

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2426-13T3

JOHN PAFF,

Plaintiff-Respondent,

v.

OFFICE OF THE PROSECUTOR
OF THE COUNTY OF WARREN,
and TARA J. KIRKENDALL, in her
capacity as an Assistant
Prosecutor,

Defendants-Appellants.

Argued November 10, 2015 – Decided December 9, 2015

Before Judges Hoffman and Leone.

On appeal from Superior Court of New Jersey,
Law Division, Warren County, Docket No.
L-0034-13.

Joseph J. Bell, IV, Warren County Counsel,
argued the cause for appellants (Bell,
Shivas & Fasolo, P.C., attorneys; Mr. Bell,
of counsel and on the brief).

Walter M. Luers, argued the cause for
respondent.

Carol M. Henderson, Assistant Attorney
General, argued the cause for amicus curiae
Attorney General of New Jersey (John J.
Hoffman, Acting Attorney General, attorney;
Ms. Henderson, of counsel and on the brief).

PER CURIAM

Defendant Warren County Prosecutor's Office (WCPO) appeals from Law Division orders entered on December 18 and 30, 2013, granting plaintiff John Paff access to thirteen requested documents under the common law right of access to public records. We affirm.

I.

On November 14, 2012, the Warren County Sheriff's Office contacted the WCPO concerning an internal affairs investigation it had commenced in connection with the use of a county-owned generator by an employee of the Warren County Correctional Center. The following day, the WCPO directed the Sheriff's Office to suspend its internal affairs investigation pending a criminal investigation by the WCPO. On November 19, 2012, Lt. Sherafin of the WCPO commenced an investigation. On December 7, 2012, the investigation concluded, with no criminal charges filed. Thereafter, the WCPO sent a confirming letter to the Sheriff, returning "the matter to you for any administrative action you deem appropriate."

On December 27, 2012, a local newspaper reported that several unidentified "Warren County jail officers used county-owned generators for personal use in the aftermath of Superstorm Sandy." The article indicated that the officers were disciplined, but not terminated. The article further stated

that the WCPO "concluded earlier this month that no criminal activity took place."

On January 3, 2013, plaintiff submitted a request for records to the WCPO under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, and the common law right of access to public records, requesting various records from the investigation into the potential misuse of county-owned generators by jail officers during Hurricane Sandy. Plaintiff explained his common law interest by stating that he worked as the Chairman of the New Jersey Libertarian Party's Open Government Advocacy Project and sought to "unearth and publish covered-up information in all corners of this state." He further indicated that:

If I learn these officers' names, I will post them on all available Internet blogs and call media and public attention to the posting. Also, I think that having the facts and the officers' names (and, in turn their possible relationships to other government officials) will help citizens determine whether the prosecutor's election to not follow through on this matter was a reasonable exercise of that discretion.

Assistant prosecutor Tara J. Kirkendall responded to this request in a letter dated January 4, 2013, releasing two partially redacted records, and explaining that the remaining records were confidential criminal investigatory and internal affairs documents and not subject to disclosure under OPRA or

the common law. The thirteen records deemed confidential and not subject to disclosure were itemized in an accompanying "Vaughn Index."¹

Plaintiff subsequently filed a complaint alleging a violation of OPRA and the common law right of access. On June 14, 2013, the judge heard oral argument, and rendered an oral decision that the records in dispute were confidential criminal investigatory records under OPRA and dismissed that count of the complaint. She entered a confirming order on June 28, 2013.² However, the judge reserved decision on whether plaintiff could obtain the requested documents under the common law right of access, and indicated that she would review the requested documents in camera.

On December 18, 2013, the judge issued an order and seven-page written decision ruling that, subject to specific personal information redactions, the WCPO must release the thirteen

¹ A "Vaughn Index" typically consists of "a detailed affidavit, the purpose of which is to permit the court system effectively and efficiently to evaluate the factual nature of disputed information." John Doe Agency v. John Doe Corp., 493 U.S. 146, 149 n.2, 110 S. Ct. 471, 107 L. Ed. 2d 462 (1989) (internal quotation marks omitted) (citing Vaughn v. Rosen, 157 U.S. App. D.C. 340, 346, 484 F.2d 820, 826 (D.C. Cir. 1973), cert. denied, 415 U.S. 977, 94 S. Ct. 1564, 39 L. Ed. 2d 873 (1974)). See also Paff v. Div. of Law, 412 N.J. Super. 140, 161 n.9 (App. Div.), certif. denied, 202 N.J. 45 (2010).

² Neither party has appealed the court's OPRA ruling.

requested documents under the common law right of access. A December 30, 2013 amended order clarified the required document redactions:

Before serving plaintiff with such documents, defendants shall redact from the documents all references to witnesses or to any person who provided a statement to defendants, as well as his or her position of employment, birth date, home and cellular telephone numbers, home address, and any personal identifier. The identities and positions of employment of public employees who conducted the investigation shall not be redacted.

After the entry of this order, the parties agreed to a consent order staying the trial court's order compelling disclosure of the WCPO's criminal investigation file pending this appeal.

The WCPO presents the following arguments for consideration:

- I. THE LOWER COURT COMMITTED A CLEAR LEGAL ERROR IN ITS APPLICATION OF THE COMMON LAW BALANCING TEST AND IN HOLDING THAT THE NEED FOR CONFIDENTIALITY DOES NOT SURVIVE CLOSURE OF A CRIMINAL INVESTIGATION.
 - A. The Trial Court Erred By Failing To Determine The Strength Of The Plaintiff's Interest Under The Common Law And The Effect Of That Interest In The Balancing Test.
 - B. The Court's Flawed Application Of Factor Three (3) Of The Common Law Balancing Test And Erroneous Conclusion That The Need To Maintain The Confidentiality Of Criminal Investigatory Records Expires Upon

Closure Of The Investigation Constitute
Clear Legal Error And Mandate Reversal.

1. Because The Lower Court Held That The Records In Dispute Were Criminal Investigatory Records Under OPRA, It Erred By Not Assessing Whether Plaintiff Could Demonstrate A Heightened And More Particularized Need.
2. The Need For Confidentiality Does NOT Necessarily Expire Upon Closure Of A Criminal Investigation.
3. The Prosecutor's Office Has An Interest In Protecting The Privacy Of Persons Investigated But Who Have Never Been Arrested Nor Charged With A Crime.
4. The Lower Court's Common Law Analysis Does Not Consider The Importance Of Privacy And Confidentiality Under The Attorney General's Internal Affairs Guidelines.
5. The Court Failed To Adequately Consider The [Loigman] Factors And Other Important Justifications Weighing In Favor Of Confidentiality.

On July 25, 2014, the Attorney General of New Jersey filed an amicus brief supporting the position of the WCPO, and presenting the following argument for consideration:

THE TRIAL COURT ERRED IN ORDERING THE
RELEASE OF CONFIDENTIAL CRIMINAL
INVESTIGATIVE AND INTERNAL AFFAIRS FILES
UNDER THE COMMON LAW RIGHT OF ACCESS.

II.

On appeal, we engage in de novo review of the trial judge's legal decisions concerning access to public records under either OPRA or the common law right of access. Drinker Biddle & Reath LLP v. N.J. Dep't of Law and Pub. Safety, 421 N.J. Super. 489, 497 (App. Div. 2011). "We apply a different and deferential standard of review when a court conducts an in camera review of documents and balances competing interests in disclosure and confidentiality in connection with a common-law-based request to inspect public records." North Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 441 N.J. Super. 70, 89 (App. Div. 2015) (citing Shuttleworth v. City of Camden, 258 N.J. Super. 573, 588 (App. Div.), certif. denied, 133 N.J. 429 (1992)). Because in this matter the judge made her determinations after reviewing the documents in camera, we must generally defer to the judge's determinations "[i]f there is a basis in the record to do so." Shuttleworth, supra, 258 N.J. Super. at 588.

The common law right of access reaches a broader class of documents than its statutory counterpart. Higg-A-Rella, Inc. v. Cnty. of Essex, 141 N.J. 35, 46 (1995). Nonetheless, that right must be balanced against the State's interest. Ibid. This common law right to access public records depends on three

requirements: "(1) the records must be common-law public documents; (2) the person seeking access must establish an interest in the subject matter of the material; and (3) the citizen's right to access must be balanced against the State's interest in preventing disclosure." Keddie v. Rutgers State Univ., 148 N.J. 36, 50 (1997) (citations and internal quotation marks omitted). Furthermore, because the common law right of access to documents is qualified, "one seeking access to such records must establish that the balance of its interest in disclosure against the public interest in maintaining confidentiality weighs in favor of disclosure." Ibid. (citation and internal quotation marks omitted). In this matter, defendants have conceded that the documents are public records and that plaintiff has the requisite standing to obtain a copy of the subject matter. Accordingly, we need only review the third factor: whether plaintiff's right to the documents outweighs the WCPO's interest in preventing disclosure.

A.

The balancing of the competing interests in disclosure and confidentiality often involves an "exquisite weighing process by the trial judge." Loigman v. Kimmelman, 102 N.J. 98, 108 (1986) (citation omitted). In the case of public records, once a plaintiff proves an interest in the material, "the State must

then demonstrate that its need for nondisclosure outweighs the plaintiff's need for disclosure." O'Boyle v. Borough of Longport, 426 N.J. Super. 1, 13 (App. Div. 2012), aff'd, 218 N.J. 168 (2014) (citation omitted). If the trial court believes that an in camera inspection of the records is warranted, "it will thereafter make a final determination as to whether, by further excision or deletion of privileged and confidential materials, it can appropriately order the materials released." Loigman, supra, 102 N.J. at 113. Our Court has provided a list of some of the factors that the trial court should consider in balancing the requester's needs against the public agency's interest in confidentiality:

(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 decisionmaking will be chilled by disclosure; (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers; (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.

[Ibid.]

As noted in Loigman, this list represents some factors to consider, and is not exhaustive. Ibid. Additionally, this court has noted that "[t]he motivation of the requester is a relevant consideration in the balancing process under the common law." North Jersey Media Grp., Inc., supra, 441 N.J. Super. at 115. Furthermore, we have emphasized that "the need for confidentiality in investigative materials may wane after the investigation is concluded." Ibid.; see also Shuttleworth, supra, 258 N.J. Super. at 585 ("While there is a real need to deny access where there is an ongoing law enforcement investigation, or where the protection of witness information or a witness's identity is at stake, the same values do not survive a balancing after the investigation is closed.").

Applying these standards, we find no basis to disturb any aspect of the orders under review. The judge's written decision addressed and weighed each Loigman factor and carefully explained her findings and conclusions. The judge stated that the fact that the WCPO's criminal investigation has concluded is "[a] factor of significance." She noted the ability of redactions to address situations where "confidentiality of a particular witness or specific information must be maintained." The judge further found no "reasonable basis to conclude that

the disclosure of the records would chill any agency functions, including self-improvement programs." The judge appropriately ordered redactions of all personal identifier information of all witnesses and persons who provided statements, which adequately addressed the WCPO's confidentiality and privacy concerns.³

B.

We further find no merit in the WCPO's contention that the trial court should have applied a "heightened standard" to plaintiff's common law request. In particular, the WCPO asserts that the trial court should have taken into consideration that the records at issue were found to be confidential criminal investigatory records under OPRA, N.J.S.A. 47:1A-1.1.

OPRA expressly exempts from unfettered public access "criminal investigatory records." The statute defines a "criminal investigatory record [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." Ibid.; North Jersey Media Grp., Inc., supra, 441 N.J. Super. at 90. However, OPRA also provides that "[n]othing contained in [OPRA]

³ The State on appeal argues that disclosing these documents might enable certain persons to figure out the identity of the persons investigated, and that a closed case like this might be reopened. However, the State made no such showings before the trial judge, so we do not consider these assertions on appeal.

shall be construed as limiting the common law right of access to a government record, including criminal investigatory records of a law enforcement agency." N.J.S.A. 47:1A-8. We have held that the common law right of access remains an independent means to obtain government records. See Bergen Cnty. Improvement Auth. v. North Jersey Media Grp., 370 N.J. Super. 504, 516 (App. Div.), certif. denied, 182 N.J. 143 (2004) ("[The suggestion] that the adoption of OPRA signaled a legislative policy shift away from the common law and in favor of a statutory means for accessing public information, palpably lacks textual support."). As such, we find no merit to the argument that the exemption of the records from OPRA requires a plaintiff to meet a heightened standard.

We do not suggest that the fact that these are criminal investigative records is irrelevant. A court may consider OPRA's exemptions in balancing under the common law "as expressions of legislative policy on the subject of confidentiality," as long as they do not "heavily influence the outcome of the analysis." Id. at 520-21. Similarly, outside the OPRA context, courts have recognized that the confidentiality of criminal investigatory records is at times crucial to effective law enforcement and that confidentiality may extend even if the investigation is closed. River Edge Sav.

& Loan Ass'n v. Hyland, 165 N.J. Super. 540, 543, 545 (App. Div.), certif. denied, 81 N.J. 58 (1979). Thus, a court may consider OPRA's exclusion of criminal investigative records, and the similar common law principles on the right to access public documents, for guidance when weighing the respective interests of the parties. Here, we are confident the judge considered the fact that OPRA excludes criminal investigative records, as the judge had earlier ruled.

C.

The WCPO further argues that the records are protected from disclosure by the deliberative process privilege, N.J.S.A. 47:1A-1.1. We disagree.

For this privilege to apply, "the governmental entity claiming the privilege bears the burden of establishing that the document in question was in fact pre-decisional and that it is deliberative in nature, containing opinions, recommendations, or advice about agency policies." In re Readoption with Amendments of Death Penalty Regulations N.J.A.C. 10A:23, 367 N.J. Super. 61, 73 (App. Div.), certif. denied, 182 N.J. 149 (2004) (citation and internal quotation marks omitted). Moreover, "[p]urely factual material that does not reflect deliberative processes is not protected." Ibid. (citation omitted).

However, the judge's analysis ensured that her ruling was consistent with our deliberative process privilege cases:

Documents #2, #3, #4, #6, #7, and #9 are witness statements, which provide factual information only, and document #1 is a summary of factual information provided by the witnesses.

Documents #5, #8, and #11 are administrative records that are routinely executed during an investigation and contain only factual information.

Document #10 contains factual information received by the Sheriff's Office, although the third and fourth "bullet" points on page two contain deliberative information, see In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 83 (2000), and shall not be disclosed. (For clarification, the third bullet point begins with "11/14/12" and the fourth bullet point begins with "11/15/12.")

Document #12 sets forth handwritten notes that were being jotted down while witnesses were giving their respective statements of facts to the author of document #12; none of the information in document #12 contains deliberative material.

Document #13 is an anonymous letter written by a "concerned citizen."

Accordingly, the record indicates that the trial court carefully reviewed the documents in camera and determined which material was clearly factual, and which material was subject to the deliberative process privilege.

Defendant's remaining arguments are "without sufficient merit to warrant discussion in a written opinion." R. 2:11-

3(e)(1)(E). We vacate the stay previously granted, effective thirty days from the date of this opinion.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.



CLERK OF THE APPELLATE DIVISION