

PREPARED BY THE COURT

FILED
AUG 06 2012
REGINA CAULFIELD, J.S.C.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, UNION COUNTY
DOCKET NO. UNN-L-1431-12

TINA RENNA,

Plaintiff,

v.

COUNTY OF UNION,

Defendants,

CIVIL ACTION

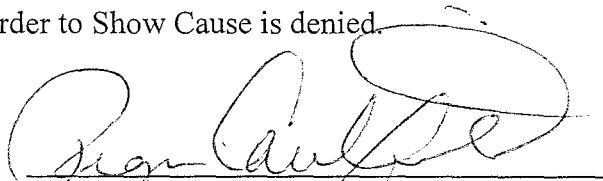
ORDER

THIS MATTER having been opened to the Court by Walter M. Luers, Esq., counsel for the Plaintiff, Tina Renna, by way of a Verified Complaint and Order to Show Cause filed on April 16, 2012, and Moshood Muftau, Esq., Assistant County Counsel, appearing for the Defendant, and the Court having considered the briefs and other papers submitted, and the oral arguments of counsel,

IT IS on this 6th day of August, 2012,

ORDERED that the Plaintiff's Verified Complaint is hereby dismissed with prejudice for the reasons stated in the Court's written decision; and it is further

ORDERED that the relief sought in said Order to Show Cause is denied.


REGINA CAULFIELD, J.S.C.

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NOT FOR PUBLICATION
WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

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DECISION

Before the Court is plaintiff's motion, pursuant to the Open Public Records Act (OPRA), seeking copies of all investigations, including those of the Union County Police Department, Sheriff and Prosecutor, into the matter involving former Union County employee Patrick Scanlon, Jr. Defendant has admitted that these documents are on file with the Union County Police Department but maintains that they are "criminal investigatory records" and not subject to disclosure under OPRA. Through an Order to Show Cause filed on April 16, 2012, and argued on June 15, 2012, plaintiff asks the Court to require defendant to release the requested documents.

In her Verified Complaint, plaintiff asserts that Patrick Scanlon, Jr., son of Union County Freeholder Deborah Scanlon, was once employed by Union County as a parks maintenance employee. Plaintiff alleges that the County conducted an investigation concerning allegations that Scanlon had stolen County property for personal gain. Plaintiff further adds that "[o]n

information and belief, the County's investigation against Scanlon, Jr. has been closed without formal charges being filed."

On March 30, 2012, plaintiff made an Open Public Records request via e-mail. In the e-mail, plaintiff formally requested "Copies of all investigations, including county police, sheriff and prosecutor into the matter involving former county employee Patrick Scanlon, Jr." On April 10, 2012, Marlena M. Russo, an Information Assistant at the Office of the County Manager, responded to plaintiff's e-mail, informing plaintiff that the County would not be releasing the requested information. In denying the request, Ms. Russo stated:

Please be advised that these documents are on file with the County Police; however, they are criminal investigatory records that are not subject to disclosure under the OPRA.

On April 16, 2012, plaintiff filed this summary action, seeking a court order to compel the release of the requested documents pursuant to OPRA.

Plaintiff's complaint contains two counts. In the first count, plaintiff alleges that defendant violated OPRA by not providing plaintiff with the documents she requested. In the second count, plaintiff alleges that defendant violated the common law right of access, on the basis that plaintiff's and the public's interest in acquiring the documents outweigh any interest in continued secrecy that defendant may have. Plaintiff asserts that she "and the public have a strong interest in learning the details of the County's investigation to determine whether nepotism or favoritism played any role in the investigation of Scanlon, Jr."

Plaintiff argues that, pursuant to OPRA, she seeks a "government record," and not a "criminal investigatory record." To that end, plaintiff cites regulations that govern how long a county police department must retain records before they are destroyed. In response, defendant

asserts that there is an ongoing criminal investigation and, as such, the County is not required to provide the requested documents.

Finally, in her reply to defendant's opposition, plaintiff suggests that defendant must supply her with a "Vaughn Index." See Loigman v. Kimmelman, 102 N.J. 98, 109-12 (1986); and Atlantic City Convention Center Auth. v. South Jersey Pub. Co., Inc., 135 N.J. 53, 68 (1994). Defendant provided plaintiff with a Vaughn Index, current to February 8, 2012, prior to the return date of this motion. Subsequently, at the Court's direction, an updated Index showing that there has been activity on the case as recently as June 18, 2012, was also provided to plaintiff.

According to defendant's counsel, the Union County Police Department was the only government entity involved in the investigation and, while Scanlon was questioned, the investigation is "active and on-going," and there have been no arrests or formal charges. Defendant has provided a certification from Lieutenant James C. Debbie, a Lieutenant in the Special Investigations Unit of the Union County Police Department, in support of its position in this case. According to Lt. Debbie, the investigation into missing equipment from the Union County maintenance service yard began on January 31, 2012. During that investigation, several parks maintenance employees, including Scanlon, were interviewed. Lt. Debbie describes the investigation into the missing equipment as "active" and "on-going," and certifies that releasing the documents will hinder said investigation, making it less likely that the equipment will be recovered and/or that witnesses will come forward.

The New Jersey Open Public Records Act is codified in N.J.S.A. 47:1A-1.1, *et seq.* The Act mandates 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 [under OPRA] as amended and supplemented, shall be construed in favor of the public's right of access." Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136, 139 (App. Div. 2006). 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.' " Mason v. City of Hoboken, 196 N.J. 51, 65 (2008); (quoting Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)); Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., 183 N.J. 519, 535 (2005). The New Jersey Supreme Court recently stated that "[t]hose who enacted OPRA understood that knowledge is power in a democracy, and that without access to information contained in records maintained by public agencies citizens cannot monitor the operation of our government or hold public officials accountable for their actions." Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities, 207 N.J. 489, 502 (2011). The burden of proof in showing that a denial of access was justified rests solely with the party that holds the records. N.J.S.A. 47:1A-6; Asbury Park Press v. Monmouth County, 406 N.J. Super. 1, 7 (App. Div. 2009).

Plaintiff argues that she seeks a "government record" within the meaning of OPRA, while defendant counters that the information is properly classified as a "criminal investigatory record." Both of these terms are defined in N.J.S.A. 47:1A-1.1. First, the definition of "government record":

"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.

The statute further provides that: "A government record shall not include the following information which is deemed to be confidential for the purposes of [47:1A-1 et seq.] as amended and supplemented: ... criminal investigatory records[.]" That term is then defined as follows:

"Criminal investigatory record" means 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.

There is an additional exemption to disclosure in the context of criminal investigatory records, and it is codified in N.J.S.A. 47:1A-3(b). Plaintiff points to this statute and argues that defendant must disclose some documents in its possession. It reads:

- b. Notwithstanding the provisions of [N.J.S.A. 47:1A-1] as amended and supplemented, the following information concerning a criminal investigation shall be available to the public within 24 hours or as soon as practicable, of a request for such information:

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;

if an arrest has been made, information as to the name, address and age of any victim unless there has not been sufficient opportunity for notification of next of kin of any victims of injury and/or death to any such victim or where the release of the names of any victim would be contrary to existing law or Court Rule. In deciding on the release of information as to the identity of a victim, the safety of the victim and the victim's family, and the integrity of any ongoing investigation, shall be considered;

if an arrest has been made, information as to the defendant's name, age, residence, occupation, marital status and similar background information and, the identity of the complaining party unless the release of such information is contrary to existing law or Court Rule;

information as to the text of any charges such as the complaint, accusation and indictment unless sealed by the court or unless the release of such information is contrary to existing law or court rule;

information as to the identity of the investigating and arresting personnel and agency and the length of the investigation;

information of the circumstances immediately surrounding the arrest, 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; and

information as to circumstances surrounding bail, whether it was posted and the amount thereof.

Notwithstanding any other provisions of this subsection, 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. This exception shall be narrowly construed to prevent disclosure of information that would be harmful to bona fide law enforcement purpose or the public safety. Whenever a law enforcement official determines that it is necessary to withhold information, the official shall issue a brief statement explaining the decision.

It is clear that, in this case, only the first exception applies as there has been no arrest and no charges have been filed. Defendant has complied with this requirement by disclosing that there was a theft of parks maintenance equipment from a maintenance service yard on or about January 31, 2012. It does not appear that such theft involved a weapon. Plaintiff seeks additional information about the investigation particularly concerning Scanlon.

Subsection (a) of N.J.S.A. 47:1A-3 is also significant. This subsection addresses situations where a request for documents has been made while an investigation is ongoing:

Notwithstanding the provisions of [N.J.S.A. 47:1A-1 et seq.] as amended and supplemented, where it shall appear that the record or records which are sought to be inspected, copied, or examined shall pertain to an investigation in progress by any public agency, the right of access provided for in [N.J.S.A. 47:1A-1 et seq.] as amended and supplemented may be denied if the inspection, copying or examination of such record or records shall be inimical to the public interest; provided, however, that 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. Whenever a public agency, during the course of an investigation, obtains from another public agency a government record that was open for public inspection,

examination or copying before the investigation commenced, the investigating agency shall provide the other agency with sufficient access to the record to allow the other agency to comply with requests made pursuant to [N.J.S.A. 47:1A-1 et seq.].

In support of her argument in this case, however, plaintiff also cites two statutes found in Chapter 3 of Title 47. Chapter 3 is entitled "Destruction and Unlawful Possession of Public Records." This Chapter includes the "Destruction of Public Records Law" under N.J.S.A. 47:3-15. The two statutes cited below, according to plaintiff, require defendant to maintain copies of the documents that were created as a result of the Scanlon investigation and, as a result, are subject to disclosure:

The bureau¹ may from time to time establish specific classifications and categories for various types of the said "public records" and, in giving its consent as provided herein, may do so in a general and continuing manner according to the said classifications and categories.

N.J.S.A. 47:3-18. Classifications and categories.

The bureau, in co-operation with the several State departments, commissions and agencies, shall make a study of the kind and character of public records in their control or custody and shall prepare proposed schedules for submission to the State Records Committee established by section six hereof for its approval and advise the said several departments, commissions and agencies of all applicable operative schedules.

N.J.S.A. 47:3-19. Schedules.

Plaintiff then points to a document entitled "State of New Jersey County Police Departments C540000-004," produced by the New Jersey Division of Archives and Records Management ("NJDARM"), which is part of the New Jersey Department of State.

¹ The "bureau" is defined in Chapter 3 as the "Bureau of Archives and History in the Department of Education." N.J.S.A. 47:3-16. However, N.J.S.A. 47:1-15 reads:

Whenever in any law, rule, regulation, order, contract, document, judicial or administrative proceeding, or otherwise, reference is made to the Bureau of Archives and History in the Department of Education[], the same shall be considered to mean and refer to the Division of Archives and Record Management in the Department of State, established pursuant to the Governor's Reorganization Plan, filed April 25, 1983.

N.J.S.A. 47:1-15. References to Bureau of Archives and History.

This document that plaintiff relies on is entitled “Records Retention and Disposition Schedule.” On the first page of the Schedule, the following note appears: “SCHEDULE APPROVAL: Unless in litigation, the records covered by this schedule, upon expiration of their retention periods, will be deemed to have no continuing value to the State of New Jersey and will be disposed of as indicated in accordance with the law and regulations of the State Records Committee. This schedule will become effective on the date approved by the State Records Committee.” This Schedule then provides how long the County Police Departments should retain certain types of records and sets forth the “retention policy” for a number of different types of records including:

Arrest Card File – Lists: name, address, date of birth, social security number, fingerprints, [etc.] [p. 2]

Criminal, Excluding Homicide, Missing Persons, and Stolen Weapons – No Arrest (Record Copy) – Contains account of reported incident and follow up investigation report for all incidents which require a further report than the initial event card or vent report. File may also include: arrest reports, copies of lab reports, polygraph results, supplementary reports, statements, tapes of statements, and waivers. [p. 7]

Master Card File/Information Card File – Lists: names, addresses, phone numbers, and case numbers of those individuals and businesses who have had contact with the police department as a suspect, offender, victim, or witness. [p. 10]

One of the questions before this Court, then, is whether this retention schedule has any relevance to the definition of “government record” in N.J.S.A. 47:1A-1.1.

A recent Appellate Division case concerned a request for a document that the government claimed was a “criminal investigatory record.” O’Shea v. Twp. of West Milford, 410 N.J. Super. 371 (App. Div. 2009). In O’Shea, the plaintiff, a resident of West Milford, asked the Township for access to “[a]ll Use of Force reports on file with the Township and/or its police department pertaining to use of force incidents occurring in 2006, 2007, and 2008.” This request was

denied, with the Township taking the position that these documents were “criminal investigatory records.” The trial court disagreed and ruled that the Township should produce the documents.

The Appellate Division affirmed the trial court’s holding and, in so doing, extensively relied on that court’s opinion. Id. at 376. In that opinion, the court interpreted “criminal investigatory record” to mean one of two things: (1) a record created while a criminal investigation is going on; or, (2) the work product of the people investigating. Id. at 378.

The Appellate Court said the following:

Defendant must meet both prongs of the definition of “criminal investigatory reports” for the documents to be inaccessible to plaintiff under N.J.S.A. 47:1A-1.1, that is, they must “not be required by law to be made,” and they must “pertain to any criminal investigation or related civil enforcement proceeding.” It is clear that the documents at issue do not meet either criterion.

Id. at 380.

It is clear that the second prong has been met in the case before the Court – the records pertain to a criminal investigation. The issue then becomes whether the records are required to be “made, maintained or kept on file” under N.J.S.A. 47:1A-1.1.

In considering plaintiff’s argument that she is entitled to defendant’s records under DARM, it is important to contrast O’Shea, supra, to New Jersey Land Title Ass’n v. State Records Committee, 315 N.J. Super. 17 (App. Div. 1998) [hereinafter, NJLTA]. The NJLTA, an organization of title insurance companies, brought suit against the Clerks of Union and Hunterdon Counties, the Division of Archives and Records Management (DARM), and the State Records Committee. The subject matter of the actual suit is inconsequential to this motion. There are, however, several excerpts from the opinion that are worth noting.

First, the appellate court explained what DARM is:

DARM is in the Department of State and serves as staff to the State Records Committee, an administrative agency created by the Legislature under the

Destruction of Public Records Law (1953) (the Destruction of Public Records Law), N.J.S.A. 47:3-15 to -32.

NJLTA, *supra*, at 19.

Later in NJLTA, the court examined the legislative history of the Destruction of Public Records Law, N.J.S.A. 47:3-15 to 47:3-32:

The Assembly Bill preceding the enactment of the Destruction of Public Records Law contains the sole legislative history concerning the “object” of the statute. It contains the following statement:

The object ... is to establish a sound archival program which will insure that basic public records in this State will be safely preserved for posterity and which will permit the systematic destruction, under approved schedules, of public records which have outlived their usefulness. It provides for the establishment of a State records committee to advise on the legal, fiscal and historical aspects of records considered for destruction.

In enacting Title 47, the Legislature set forth a comprehensive scheme to guide and direct state and county offices, including county filing and recording offices, in the proper care, custody and control required for maintaining preserving and disposing of public records.

It is clear from the language of the Destruction of Public Records Law that its purpose is to establish a “sound archival program.” Also significant is the definition of “public record” provided in N.J.S.A. 47:3-16:

As used in this act, except where the context indicates otherwise, the words “public records” mean any paper, written or printed book, document or drawing, map or plan, photograph, microfilm, data processed or image processed document, sound-recording or similar device, or any copy thereof which has been made or is required by law to be received for filing, indexing, or reproducing by any officers, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received by any such officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, in connection with the transaction of public business and has been retained by such recipient or its successor as evidence of its activities or because of the information contained therein.

There is clearly a distinction between the definition of “public record” for archiving purposes and the definition of “government record” under N.J.S.A. 47:1A-1.1 when a court considers an OPRA request. While DARM regulates the archival procedures for a “public record,” such as the “Master Card File/Information Card File” found on page 10 of C540000-004, that same “public record” will not be subject to disclosure under OPRA because: (a) it is a “criminal investigatory record,” N.J.S.A. 47:1A-1.1; and/or, (b) an investigation is on-going, N.J.S.A. 47:1A-3(a). DARM is an administrative agency that serves the purpose of regulating bookkeeping. Accordingly, the regulations relied on by plaintiff are for bookkeeping purposes only. Plaintiff does not cite a case that supports her argument that, because DARM regulates the archiving of a “public record,” then such a document is no longer a “criminal investigatory record” and should therefore be disclosed under OPRA.

The plaintiff also claims the right to defendant’s records under the common law right of access. OPRA does not limit the common law right of access to government records. Mason v. City of Hoboken, supra. The provisions in OPRA explicitly retaining the common law right of access imposes a duty upon the judiciary to apply the common law standards and to make an independent assessment as to whether disclosure is warranted. Bergen County Improvement Auth. v. N. Jersey Media Group, Inc., 370 N.J. Super. 504, 520 (App. Div.), cert. denied, 182 N.J. 143 (2004).

In Nero v. Hyland, 76 N.J. 213 (1978), the New Jersey Supreme Court, for the first time, “articulated with particularity the legal principles comprising the common law right of access in the context of a citizen's petition for access to public records.” Bergen County, supra, at 509-10. Thus, a public record under the common law is:

one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of

something written, said, or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office. The elements essential to constitute a public record are...that it be a written memorial, that it be made by a public officer, and that the officer be authorized by law to make it[.] Nero v. Hyland, supra, at 221-22.

The common law definition of a “public record” is broader than the statutory definition of “government record” under OPRA. Mason v. City of Hoboken, supra, at 67; Bergen County, supra, at 509-10. OPRA itself provides no limit to “the common law right of access to a government record, including criminal investigatory records of a law enforcement agency.” O’Shea, supra, at 386; N.J.S.A. 47:1A-8. The requestor does not have to meet both OPRA and the common law right to access – documents unavailable under one approach may be accessed by another. O’Shea, supra, at 387. Under the common law, public records available for inspection “ ‘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.’ ” O’Shea, supra, at 386-87 quoting Daily Journal v. Police Dep’t of City of Vineland, 351 N.J. Super. 110, 122 (App. Div.) certif. denied, 174 N.J. 364 (2002). However, to access this broader class of documents, the requestor must make a greater showing than that required under OPRA: (1) “the person seeking access must ‘establish an interest in the subject matter of the material’ ”; and (2) “the citizen’s right to access ‘must be balanced against the State’s interest in preventing disclosure.’ ” Mason v. City of Hoboken, supra, at 67-68; Keddie v. Rutgers, 148 N.J. 36, 49 (1997); Bergen County, supra, at 519.


The New Jersey Supreme Court has established that the court engaged in the required balancing test set forth in Mason v. City of Hoboken, supra, may consider the following:

(1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government; (2) the effect disclosure

The theft occurred just over six months ago. According to the Lieutenant, new information is still forthcoming and leads have not been exhausted. Further, he has certified that releasing the investigatory information will hinder the investigation and there is less likelihood that the remaining equipment will be recovered and that witnesses or potential suspects will come forward.

For these reasons, it is the finding of this Court that defendant's interest in pursuing an active investigation is superior to plaintiff's right of access to said information and, therefore, the requested documents will not be released to plaintiff.

For the foregoing reasons, the relief sought by plaintiff in her Order to Show Cause is denied and her Complaint is dismissed with prejudice.



REGINA CAULFIELD, J.S.C.

DATED: August 6, 2012