis should consider "the overarching public policy in favor of a citizen's right of access." Id. at 383. If it is determined that access has been improperly denied, the court shall enter an order requiring the public agency to comply, and the prevailing party shall be entitled to a reasonable attorney's fee. N.J.S.A. 47:1A-6.

E. Common Law

Under the common law, a citizen may gain access to "public" documents if she has an "interest in the subject matter". Her interest need not be "purely personal", but may relate to a public problem or issue. A "public record" is one: 1) required by law to be kept; 2) necessary to be kept in the discharge of a public duty imposed by law; 3) directed by law to serve as a memorial and evidence of something written, said or done; 4) a written memorial made by a public officer authorized to perform that function, or 5) a writing filed in a public office. S. Jersey Pub. Co. v. N.J. Expressway Auth., 124 N.J. 478, 487 (1991). However, before access may be granted, a court must "balance the plaintiff's interest in the information against the public interest in confidentiality" including a consideration of whether the request is made to advance a public or private purpose.

Factors to consider when balancing the respective interests include:

- (1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government;
- (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;
- (3) the extent to which agency self-evaluation, program improvement, or other decision making will be chilled by disclosure;
- (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policy-makers;
- (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and
- (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials.

[Loigman v. Kimmelman, 102 N.J. 98, 113 (1986).]

Reasoning

CRIMINAL INVESTIGATORY RECORDS

In denying access, Defendants claim “a police dashboard video” is “not a public record” and is excluded from disclosure “as per Executive Order #69 . . . as interpreted by Superior Court of New Jersey, Appellate Division in the case of North Jersey Media Group, Inc. v. Borough of Paramus.” Other than a conclusory statement offered to deny access, Defendants have failed to provide any facts, evidence or argument to support denial based on the second prong of the test set forth in EO 69. No certification or other evidence was offered to show that Defendants were “required to maintain” the dash camera audio/video. In fact, Defendants’ brief failed to even address this issue. In addition, Defendants failed to provide any evidence that the dashboard audio/video had anything to do with a criminal investigation. Consequently, Defendants have failed to meet their burden to provide “specific reliable evidence” to support a denial of access.

While Defendants’ lack of factual evidence is problematic, the legal basis for Defendants’ denial is also misplaced. EO 69 limits access to public documents pursuant to the RTKL, a statute that was superseded by OPRA. In addition, “criminal investigation records” defined by EO 69 and OPRA have different meanings. Criminal investigation records “required by law to be made” that were protected under EO 69, are accessible under OPRA unless they are subject to another exception. OPRA excludes criminal investigatory records “not required by law” to be made. Simply stated, Defendants relied on the wrong definition of “criminal investigatory records” to deny access. It goes without saying that Defendants’ denial of access was not “authorized by law” when Defendants relied on an exclusion not recognized by OPRA.

Defendants place great weight on the unpublished Appellate Division decision of North Jersey Media Group, Inc. v. Borough of Paramus, 2012 N.J. Super. Unpub. LEXIS 1685 (App. Div. 2012),

to support their contention that EO 69 excludes “police dashboard video” from public access as a matter of law. This argument is unpersuasive for several reasons. The unpublished decision is not binding on this court. More importantly, Defendants greatly overstate Judge Doyne’s holding.

A review of the case indicates Plaintiff requested copies of police dispatch audio and video recordings from police cars in connection with the shooting of Officer Rachel Morgan of the Paramus Police Department. Contrary to Defendants’ assertion that the dash camera audio/video is “not a public record under [OPRA],” Judge Doyne found that “because the audio recordings and video recordings are required by law to be maintained on file by the Borough in the course of its official business, they are government records subject to disclosure under OPRA.” *Id.* at *3. He concluded that the “audiotapes and videotapes” were “required by law to be maintained” pursuant to the Destruction of Public Records Law and the New Jersey Division of Archives and Records Management and were “not exempt as criminal investigatory records.” *Id.* at *4. In ultimately denying access to the dash camera videos in this particular case, Judge Doyne concluded that “a video may be described as a compilation of many photographs” and that “access to police video recordings may be precluded pursuant to EO 69” as “otherwise inappropriate” based on Officer Morgan’s right of privacy. *Id.* at *8. He further acknowledged that the authority for his decision, found in paragraph 4 of EO 69, was codified in OPRA, N.J.S.A. 47:1A-3(b). *Id.*

This Court is unaware of any reported decision that holds that police dashboard video footage is exempt pursuant to OPRA as a matter of law. On the contrary, a determination of whether public records are exempt as “criminal investigatory records” depends on the specific facts of the case. In fact, Judge Doyne has ruled that police dashboard camera video footage is subject to disclosure pursuant to OPRA. North Jersey Media Group, Inc. v. Township of Lyndhurst, 441 N.J. Super. 70 (App. Div. 2015). More importantly, it defies reason that a decade of jurisprudence defining the clear public policy embodied by OPRA should be usurped by application of an outdated Executive Order

that has little practical relevance. See Shuttleworth v. City of Camden, 258 N.J. Super. 573, 592 (App. Div. 1992) (holding that Executive Orders, without specific language, should not be used to provide an exception to specific legislative requirements).

OPRA

While Defendants failed to apply the proper test, a review of the record fails to reveal the existence of any evidence to justify the “criminal investigatory record” exclusion under OPRA. No argument was made that the dashboard video “was not required by law to be maintained.”¹ In addition, there is no evidence that the dashboard video “pertains to any criminal investigation or related civil enforcement proceeding,” as required under OPRA.

Regarding the second prong of the test, the record indicates that Mr. Mitchell was charged with violating N.J.S.A. 2C:29-2(a)(1) (Resisting Arrest) and N.J.S.A. 2C:29-1(b) (Obstruction of Justice) while being investigated for a “DUI charge,” N.J.S.A. 39:4-50. “Disorderly persons offenses and petty disorderly persons offenses are petty offenses and are not crimes within the meaning of the Constitution of this State.” N.J.S.A. 2C:1-4(b). Pursuant to N.J.S.A. 2C:29-2(a)(1), “a person is guilty of a disorderly persons offense” of resisting arrest “if he purposely prevents or attempts to prevent a law enforcement officer from effecting an arrest.” (emphasis added). Similarly, a person commits the disorderly persons offense of obstruction of justice “if he purposely obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from lawfully performing an official function by means of flight, intimidation, force, violence, or physical interference or obstacle, or by means of any independently unlawful act.” N.J.S.A. 2C:29-1(a); N.J.S.A. 2C:29-1(b). Nothing in the record suggests that Mr. Mitchell was ever suspected of violating any “criminal offense” as defined by the New Jersey Code of Criminal Justice.

¹ The court notes that in North Jersey Media Group Inc. v. Township of Lyndhurst, 441 N.J. Super. 70 (App. Div. 2015), the appellate division ruled that Destruction of Public Record Law (DRPL) did not satisfy the required by law standard.

See State v. Negran, 178 N.J. 73, 83 (2003) (citing State v. Hammond, 118 N.J. 306, 311-12 (1990) (reasoning that “motor vehicle violations, including DWI violations, constitute only ‘petty offenses’ and thus are distinct from violations intended to constitute ‘offenses’ under the New Jersey Code of Criminal Justice.”).

INVESTIGATION IN PROGRESS

Defendants did not raise this exemption and failed to offer any evidence that the dashboard audio and video footage should be excluded because it pertains to an investigation in progress. When asked about the status of the charges filed or pending against Mr. Mitchell, counsel for Defendants had no additional information to offer other than what was included in the complaint.

COMMON LAW RIGHT OF ACCESS

Because access is granted pursuant to OPRA, the court will not analyze Plaintiff's claims under the common law. The court notes however, that as an advocate for open government, Plaintiff has an “interest in the subject matter.” However, recent authority exists that general document retention statutes do not meet the “required by law” standard for criminal investigatory records. See North Jersey Media Group Inc. v. Township of Lyndhurst, 441 N.J. Super. 70, 90 (App. Div. 2015).