

FILED

JUN 4 2015

NELSON C. JOHNSON, J.S.C.

COURT INITIATED

JOHN PAFF,

PLAINTIFF,

VS.

ATLANTIC COUNTY PROSECUTOR'S
OFFICE,

DEFENDANT.

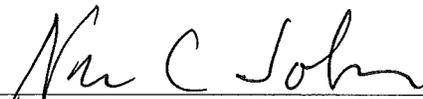
SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
ATLANTIC COUNTY
DOCKET NO. ATL-L-5474-14

ORDER

THIS MATTER having been opened to the Court by Donald M. Doherty, Esquire, attorney for the Plaintiff, John Paff, by way of an Order to Show Cause; and Assistant Atlantic County Counsel, Elizabeth C. D'Ancona, Esquire, appearing on behalf of the Defendant, Atlantic County Prosecutor's Office ("ACPO"); and the Court having considered the papers submitted by the parties and conducted an *in camera* review of the documents tendered by Ms. D'Ancona; and having heard oral argument on May 27, 2015; and for the reasons set forth in the Court's Memorandum of Decision of even date herewith and for good cause shown;

IT IS ON THIS 4th day of JUNE, 2015, **ORDERED** that Plaintiff, John Paff's OPRA request is hereby DENIED and his Complaint as to all claims against the Atlantic County Prosecutor's Office and Kathleen Bond, Esquire, are DISMISSED with Prejudice .

IT IS FURTHER ORDERED that a copy of this Order shall be served on all counsel within seven (7) days of service of this Order.



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SUPERIOR COURT OF NEW JERSEY

NELSON C. JOHNSON, J.S.C.

1201 Bacharach Boulevard
Atlantic City, NJ 08401-4527
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MEMORANDUM OF DECISION

TO: Donald M. Doherty, Esquire
125 North Route 73
West Berlin, New Jersey 08091
Attorney for Plaintiff, John Paff

Elizabeth C. D'Ancona, Esquire
Atlantic County Department of Law
1333 Atlantic Avenue
Atlantic City, New Jersey 08401
*Attorney for Defendant, Atlantic County
Prosecutor's Office*

RE: Paff vs. Atlantic County Prosecutor's Office **DOCKET NO.** ATL-L-5474-14

This matter comes before the court via the Verified Complaint and petition for an Order to Show Cause ("OTSC") of the Plaintiff, John Paff, a self-proclaimed open government activist. In this instance, Mr. Paff seeks access to public records which he believes are existent and in the possession the Atlantic County Prosecutor's Office ("ACPO"). The Plaintiff is represented by Donald M. Doherty, Esq. and the ACPO is represented by Elizabeth C. D'Ancona, Esq. Assistant County Counsel of the Atlantic County Department of Law.

Mr. Paff purportedly received a "tip" that there were possible "shenanigans" occurring in the Fire Department of the City of Margate. Following an initial inquiry made to the City, he made an OPRA request to the ACPO. It's apparent to the court that in making his inquiry, Mr. Paff made a good faith effort to narrow the scope of the records he sought by providing some of the details, i.e., "background," that he had learned from his "tip," focusing the attention of the ACPO to the Margate Fire Department.

Mr. Paff is a savvy activist and based upon his many inquiries under OPRA was aware that some of the documents he was seeking were possibly exempt and tailored his record request to the ACPO in the following manner:

1. If a crime that meets the description in “Background” [Margate Firefighter, possibly also the former Treasurer of the FMBA Local, forged checks or otherwise misappropriated money from the Local and is represented by attorney Mr. Swift] has been committed but for which no arrest has yet made, I would like a record that discloses “information as to the type of crime, time, location and type of weapon, if any.” *N.J.S.A.* § 47:1A-3.
2. If a crime that meets the description in “Background” has been committed and an arrest has been made, I would like the CDR or other form of complaint that was issued to the defendant.
3. I would like all police incident and investigative reports concerning the incident described in “Background” above.
4. I would like all correspondence between the city [of Margate], or any department of official thereof, and any attorney named Swift related to the incident described in “Background” above.
5. If the person referred to in “Background” above has made any reimbursements to the fund that was allegedly pilfered, I would like copies of checks or other record referencing that such a reimbursement had been made.

The reply of ACPO to Mr. Paff’s OPRA request was set forth in correspondence dated August 18, 2014, issued by Kathleen E. Bond, Assistant Prosecutor and Custodian of Records. The letter and attachment, in substantial part, appear to be a form routinely used. As complained by Mr. Doherty, Ms. Bond’s response may cause confusion in the minds of some readers, nonetheless, Ms. Bond’s letter makes it clear that Paff’s OPRA request was denied. Additionally, her response makes it clear that the ACPO can neither “confirm or deny the existence” of an investigation of the Margate Fire Department. This lawsuit, nonetheless, followed some time thereafter.

The Court originally heard the oral arguments of Ms. D’Ancona and Mr. Doherty at the initial OTSC hearing on December 15, 2014. At that time, the court accepted the representations of Ms. D’Ancona that there was an on-going criminal investigation, to wit, “an investigation in progress” as defined by *N.J.S.A.* §§ 47:1A-3, and that formal charges had yet to be filed against anyone. After a brief colloquy with counsel regarding what would be a “realistic time-frame” in

which to permit events to unfold to determine what if any charges were to be filed against the individual/public employee whom the Plaintiff believed had engaged in serious misconduct, it was agreed that the ACPO would report to both the Plaintiff and the court with regards to the status of the investigation by the second week of March, 2015.

Upon conclusion of the hearing the court issued an “interim order” directing Ms. D’Ancona to report to the court on or before March 9, 2015 regarding the status of the investigation. Thereafter, the court and Mr. Doherty received an update from Ms. D’Ancona on March 11, 2015 advising that charges had been brought, and on March 24, 2015, the court and Mr. Doherty received a true copy of a “Complaint-Summons” dated March 10th reciting certain charges that had been brought against one Michael C. Palmer, a fireman with the City of Margate, and an officer with the fireman’s union.

On April 20, 2015, the court wrote to both counsel and scheduled a hearing for May 27, 2015, and directed Ms. D’Ancona as follows:

Prior to the hearing, it is essential that I conduct an *in camera* review of the documents existent with, and in the possession of, the Prosecutor’s Office as of December 15, 2014. By “documents” I mean *all* those documents, whether created or filed with, or by, both the City of Margate and the Atlantic County Prosecutor’s office. I must examine whatever it was the Prosecutor’s Office had in its file at the time of the hearing on the OTSC.

Ms. D’Ancona should make arrangements to have true copies of said documents delivered –under seal - to my chambers a minimum of seven (7) days prior to the hearing date. Said documents must be accompanied by a Certification of an attorney in the Prosecutor’s Office.

Thereafter, on or about May 15, 2015, the Court received the requested documents (many hundreds of pages) and the “Confidential Certification” of Diane M. Ruberton, First Assistant Prosecutor, bearing the same date. Ms. Ruberton’s Certification does herself and the ACPO proud. Her Certification is thorough, informative and allays the court’s worst fears (and possibly those of Mr. Paff) expressed at the time of the OTSC hearing on December 15, 2014. Both the court and counsel for Plaintiff were concerned that efforts may have been made to “sweep under the rug” any wrongdoings via a quiet restitution of any funds that may have been pilfered. A

review of the entire file – its genesis and progression to date – satisfies the court that there were no efforts to “cover-up” misconduct by anyone in the City of Margate.

As noted by Ms. Ruberton’s Certification, ACPO’s Directive 5-88 mandates that municipal police departments must make *immediate* notification to the ACPO of any allegation involving governmental corruption or misconduct by a public employee. Said Directive is part of the Atlantic county Police Chief’s Manual. As stated in the Prosecutor’s Directive:

*You are hereby directed that **all** involving governmental corruption or misconduct by any government employee are to be immediately referred to the Atlantic County Prosecutor’s Office for review ... Under no circumstances should a municipal police department commence a governmental corruption investigation without prior notification to the Atlantic County Prosecutor’s Office.*

After a total of three telephone conversations on or about June 20, 2014, the City was informed that it had no role to play in this matter and that the ACPO would be the sole investigating agency into the alleged misconduct by a public employee. Thus, the only documents prepared in connection with the investigation pertaining to the charges against Mr. Palmer are those created by the ACPO; no written records of this matter were generated by the City of Margate. Concomitantly, it is evident to the court that there were no public records generated that might qualify for release under *N.J.S.A. 47:1A-3*. The City generated no documents and there were records “open for public inspection, examination, or copying before the investigation commenced.” Additionally, there were written communications from James Swift, Esquire, and the ACPO; all were part and parcel of the on-going investigation and may be characterized as privileged communications in furtherance of negotiations towards resolution of a disputed claim as per *Ev. R. 408*.

On May 27, 2015, the court conducted a hearing at which time it engaged in an extensive colloquy with counsel and received the excellent arguments of both Ms. D’Ancona and Mr. Doherty. In making its ruling the court relies upon the legal briefs, supplemental case law cited by counsel, the oral arguments of counsel and particularly, in upon the *in camera* review of the records presented, together with the Confidential Certification of Diane M. Ruberton, First Assistant Prosecutor.

DISCUSSION OF THE LAW

A New Jersey citizen's access to government records may be achieved in three distinct ways: (1) through the Open Public Records Act ("OPRA"), *N.J.S.A.* §§ 47:1A-1 to -13; (2) via the citizen's common law right of access ("CLRA"); and (3) through discovery procedures applicable to civil disputes. *O'Shea v. Township of West Milford*, 410 *N.J. Super.* 371, 379 (App. Div. 2009). "Records that are not available under one approach may be available through another." *MAG Entertainment, LLC v. Division of Alcoholic Beverage Control*, 375 *N.J. Super.* 534, 543 (App. Div. 2005).

"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 Community Dev. Corp.*, 183 *N.J.* 519, 535, (2005) (quoting *Asbury Park Press v. Ocean County Prosecutor's Office*, 374 *N.J. Super.* 312, 329 (Law Div. 2004)). As stated by Judge Serpentelli in *Asbury Park Press* supra, at 329, "[T]he court must 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."

The State of New Jersey, as expressed by the Legislature and our Supreme Court is committed to a robust policy of insuring that public records are "readily accessible" to all citizens, so much so, that when adopting OPRA, the Legislature imposed the burden of proof upon government to justify why a particular document ought not to be released, and wisely injected a high degree of sobriety into these matters by providing for a fee-shifting provision.

All that said, *N.J.S.A.* § 47:1A-1.1 declares that a "government record shall not include" various categories of "information which [are] deemed to be confidential." One such category is "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. Defendants must meet both prongs of this definition for the documents to be inaccessible to a plaintiff under *N.J.S.A.* § 47:1A-1.1, that is, they must: (1) not be required by law to be made; and (2) pertain to any criminal investigation or related civil enforcement proceeding. *O'Shea*, supra, 410 *N.J. Super.* at 380-381.

Another exception to public access of a government record is found in *N.J.S.A.* § 47:1A-3(a), which provides,

where it shall appear that the record or records...pertain to **an investigation in progress by any public agency**, the right of access . . . may be denied if the inspection, copying or examination of such record or records shall be inimical to the public interest...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. (emphasis added)

Accordingly, the ACPO must show three elements in order to deny access under § 3(a): (1) the record pertains to an investigation in progress by a public agency; (2) disclosure would be inimical to the public interest; and (3) the record was not already open for disclosure before the investigation commenced. *Ibid.*

However, § 3(b) mandates that certain information concerning a criminal investigation be available to the public including “where a crime has been reported but no arrest yet made, information as to the type of crime, time, location and type of weapon, if any[.]”. Nevertheless, this subsection qualifies the release of this information, providing “where 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, such information may be withheld.” *Ibid.* “This exception shall be narrowly construed to prevent disclosure of information that would be harmful to a bona fide law enforcement purpose or the public safety.” *Ibid.*

Furthermore, the OPRA expressly provides no limit to “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. The common law allows a broader class of documents to be available than OPRA, but on a qualified basis. *O’Shea, supra*, 410 *N.J. Super.* at 386 (internal citations omitted). “Public records available for inspection under the common law include any records made by public officers in the exercise of their functions. As such, they include almost every document recorded, generated, or produced by public officials, whether or not required by law to be made, maintained, or kept on file.” *Daily Journal v. Police Dept. of City of Vineland*, 351 *N.J. Super.* 110, 122 (App. Div. 2002) (internal citations omitted).

To access records under the common law, a requestor is governed by a two-prong test: (1) the requestor must establish an interest in the subject matter of the material; and, (2) the requestor's right to access must be balanced against the State's interest in preventing disclosure. *Mason v. City of Hoboken*, 196 N.J. 51, 67-68 (2008) (quoting *Keddie v. Rutgers*, 148 N.J. 36, 50 (1997)). “The requisite interest necessary to accord a plaintiff standing to obtain copies of public records may be either ‘a wholesome public interest or a legitimate private interest.’” *Higg-A-Rella, Inc. v. County of Essex*, 141 N.J. 35, 47 (1995) (quoting *Loigman v. Kimmelman*, 102 N.J. 98, 112 (1986)).

ANALYSIS

The court doesn't know, nor is concerned with, the unconventional sources of information which Mr. Paff has cultivated to assist him in his efforts. His diligence on behalf of the public interest is commendable. No doubt, the renown he has received, and the stature he has attained, over the past several years have made him a magnet of sorts. People in public life know of his willingness to “fight city hall” and it's apparent to this court that some of his OPRA requests are likely prompted by information brought to him by people reluctant to stand in the limelight. In this instance, it is apparent that the catalyst of his inquiry was information furnished by others. After receipt of the same, Mr. Paff's instincts and curiosity told him he was on to something; he knew he had put his finger on an important matter, the details of which may possibly warrant disclosure to the public.

Based upon the court's *in camera* review of the documents provided by the Prosecutor's Office, the court is satisfied that the scope, depth and breadth of the on-going investigation is such that a premature release of any of the Prosecutor's work product would be “inimical to the public interest” and could compromise what may prove to be a far-flung series of criminal charges, involving numerous people.

It's apparent to this court that there is much more entailed in this on-going investigation than the misconduct a single fireman. Scrutiny of Mr. Palmer's conduct, together with information received from him, has revealed more than a lone theft of funds from the Firefighter's Local 41 account. The investigation into his conduct has opened the door on other matters, and shed light on the potential misdeeds of other public officials and licensed

professionals. The arrest of Mr. Palmer launched a wide-ranging investigation involving many people and extending beyond the City of Margate.

At this time, some of Mr. Paff's request for the ACPO's records are no longer at issue. Mr. Paff and the court have been supplied with the Complaint-Summons against Michael Palmer which includes "information as to the type of crime, time, location and type of weapon, if any" as well as the actual form of the complaint. While the court agrees that this is minimal information, it's all that the OPRA or common law require at this time. Access to the remainder of the ACPO's records must be denied under *N.J.S.A.* § 47:1A-3(a) and (b).

Read together, Sections (a) and (b) of the aforesaid statute encourage our courts to make a case-by-case review of whether release of such records would prejudice effective law enforcement. Here, the court is satisfied that the ACPO has shown that: (1) the records pertain to an investigation in progress; (2) disclosure would be inimical to the public interest; and (3) the records were not already open for disclosure before the investigation commenced. Although formal charges have be brought against Mr. Palmer, there is still an on-going investigation of events in which he was involved.

Further, the court has no doubt that disclosure of the Prosecutor's work product would be harmful to the public interest. Prematurely releasing such information may encourage persons with mean-spirited intentions to use records from the ACPO to further an agenda of damaging the reputation of an individual with the mere report of an alleged illegal act. Given the scope of the investigation these concerns are present here, because they could impact multiple individuals.

Finally, there is the question raised at oral argument by Mr. Doherty regarding the form and language of the initial denial of his client's OPRA request on August 18, 2014, issued by Kathleen E. Bond, Assistant Prosecutor, and Custodian of Records.

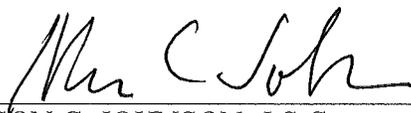
Mr. Doherty asserts that *N.J.S.A.* § 47:1A-5 requires more specificity when replying to a citizen's request under OPRA. He raised that concern because he believes a more detailed denial might have obviated the need for this litigation. In expressing his frustration, Mr. Doherty relies upon Section "g" of the aforesaid statute which reads in part,

A custodian shall promptly comply with a request to inspect, examine, copy, or provide a copy of a government record. If the custodian is unable to comply with a request for access, the custodian shall *indicate the specific basis therefor* on the request form and promptly return it to the requestor. (emphasis added)

At oral argument, Mr. Doherty inquired whether the court was “focusing upon the prosecutor versus another public official.” The court replied “yes,” such a distinction must be made when evaluating whether a records custodian has acted reasonably and provided sufficient explanation when indicating records will not be produced.

The court has much respect for Mr. Doherty, nonetheless, there are two important concerns which the court cannot ignore. *First*, a citizen’s right to receive a fair trial under the Sixth Amendment to the U.S. Constitution. Premature release of information cannot only damage reputations and disrupt criminal investigations but can also prejudice a defendant’s ability to receive a fair trial. The Prosecutor’s public pronouncement to “neither admit nor deny” the existence of an investigation is within his discretion and protects a citizen’s right to receive a fair trial on evidence presented in the court room. *Second*, it’s not the role of a court to tell other agencies of government how to perform their duties unless they abuse their authority or engage in arbitrary and unreasonable conduct in exercising their responsibilities. Although Ms. Bond’s letter is neither precise nor concise, and may frustrate Mr. Doherty and his client, the statement is within her discretion as record custodian. Her response addresses Mr. Paff’s OPRA request adequately enough to let him know that his request has been denied for reasons within the Prosecutor’s discretion, as permitted by law.

Accordingly, Plaintiff’s Complaint is Dismissed with Prejudice. An appropriate Order has been entered. Conformed copies accompany this Memorandum of Decision.



NELSON C. JOHNSON, J.S.C.

Date of Decision: June 4, 2015