

SUPERIOR COURT OF NEW JERSEY

TRAVIS L. FRANCIS
ASSIGNMENT JUDGE



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

September 21, 2015

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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:

Considering oral argument and a review of the pleadings, this Court GRANTS Defendant's motion for reconsideration and pursuant to recent decision of the Appellate Division finds that no privilege exists.

Statement of Facts

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." On December 19th in addition to said OPRA request, Plaintiff requested "all" communications regarding his December 15, 2014 request including "communications with anyone regarding" said request. The Middlesex County Prosecutor's Office (MCPO) denied both.

This Court, in a written decision granted 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 OPRA, N.J.S.A. 47:1A-1 et seq. The Court specifically granted Plaintiff access to the MVRs that coincided with the print out created by Defendants. The list included 119 cases from May 25, 2004 to March 24, 2015 which involved eluding charges. The decision denied Plaintiff access to email communications between the Middlesex County Prosecutors' Office and records custodian, James O'Neill, as privileged communications.

Thereafter the Court heard competing motions for reconsideration and denied Defendant's request to reverse its decision on the MVRs and granted Plaintiff's request for a Vaughn index of the email communications pursuant to Defendant's claim of privilege.

Plaintiff filed a motion for attorney's fees as the prevailing party. The Defendant, in light of the Appellate Division decision in N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, No. A-2523-14T1, 2015 WL 3617046 (N.J. Super. Ct. App. Div. June 11, 2015) (hereinafter referred to as "Lyndhurst") filed a second motion for reconsideration of the Court's opinion. Plaintiff then filed a subsequent motion to compel production of the email communications between the Middlesex County Prosecutor's Office and James O'Neil for the Court's *in camera* review to determine the privilege question. The issues before the Court is whether Defendants have ushered enough support for the Court to reconsider its opinion in light of the Appellate Division's conclusions in Lyndhurst and based on the same whether the MVRs produced by the Defendant are exempt from disclosure. The Court must also decide if the documents produced *in camera* are subject to privilege.

Reconsideration motions are governed by Rule 4:49-2 which permits a party to make “a statement of the matters or controlling decisions which [the party] believes the court has overlooked or as to which it has erred” in entering an order or judgment. State v. Fitzsimmons, 286 N.J. Super. 141, 147 (App. Div. 1995). Reconsideration should be used for cases where 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence. Fusco v. Board of Educ. of the City of Newark, 349 N.J. Super. 455, 462 (App. Div. 2002). The Appellate Division has explained that the court has an independent interest in judicial economy and efficiency that the Rules seek to preserve. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401-02 (Ch. Div. 1990)). This Court finds that the broad irreparable impact of the recent Lyndhurst decision compels reconsideration by this Court of its written decision granting access to, now for the first time exempting, criminal investigatory records.

Defendant argues that in light of the Lyndhurst case, the MVRs fall under the criminal investigatory records exception to OPRA noting that the Lyndhurst trial court determined that plaintiff was entitled to access the audio and video recordings from the mobile recorders in the vehicles of law enforcement personnel under OPRA and that these recordings did not fit the “criminal investigatory records exception” nor the “ongoing investigation exception.” Defendant correctly asserts that the Appellate Court disagreed, holding that when a police officer initiated a mobile video recorder to document a traffic stop or pursuit, which may pertain to a criminal investigation in the earliest stages, it would be exempt from OPRA. Defendant argues that the

inception of the videos is the commencement of an investigation and therefore based on Lyndhurst the MVRs are exempt from production under OPRA.

Plaintiff asserts that the instant matter is distinguished from Lyndhurst because Lyndhurst involved an ongoing investigation, which does not exist here and that Defendants have not met the burden of establishing a basis for nondisclosure. Plaintiff also asserts that the Lyndhurst Court determined that the need for confidentiality declines once the investigation is over, and the confidentiality of informants and citizens safety are no longer at risk of being revealed or compromised. Plaintiff asserts that the materials sought do not implicate the identities or communications of confidential informants and that the majority of the cases from the early years are completed, Plaintiff asserts the need for confidentiality has diminished if not totally eviscerated and the tapes should be released.

Conclusions of Law

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)).

While the goal of OPRA is to promote broad access to government records, that access is not absolute. OPRA includes 24 specific exemptions to disclosure. Any exemption must be narrowly construed to effect the strict mandate of OPRA that government documents be available for public inspection. N.J.S.A. 47:1A-1. One of the specific exemptions is for criminal investigatory records. Under OPRA, "A government record shall not include.....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 (Emphasis Added).

The Lyndhurst court revisited the meaning of “required by law to be made, maintained or kept on file” and what it means to “pertain to any criminal investigation or related civil enforcement proceeding.” This Court’s written decision, cited O’Shea v. Township of West Milford, 410 N.J. Super. 371 (App. Div. 2009), and stated:

[I]nformation 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[.]’

Following O’Shea’s reasoning, this Court allowed 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 and the MVRs that coincide with the print out from Promis Gavel which lists 119 cases from 2004 to March 24, 2015. Defendant did not articulate any concerns regarding how the release would influence an investigation and this Court did not find persuasive Defendant’s argument that the records fell into the criminal investigatory exception or the ongoing investigation exception. Defendant’s primary argument was that the search was too broad under MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005).

In Lyndhurst, the Appellate Division explicitly noted their departure from the O’Shea Court’s opinion, which gave little weight to decisions under the Right to Know Law (hereinafter “RTKL”). The Lyndhurst Court determined that the criminal investigatory records exception should be interpreted in light of pre-OPRA case law interpreting the RTKL. Documents are required by law to be made maintained or kept on file if so mandated by a statute, regulation, executive order, or judicial decision. Id. at 32. The Court held a generic record retention policy or an internal agency directive of a public official would not suffice to satisfy the RTKL standard with respect to criminal investigatory records. Id. An agency may through formally promulgated regulations both require the making of a document and exempt it from access. Id. at 41.

The Court in Lyndhurst decided that since the audio-video recordings of police pursuits are not required by law or mandated by a statute, regulation, executive order, or judicial decision, viewing OPRA through the prism of the RTKL, the audio-video recordings, MVRs, are included under the first prong of criminal investigatory record exemption which applies if the record “is not required by law to be made, maintained or kept on file.” Nonetheless, the second prong of the criminal investigatory records exception has another requirement: “that the [record] is held by a

law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding.”

The Lyndhurst court stated:

We conclude that entries related to criminal investigative activities are properly deemed to “pertain[] to any investigation.” ...The reporters seek documents that report officers’ daily activities, including CAD reports detailing information received by or from police dispatchers, log book notation, daily activity logs, daily bulletins, daily statistical sheets, tally sheets, and vehicle logs. The requestors also seek various forms of audio and video recordings (as well as transcription), including recordings of the pursuit and shooting; communications among police officers and others; and recordings made by mobile video recorders (MVRs) The reporters also requested various reports, incident reports, and supplemental reports. **All of these documents are exempt.** No law cited to the court required their creation or retention. **They pertain to a criminal investigation, to the extent the entries concern or address an officer’s involvement in the search for the attempted burglary suspect, the pursuit of Ashford and Bynes once they were identified as suspects, the shooting of Ashford and arrest of Bynes, the subsequent investigational activities related to Bynes’s arrest, and the SRT investigation of the fatal shooting.**

Lyndhurst, supra at 44-46.

The Appellate Division’s reading of the criminal investigatory exemption, which is meant to be construed narrowly, is virtually limitless. The examples articulated by the Appellate Division of what is not a criminal investigatory record, and therefore subject to OPRA are extremely limited; namely “daily activity logs or CAD reports ...prepared on a regular basis, regardless of whether an officer is performing a community caretaking function, such as assisting a boy who fell off a bicycle...An entry about [a boy who fell off his bicycle] would not pertain to an investigation.” Id. at 43-44. This Court muses at the notion that OPRA was created to assist those trying to keep a watchful eye over the police in their general duties but if an interaction is documented on an MVR or body camera, the same would be considered an exempt criminal investigatory record. This Court wearily searches for the boundaries of the “criminal investigatory record exemption “to no avail.” Could the New Jersey Department of Taxation blanket their actions under the criminal investigatory records exemption? Could the NJDEP not release their finding from an investigation? Could the New Jersey Society for the Prevention of Cruelty of Animals decide to stonewall the public from their investigative measure into animal cruelty? The answer seems to be

a resounding yes for all of the aforementioned government agencies consistent with the Appellate Division's broadened view of criminal investigatory exemption under OPRA. The Appellate Division has established a bright line shielding all criminal investigatory records of any age that implicitly applies to open or closed cases. In addition 'inimical to the public interest.'" the Appellate Division then stated that even after determining that a document is not subject to the criminal investigatory exemption, the Court should then engage in a case by case, fact sensitive inquiry, to determine if release should be precluded because it would be subject to the on-going investigation exemption's requirement that release should not be "inimical to the public interests." Id at 48.

For OPRA purposes it is clear that an MVR would arguably be one of the best documents to use to keep a watchful eye over government or to get to the facts of a set of circumstances. Now, the news or any inquisitive citizen must understand what happened in an event through a press release, as access to these MVRs is forever barred from OPRA related public access.

The new interpretation of criminal investigatory records... does little if anything to minimize the evils inherent in a secluded process," does not construe "Any exemption [] narrowly [s] to effect the strict mandate of OPRA that documents should be available for public inspection" and does not allow that "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." See Times of Trenton Publishing Corp., supra 183 N.J. 519, 535 (2005); N.J.S.A. 47:1A-1. The law as interpreted by the Appellate Division eliminates the necessity for the Court to consider a case specific analysis of the nexus to criminal investigation or if release would be inimical to the public interest and leaves MVRs shielded in secrecy. Thus a party seeking to view MVRs must file suit against a government entity and proceed pursuant to the rules of discovery. This result effectively eliminates OPRA requests from media outlets.¹

¹ The public policy implications of this new interpretation of "criminal investigatory records" creates an interesting juxtaposition between the judiciary and the Legislature. The Legislature has produced several pieces of legislation to make body cameras mandatory. See Jason Laday, *Police body camera bill debuted in N.J. Legislature*, SOUTH JERSEY TIMES (October 17, 2014) available at http://www.nj.com/gloucester-county/index.ssf/2014/10/police_body_camera_bill_debuted_in_nj_legislature.html (discussing the body camera bills, S2518 in the Senate and A3852 in the Assembly). Several police departments throughout the state have independently initiated their own body camera programs. See Jason Laday, *Evesham police unveil 'body cameras' worn by officers*, SOUTH JERSEY TIMES (October 17, 2014) available at http://www.nj.com/gloucester-county/index.ssf/2014/07/vesham_police_unveil_body_cameras_worn_by_officers.html. New York Police have started using body cameras as well. See J. David Goodman, *New York Police Officers to Start Using Body Cameras in a Pilot Program*, NEW YORK TIMES, (Sept. 4, 2014) <http://www.nytimes.com/2014/09/05/nyregion/new-york-police-officers-to-begin-wearing-body-cameras-in-pilot-program.html?>. (The issue was described by Police Commissioner Bratton as "too important to wait.") Body camera programs are popping up all over the County. In California, a study found that "after cameras were introduced in February 2012, public complaints against officers plunged 88% compared with the previous 12 months. Officers' use of

The Appellate Division's unique interpretation of "criminal investigatory records" seems to depart from the policy behind OPRA and compels a lawsuit for the public to discover the facts of an interaction in lieu of requesting the same under OPRA.

This Court is not certain of Plaintiff's reasoning for seeking "video and audio recordings of police pursuits engaged in by members of the New Brunswick Police Department from January 2004 to present". In the instant matter there were 119 MVRs that this Court ordered to be released. The new interpretation of criminal investigatory records clearly eliminates the burden on the government entity to establish that there is a reason for not releasing the videos. There is no distinction afforded to the date of records, the status of the investigation, whether charges were filed, the type of entity requesting the records, or whether there is a public interest in the case. A current ongoing investigation as opposed to one that is 10 years old requires greater protections. However, at bar both sets of records shall be afforded confidentiality from the public view by the Open Public Records Act forevermore.

Although this Court disagrees with the breadth of the Appellate Division's Lyndhurst decision, it is compelled to include MVRs as part of criminal investigatory records. The Appellate Division is clear in its holding and as a fundamental principal of our justice system, trial courts are bound to the constraints of higher courts. Caldwell v Rochelle Park Tp., 135 N.J. Super. 66, 76 (Law Div. 1979). Accordingly, this Court finds that Plaintiff has ushered sufficient support for the Court to reconsider its opinion in light of Lyndhurst. Clearly MVRs fall within the Appellate Division's understanding of the criminal investigatory record exemption and based on Lyndhurst the MVRs produced by the Defendant are exempt from disclosure. Therefore, Plaintiff is ordered to return to Defendants the MVRs provided pursuant to the Order of May 19, 2015, and all copies made, or had made, of these MVRs, and Plaintiff is ordered to recover any of these MVRs, or copies of them, from anyone to whom he distributed them.

With regard to the Common Law Right of Access, the Court is not persuaded to reconsider its previous denial. Plaintiff did not articulate a reason for seeking the tapes and therefore, the balance weighs in favor of the government's right of confidentiality.

Furthermore, with regard to Plaintiff's motion for attorney's fees as a prevailing party, Plaintiff's motion is DENIED as it pertains to the MVRs. Under N.J.S.A. 47:1A-6, "If it is determined that access has been improperly denied, the court or agency head shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." As this Court has granted Defendant's motion for reconsideration, Plaintiff is not a prevailing

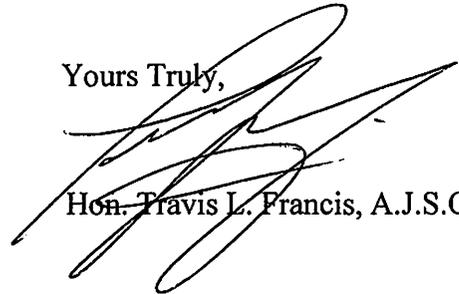
force fell by 60%." See Rory Carroll, *California police use of body cameras cuts violence and complaints*, <http://www.theguardian.com/world/2013/nov/04/california-police-body-cameras-cuts-violence-complaints-rialto> (Rialto's Police Chief who implemented the programs stated "I think we've opened some eyes in the law enforcement world. We've shown the potential....It's catching on.....When you know you're being watched you behave a little better. That's just human nature," said Farrar. "As an officer you act a bit more professional, follow the rules a bit better.") Nationwide, there seems to be a consensus between law enforcement and the citizenry that cameras help the public understand what went on in interaction with police and citizens. In an effort to effectuate that purpose cameras are becoming required state by state

party under N.J.S.A. 47:1A-6 with regard to his receipt of the MVRs, which he is now ordered to return.

As for the five emails that were produced *in camera* for the Court to review, the Court is stunned that these emails have become an issue. The emails shed absolutely no light on the inner-working of government and the Court cannot imagine any harm that could come from the release of these emails. For each of the emails, defendants have claimed Attorney Client Privilege, Attorney Work Product Privilege, OPRA exempt: Intra-office communication, and Attorney legal opinion/advice. The argument asserting privilege lacks merit and accordingly, the Court finds no privilege to apply to any of the five emails submitted.

The Plaintiff shall submit an Order consistent with this decision pursuant to N.J. Corut Rule 4:42-1(c).

Yours Truly,

A handwritten signature in black ink, appearing to read 'Travis L. Francis', is written over the typed name below.

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