

SUPERIOR COURT OF NEW JERSEY

TRAVIS L. FRANCIS  
ASSIGNMENT JUDGE



MIDDLESEX COUNTY COURT HOUSE  
P.O. BOX 964  
NEW BRUNSWICK, NEW JERSEY 08903-0964

April 6, 2015

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Middlesex County Prosecutor's Office

RE: William J. Brennan v. Middlesex County Prosecutor's Office, James O'Neil,  
Custodian of Records for the Middlesex County Prosecutor's Office, and John  
Does 1-10  
Docket No. MID-L-293-15

Dear Counsel:

This Court based on the unique act of factual circumstances hereby grants Plaintiff access to "video and audio recordings of police pursuits engaged in by members of the New Brunswick Police Department from January 2004 to present" pursuant to the open public records act (OPRA), N.J.S.A. 47:1A-1 et seq. The Courts' reasons are set forth below.

On December 15, 2014, William J. Brennan, filed an OPRA request with the Middlesex County Prosecutor's Office seeking "video and audio recordings of police pursuits engaged in by members of the New Brunswick Police Department from January 2004 to present." Additionally, on December 19<sup>th</sup> after submitting said OPRA request, Plaintiff subsequently requested "all communications regarding his government records request dated December 15, 2014 including your communications with anyone regarding my request."

The Middlesex County Prosecutor's Office (MCPO) denied both requests. In denying the December 15<sup>th</sup> request, the MCPO stated that:

[T]he only way this office is able to identify cases involving an eluding charge is to utilize the Judiciary Communications Network, commonly referred to as the promis gavel computer system. It is not an authorized use by this office to do research or to provide printouts relating to civil discovery or OPRA requests.

The MCPO explained, Mobile Video Recorders (MVRs) “are exempt as criminal investigatory records, are not considered public records, and cannot be released under N.J.S.A. 47:1A-1.1 et seq.” The MCPO further considered the request overbroad and not sufficiently specific as required by the statute. With regard to the December 19<sup>th</sup> request, the MCPO denied that request as an intra-agency communications exempt from public disclosure. The MCPO also denied access to the requested records under the Common Law Right of Access.

Regarding Plaintiff’s argument that he is entitled to access under the Common Law Right of Access a person seeking access to government records must establish: (1) The records sought are public records under the common law, (2) the requestor has an interest in the subject matter of the material, and (3) the requestor’s interest in disclosure outweighs the government’s interest in non-disclosure. South Jersey Publishing Company v. New Jersey Expressway Authority, 124 N.J. 478 (1991); Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35 (1995). Under the Common Law Right of Access, the definition of a public document is quite broad. A public document is anything “required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law. . . or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office.” Josefowicz v. Porter, 32 N.J. Super. 585, 591 (App. Div. 1954). The Appellate Division held that the common law definition includes “almost every document recorded, generated, or produced by public officials.” Shuttlesworth v. City of Camden, 258 N.J. Super. 573, 582 (App. Div. 1992).

After establishing that said documents fall within the Common Law Right of Access and that the requestor has standing, there is a balancing process that is “concretely focused upon the relative interests of the parties in relation to those specific materials.” McClain v. College Hospital, 99 N.J. 346, 361 (1985). In the instant matter, Plaintiff alleges that as a citizen he has a right to review and evaluate the government records requested. Plaintiff also argues that there is no basis for secrecy of these government records and accordingly, the balance is decidedly in favor of disclosure. Plaintiff’s Brief at pg. 37. This reasoning is misguided and unsupported. While the Court has entertained access under the Common Law Right of Access where a party’s interest has been slight,<sup>1</sup> the Plaintiff in this case has articulated nothing more than his interest as a taxpayer. This Court is averse to granting access under the Common Law Right of Access where Plaintiff has not expressed a concrete interest in the subject matter and the government wishes to preserve information regarding their pursuit procedures. Additionally, this Court will not grant access to intra-agency confidential communications merely because the Plaintiff is a

<sup>1</sup> See Irval Realty v. Bd. of Pub. Util. Comm’rs, 61 N.J. 366, 372-373 (1972).

taxpayer with an interest. Accordingly, Plaintiff's request for access to the records requested on December 15<sup>th</sup> and 19<sup>th</sup> under the Common Law Right of Access in DENIED.

Under OPRA, it is the public policy of the State 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 accorded by [this Act] as amended and supplemented, shall be construed in favor of the public's right of access;

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

OPRA is intended to promote transparency and public confidence in the affairs of government. To support this objective the Legislature adopted a broad definition of "government records." See Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., 183 N.J. 519, 535 (2005) ("The purpose of OPRA is to maximize knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." (internal quotation marks omitted)) (quoting Asbury Park Press Office v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)).

Against this backdrop, Defendants asserted they would not comply with the Plaintiff's OPRA requests because the request was 1) for criminal investigatory records and because 2) the request was ambiguous, unspecific and required research.

A "criminal investigatory record" (which is exempt from OPRA), is 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. On the question of whether the requested audio and video are criminal investigatory records the Court is informed by the language of O'Shea v. Township of West Milford 410 N.J. Super. 371 (App. Div. 2009), Plaintiff wanted "a copy of the requested Use of Force Reports [from its police department] specifically those involving an arrest or where charges were brought." Superior Court Judge Brogan held that Use of Force Reports (UFR) are not exempt from general disclosure requirements of OPRA as criminal investigatory reports under N.J.S.A. 47:1A-1.1. The Appellate Division affirmed stating:

It was not within OPRA's design to render documents inaccessible as criminal investigatory records merely because they might "result in either an internal affairs investigation and/or criminal record—criminal charges against the police officer[.].... Under the statute, 'information concerning a criminal investigation,' such as

‘information of the circumstances immediately surrounding [an] arrest’ is available to the public for immediate access, “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). Such records must be released unless the information ‘will jeopardize the safety of any person or jeopardize any investigation in progress or may be otherwise inappropriate to release[.]’”

Judge Brogan further said that the UFRs at issue did not qualify as criminal investigatory records because 1) they were not created as part of an investigation and 2) defendant had merely speculated that the documents sought would ever be used in an investigation. *Id.* at 377.

In the instant matter Plaintiff has not articulated concerns regarding the safety of any person. Nor does any investigation appear to be in jeopardy as a result of a release. The Defendant appears to use “criminal investigatory records” as a wholesale exemption without any articulable concerns of how their release would influence an investigation or the role such video would play in said investigation. Accordingly, Defendant’s use of the “criminal investigatory record” exemption is misplaced and cannot serve as a basis for exemption.

Defendant relies on MAG Entertainment, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 543 (App. Div. 2005) in denying Plaintiff’s request as overbroad. Plaintiff in MAG had their liquor license revoked for allegedly serving alcohol to an intoxicated patron who was then involved in a fatal car crash. There Plaintiff filed an OPRA request for “all documents or records evidencing that the ABC sought, obtained or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person in which such person... was involved in a fatal auto accident.” The Division’s record custodian rejected MAG’s request deeming it a “[general] request for information’ obtained through research, rather than a “request for a specific record.” Since the request was not limited to a particular time frame and because the agency’s case tracking system did not have a search engine, the custodian would have had to manually review the contents of the case file. *Id.* at 540. The Court stated OPRA:

is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records ‘readily accessible for inspection, copying or examination.’ . . . ‘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.’ Reba v. Tp. Of West Milford, GRC Complaint No. 2002-58 (January 17, 2003).

In MAG, the Court held,

Under OPRA, agencies are required to disclose only 'identifiable' governmental records not otherwise exempt. Wholesale requests for general information to be analyzed, collated and compiled by the responding government entity are not encompassed therein. In short, OPRA does not countenance open-ended searches of an agency's file. . . . Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.

While the instant matter in some respects mirrors MAG, there are also clear differences. In MAG, the requestor sought "all documents or records," in all situations where "ABC sought, obtained or ordered revocation of a liquor license," for an unbounded time period. In the instant matter Plaintiff seeks all video and audio for police chases by New Brunswick police. The subset is much smaller. Identifying the information requires less guess work and research. Defendant unpersuasively argues that similar to MAG, the documents are unidentifiable, unspecific and ambiguous. However, it was revealed in oral arguments, that Defendants have compiled a list of applicable cases with the requested audio and video. This Court finds that Defendant having identified and compiled the documents controverts any assertions of ambiguity challenging the specificity of the request. Plaintiff is GRANTED access under OPRA to the audio and video requested.

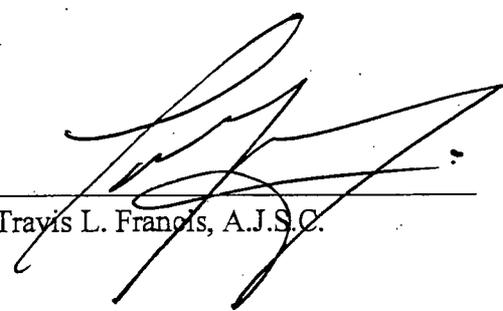
With regard to the December 19<sup>th</sup> email seeking for the email communications between O'Neil and the Prosecutor's Office, the Court finds such communications are exempt under OPRA:

"Government record" or "record" means any 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 by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

inter-agency or intra-agency advisory, consultative, or deliberative material.

N.J.S.A. § 47:1A-1.1(emphasis added)

Plaintiff asserts that even though the term is not included within “government records,” the government must prove that said documents are “pre-decisional” and “deliberative in nature, containing opinions, recommendations, or advice about agency policies.” In re Liquidation of Integrity Ins. Co. 165 N.J. 75. at 84-85. This argument is without merit in this situation. By definition the emails concern the agency’s OPRA decision and pertain to which process should be followed. There are also concerns regarding attorney-client privilege. Accordingly, the December 19<sup>th</sup> OPRA request is DENIED.



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Travis L. Francis, A.J.S.C.

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JUDGE TRAVIS L. FRANCIS

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TRAVIS L. FRANCIS  
ASSIGNMENT JUDGE  
MIDDLESEX COUNTY COURT OF NEW JERSEY  
LAW DIVISION: MIDDLESEX COUNTY

DOCKET NO.: MID-L-293-15

WILLIAM J. BRENNAN,  
PLAINTIFF,

v.

CIVIL ACTION

MIDDLESEX COUNTY PROSECUTOR'S  
OFFICE; JAMES O'NEILL, CUSTODIAN OF  
RECORDS FOR THE MIDDLESEX COUNTY  
PROSECUTOR'S OFFICE; AND JOHN DOES 1-  
10, BEING AGENTS, SERVANTS, AND  
EMPLOYEES OF EACH AS A CONTINUING  
INVESTIGATION MAY REVEAL (WHO ARE  
FICTITIOUSLY NAMED BECAUSE THEIR  
TRUE IDENTITIES ARE UNKNOWN),  
DEFENDANTS.

ORDER GRANTING PLAINTIFF RELIEF  
PURSUANT TO THE OPEN PUBLIC  
RECORDS ACT AND COMPELLING  
DEFENDANTS TO PRODUCE  
GOVERNMENT RECORDS

THIS MATTER being brought before the Court by the LAW OFFICE OF  
DONALD F. BURKE, Donald F. Burke, Esq. appearing on behalf of plaintiff WILLIAM J.  
BRENNAN, seeking relief by way of summary action pursuant to Rule 4:67-1(a); and the  
matter having proceeded summarily pursuant to N.J.S.A. 47:1A-1 to -13; and the Court  
having considered the submissions and argument of counsel for plaintiff and counsel for  
defendants; and for good cause shown;

IT IS on this 7<sup>th</sup> day of April, 2015,

ORDERED that defendants violated the Open Public Records Act, N.J.S.A.  
47:1A-1 to -13, by refusing to provide records requested by plaintiff on December 14,  
2014 in response to plaintiff's Open Public Records Act request; and

**IT IS FURTHER ORDERED** that defendants shall produce within 3 days of receipt of this Order pursuant to the Open Public Records Act, N.J.S.A. 47:1A-1 to -13, the video and audio recordings of police pursuits by motor vehicle engaged in by members of the New Brunswick Police Department from 2004 to present as requested by plaintiff on December 14, 2014; and

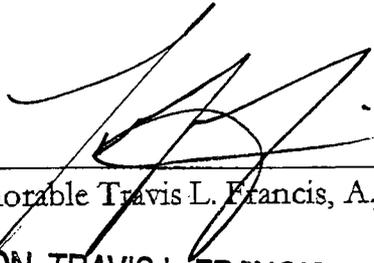
**IT IS FURTHER ORDERED** that defendants shall produce within 3 days of receipt of this Order pursuant to the Open Public Records Act, N.J.S.A. 47:1A-1 to -13, all communications regarding plaintiff's Open Public Records Act request as requested by plaintiff on December 19, 2014 including the five written communications identified by defendant O'Neill in his email to plaintiff dated December 31, 2014; and

**DENIED**

**IT IS FURTHER ORDERED** that defendants shall pay to plaintiff reasonable costs, expenses and attorneys' fees pursuant to N.J.S.A. 47:1A-6 and counsel for plaintiff shall file an Affidavit of Services within 20 days of the date of this Order; and

**IT IS FURTHER ORDERED** that in light of the full relief afforded plaintiff pursuant to the Open Public Record Act, the plaintiff's claims under the common law right of access to public records and the New Jersey Civil Rights Act are withdrawn; and

**IT IS FURTHER ORDERED** that a copy of this Order shall be provided to counsel for defendants within 5 days of receipt by counsel for plaintiff.

  
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Honorable Travis L. Francis, A.J.S.C.

HON. TRAVIS L. FRANCIS, A.J.S.C.