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ARTHUR MERCHANT,

Plaintiff,

v.

NUTLEY POLICE DEPARTMENT

and

CECI TRAMONTANA, in her capacity as
Custodian of Records for the Township of
Nutley and the Nutley Police Department,

Defendant(s)

SUPERIOR COURT
OF NEW JERSEY
LAW DIVISION
ESSEX COUNTY

DOCKET NO. L- 5996-20

CIVIL ACTION

~~PROPOSED~~ FINAL ORDER

THIS MATTER being brought before the Court by Alan G. Peyrouton, Esq., of Peyrouton Law, Attorney for the Plaintiff, seeking relief by way of ^{ry}summary action pursuant to R. 4:67-1(a), based on the facts set forth in the Verified Complaint and supporting papers filed herewith; and the Court having determined that this matter be commenced by order to show cause as a summary proceeding pursuant to N.J.S.A. 47:1A-6 and for good cause showing,

IT IS on this 11th day of February, 2022 ~~x2020~~

ORDERS the following:

a) Declaring Defendants in violation of OPRA and the common law right of

access to public records;

Ordering Defendants to produce to Plaintiffs all records described in the attached Decision of the Court, and

b) ~~Enjoining Defendants from denying access to nonexempt portions of~~

~~government records requested by Plaintiffs and compelling Defendants to~~

~~immediately provide access to such nonexempt records;~~

- reasonable
- c) Granting attorney's fees and costs of suit pursuant to N.J.S.A. 47:1A-6; and subject to submission of a Certification of Services compliant with R.P.C. 1.5(a) 1-8.
 - d) Granting such other relief as the Court deems equitable and just.

~~Honorable~~

~~KSX~~

/s/ Bridget A. Stecher

HON. BRIDGET A. STECHER, J.S.C.

DECISION OF THE COURT IS ATTACHED HERETO.

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**Essex Vicinage**

Amy K. DePaul
Trial Court Administrator

Honorable Sheila A. Venable
Assignment Judge

Hon. Bridget A. Stecher, J.S.C.
Judge Superior Court

470 Dr. Martin Luther King Jr. Blvd., Courtroom 102
Newark, New Jersey 07102

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Re: **Merchant v. Nutley Police Department, et al.**
Docket #: ESX-L-5996-20

STATEMENT OF REASONS

This matter comes before the Court by way of Plaintiff's request under the New Jersey Open Public Records Act, (hereinafter "OPRA"), N.J.S.A. 47:1A-1 *et seq.* and the common law right of access regarding the Defendant's refusal to provide access to government records, namely the Nutley Police Department investigation into the 1996 disappearance of Susan Walsh, former resident of the Township of Nutley, and sister of Plaintiff.

PLAINTIFF'S OPRA REQUEST

Plaintiff argues that to preclude disclosure of the Nutley Police Department's investigation records, Defendant must satisfy the two-prong "open investigation" exemption and provide: (1) proof that Susan Walsh's disappearance investigation is open, ongoing, and in progress even if the investigation is not listed as "closed", and (2) proof that the disclosure of investigation records would be inimical to the public interest. Further, Plaintiff argues that a public agency seeking to exempt disclosure has the burden of proving that denial of access is authorized by an exception to the relevant statute. N.J.S.A. 47:1A-6. Plaintiff relies upon North Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017) which stands for the proposition that a public agency seeking to withhold a record from disclosure as a "criminal investigatory record" must demonstrate that the record is (1) "not required by law to be made, maintained, or kept on file" and (2) "that it pertains or pertained to a criminal investigation or related criminal enforcement proceeding." Id. at 565.

DEFENDANT'S OPPOSITION

Defendant, Nutley Police Department, argues in opposition that disclosure is not required and is precluded by the exemptions for ongoing investigatory records and criminal investigatory records as defined by N.J.S.A. 47:1A-1.1. Furthermore, Defendant argues that the public's common law right of access to public records requires a balancing of interests that weighs in their favor. Defendant claims that when determining whether the common law requires production of the records at issue, the Court must evaluate: "(1) whether the records are "public records" as defined by the common law; (2) whether the plaintiff has the requisite interest to inspect the public records; and (3) whether an interest in confidentiality outweighs disclosure." South Jersey Publ'g

Co. v. N.J. Expressway Auth., 124 N.J. 478, 487-88 (1991); Techniscan Corp. v. Passaic Valley Water Comm'n., 113 N.J. 233, 237 (1983); Homes News Publ'g Co. v. State, 224 N.J. Super. 7, 16 (App. Div. 1988). Defendant concedes that the investigatory records generated by the Nutley Police Department pursuant to the investigation are government records for the purposes of the common law. However, Defendant contends that the records made by a third-party private investigator do not fall under government records as they were not created by a public officer. As such, Plaintiff's request for the private investigator's records should fail under the first prong, public records. Defendant next argues that Plaintiff lacks the requisite interest to inspect the common law government records. Specifically, Defendant relies upon Plaintiff's statement in the verified complaint: "Plaintiff seeks this information because his father funded Mr. Barry's [the private investigator] investigation, thus making these records family property." Defendant believes such an interest fails to meet the threshold requirement and therefore, the private investigator's report and the Nutley Police Department records should be barred from disclosure. Nevertheless, Defendant maintains that even if Plaintiff could establish the requisite interest, the Defendant's interest in confidentiality outweighs Plaintiff's interests in disclosure.

STANDARD OF REVIEW:
THE OPEN PUBLIC RECORDS ACT

The New Jersey Open Public Records Act ("OPRA") provides that "government records shall be accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest . . ." N.J.S.A. § 47:1A-1 (Westlaw 2021). The statute also provides that "any limitations on the right of access [. . .] shall be construed in favor of the public's right of access . . ." Id.

Under OPRA, "*all government records*" are subject to public access. OPRA defines "government record" as:

[A]ny 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 . . . 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 that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State Id. § 47:1A-1.1 (emphasis added.)

OPRA applies solely to public agencies. OPRA defines "public agency" as:

[A]ny of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department; the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch; and any independent State authority, commission, instrumentality or agency. Id.

When reviewing a request made under OPRA, the Court must first determine whether the requested records are exempt from disclosure. All government records shall be subject to public access unless exempt from such access. N.J.S.A. 47:1A-1 *et seq.* Various categories of information do not constitute "government records" and are thus deemed to fall outside the purview of OPRA and need not be disseminated by the governmental agency.

N.J.S.A. § 47:1A-3(a) Ongoing Investigatory Records, N.J.S.A. § 47:1A-3(b) Criminal Investigatory Records and the Common Law Right of Access.

Under Section 3(a), OPRA exempts public access to records that are part of an “ongoing investigation,” not limited to criminal investigatory records. Id. § 47:1A-3(a). N.J.S.A. § 47:1A-3(b) of the OPRA statute exempts public access to criminal investigatory records.

To analyze the exemption for ongoing investigation records and criminal investigatory records under OPRA, N.J.S.A. §§ 47:1A-1 to -13, courts must weigh various factors to decide whether the disclosure will be inimical to the public interest. N.J.S.A. § 47:1A-3(a). The danger of compromising an ongoing investigation would typically weigh against disclosure of detailed witness statements and investigative reports while the investigation is underway, under both OPRA and the common law. North Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 551 (2017). The State’s policy favors broad access to public records. Id. To be exempt from disclosure, a record must pertain to an ongoing investigation or to any criminal investigation. N.J.S.A. § 47:1A-1.1. To “pertain” means to have some connection with or relation to something. Id. Only records relating to the investigation of a crime are covered by the [ongoing investigation] exemption. Id. To avail itself of N.J.S.A. § 47:1A-3(a)’s ongoing investigation exemption, a public agency must show that: (1) the requested records pertain to an investigation in progress by any public agency; (2) disclosure will be “inimical to the public interest”; and (3) the records were not available to the public before the investigation began. N.J.S.A. § 47:1A-3(a). Regarding how long an investigation must be ongoing in order for the exception to apply, the New Jersey Supreme Court held that “[s]ection 3(a) does not contain a time limit for ongoing investigations, and no fixed limit would apply to all cases.” North Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 551 (2017). There, the court held that “although it may be appropriate to deny a request for investigative reports under section 3(a) early in an investigation . . . the outcome might be different later in the process.” Id. The Lyndhurst decision requires reviewing courts to perform a balancing test when evaluating whether a public agency has met their burden of establishing that disclosure of the requested records would be “inimical” to the public interest, weighing the factors of (1) officer safety, (2) a reliable investigation, and (3) the need for transparency when faced with an asserted “ongoing investigation.” Id. at 907.

To restrict the public’s right of access to government records, the agency must produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality. Courier News v. Hunterdon County Prosecutor’s Office, 358 N.J. Super. 373, 382 (App. Div. 2003). To prove that a record is a criminal investigatory record, the public agency must show that the record: (1) is not required by law to be made; and (2) pertains to a criminal investigation or related civil enforcement proceeding. O’Shea v. Twp. of West Milford, 410 N.J. Super. 371, 380-81 (App. Div. 2009).

DECISION

The New Jersey Legislature enacted the New Jersey Open Public Records Act, N.J.S.A. §§ 47:1A-1 to -13, to promote transparency in the operation of government. Paff v. Ocean Cty Prosecutor's Office, 235 N.J. 1 (2018). Records shall be readily accessible for inspection, copying, or examination, with certain exceptions...[but] any limitation of the right of action accorded by OPRA shall be construed in favor of the public's right of access. N.J.S.A. § 47:1A-6.

N.J.S.A. § 47:1A-3(a) Ongoing Investigatory Records

Defendant, Nutley Police Department, must disclose the records sought as the Court finds that these records do not qualify for the ongoing investigatory records exemption. The ongoing investigatory record exemption applies to “any records pertaining to an investigation in progress by any public agency if disclosure of such record or records shall be detrimental to the public interest.” N.J.S.A. § 47:1A-3(a). However, where it shall appear that “the record[s]...sought...shall pertain to an investigation in progress by any public agency, the right to access...may be denied if [the examination of the] records shall be inimical to the public interest. Id. To avail itself of N.J.S.A. § 47:1A-3(a)'s ongoing investigation exception, a public agency must show that (1) the requested records pertain to an investigation in progress by any public agency, (2) disclosure will be inimical to the public interest, and (3) the records were not available to the public before the investigation began. North Jersey Media Grp., Inc. v. Tp. of Lyndhurst, 229 N.J. 541, 573 (2017).

Defendant contends that the investigatory records of Ms. Walsh's disappearance are precluded from disclosure by the ongoing investigatory exemption N.J.S.A. § 47:1A-3(a), because the investigation is “in progress” or “ongoing” according to the applicable exemption. The Court disagrees. The records provided to this Court for *in camera* review contradict such an assertion. The current scope and active investigation into the disappearance of Ms. Walsh is questionable. The records provided to this Court show that the Nutley Police Department is not actively investigating this matter. Rather, the documents produced for the Court's *in camera* review document that “tips” are called in to the Nutley Police Department, often after television reporting about Ms. Walsh's disappearance. Defendant will then initiate a follow-up of any tip received. However, long stretches of time occur when there is no active investigation initiated by the Defendant and, for many years, the investigation is *reactive* in response to tips received and has not been *proactive* in any respect. Therefore, the Court finds that Defendant has failed to meet the requisite burden of proof pursuant to the first prong of N.J.S.A. § 47:1A-3(a) because the investigation is not *ongoing* in any usual or common understanding of that term.

Defendant is unable to show that disclosure will be inimical to the public interest under the second prong of N.J.S.A. § 47:1A-3(a) warranting non-disclosure. Defendants argue that disclosure will undermine the reliability of ongoing investigations and likewise damage the integrity of its tip hotline because “if it becomes known that...tips will be public records, that will have a serious chilling effect on the collection of information.” Def. Br. 8. Early disclosure may be inimical to the public interest as the Court described in North Jersey Media Grp., Inc. at 906, that is not the case here. Ms. Walsh disappeared in 1996. Disclosure now is hardly “early”. Defendant argues that disclosure would be inimical to the public interest because

“the...Department still receives phone calls and emails from people who believe they have seen Ms. Walsh”. But the fact remains, the Department only receives these “calls and emails” after televised documentaries air regarding Ms. Walsh’s disappearance. To argue that disclosure of these records would be detrimental to the public interest is counterintuitive. The tip hotline information has, in many respects, been widely disseminated by way of the numerous documentaries covering Ms. Walsh’s disappearance.

Regarding the third prong, the Court must examine whether the records held by the Nutley Police Department were available to the public before the investigation began. The Court concedes that when the investigation began 26 years ago, the general information received was not available to the public. However, as noted above, recent investigative “tips” have been forwarded to the police from the television shows’ tip hotline. The Defendant (and arguably the Plaintiff) already has access to these same “tips” sought by the Plaintiff. The tips are not secret; they were forwarded to the Nutley Police from the recipient tip hotline. Defendant believes, wrongfully, that the reliability of further investigations would be hindered by disclosure of these records to the public. Disclosure of the missing persons records at issue will not be inimical to the overall public interest because this investigation is, and has been for some time, closed but for the receipt of information provided by the public. While the earliest records at issue were not available to the public before the investigation began, the Court may fashion a remedy to protect some of the identification and sensitivity of the records in question upon release.

The Private Investigator’s Report.

Defendant, Nutley Police Department, is a law enforcement agency. Law enforcement agency means “any public agency, or part thereof, determined by the Attorney General to have law enforcement responsibilities.” N.J.S.A. § 47:1A-1.1. All records generated, maintained or received by the public agency are deemed “public records”:

“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 that has been received in the course of his or its official business** by any such officer, commission, agency, or authority of the State Id. § 47:1A-1.1 (emphasis added.)

Defendant argues that the private investigator’s report is precluded from disclosure as not constituting “government records”. However, the investigator’s report was received by the public agency in furtherance of Ms. Walsh’s missing persons investigation and maintained by such for the intervening years. Therefore, the report qualifies as a public record as it is part and parcel of the Nutley Police Department’s records of this matter.

Defendant is unable to avail themselves of the protections afforded by N.J.S.A. § 47:1A-3(a) because the records in question are not subject to an ongoing investigation and disclosure would not be inimical to the public interest.

N.J.S.A. § 47:1A-3(b) Criminal Investigation Records Exemption

The disclosure requirement under Section 3(b) of OPRA requires the disclosure of specific information about a criminal investigation within twenty-four hours, or as soon as practicable, of a request for same . N.J.S.A. § 47:1A-3(b). This provision provides that the following *criminal* investigation records are not exempt from disclosure:

1. 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;
2. If an arrest has been made, information as to the name, address and age of any victims 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.
3. 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;
4. 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;
5. 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;
6. Information as to the identity of the investigating and arresting personnel and agency and the length of the investigation;
7. 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
8. Information as to circumstances surrounding bail, whether it was posted and the amount thereof.

The statute further provides “notwithstanding any other provision 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 a bona fide law enforcement purpose or the public safety.” N.J.S.A. 47:1A-3(b).

The missing person records of Ms. Walsh are not subject to the criminal investigatory records exemption. “Criminal investigatory record” is 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. The file as to Ms. Walsh's disappearance held by the Nutley Police Department was and remains a missing persons file, unrelated to any “criminal investigation or related civil enforcement proceeding”. Furthermore, pursuant to N.J.S.A. § 47:1A-8, nothing shall be construed

as limiting the common law right of access to a government record, including the criminal investigatory records of a law enforcement agency.

Common Law Right of Access

The common law right to access public records is subject to 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). Furthermore, because the common law right of access to documents is qualified, the party seeking access to such records must establish that disclosure is weighed in their favor when balanced against the public interest in maintaining confidentiality. The common law right of access reaches a broader class of documents than its statutory counterpart of OPRA. Higg-A-Rella, Inc. v. Cnty. of Essex, 141 N.J. 35, 46 (1995). A party seeking access to a public record must "make a greater showing than required under OPRA." Mason v. City of Hoboken, 196 N.J. 51, 67 (2008). The requester must establish an interest in the subject matter of the material. Keddie, 148 N.J. at 50. The requestor's interest "may be either a wholesome public interest or a legitimate private interest." Drinker Biddle & Reath LLP v. N.J. Dep't of Law and Pub. Safety, 421 N.J. Super. 489, 497 (App. Div. 2011). The court must then balance "the citizen's right to access...against the State's interest in preventing disclosure." Mason, 196 N.J. at 67-68. The court should then consider "whether the demand for inspection is premised upon a purpose that tends to advance or further the requestor's interest." S. N.J. Newspapers, Inc. v. Twp. of Mount Laurel, 141 N.J. 56, 72 (1995). The State's "interest in nondisclosure is based on the need to keep the information confidential." Keddie, 148 N.J. at 51. However, "where the interest in confidentiality is 'slight or non-existent,' standing alone will be sufficient to require disclosure to advance a legitimate private interest." Id.

Plaintiff has a valid interest in the records at issue. Defendant concedes that the records generated by the Nutley Police Department in connection with the disappearance of Ms. Walsh are government records for the purposes of the common law. Def. Br. 9. However, Defendant argues that the records made by a third-party investigator, Mr. Barry, were not made by the police department and therefore, are not government records under the common law. Plaintiff's counter argument is that the private investigator records provided to the Defendant, were prepared at the expense of Plaintiff's father. Def. Br. 10. To deny Plaintiff access to such records because the private investigator records were not technically prepared by the Defendant is akin to the unjust seizure of private property. Plaintiff is entitled to the records under the common law right of access. First, as found by the Court above, even if the records did not begin as government documents, they became government documents by virtue of their receipt, use and maintenance by the governmental agency. The government documents qualify under the first prong of the common law right of access. Next, Plaintiff has established a significant private interest in the missing person records of Ms. Walsh; Plaintiff is the brother of Ms. Walsh and has an interest in obtaining the records. Plaintiff's interest in accessing the records is substantial, whereas Defendant's opposition to disclosure is without current merit. Defendant is not actively investigating the disappearance of Ms. Walsh and Defendant is unable to establish an interest in confidentiality when a plethora of information as to this matter is now and has been the subject of television documentaries. To which, most of the "tips" Defendant seeks to keep confidential, are provided as the result of the documentaries' sporadic airing on television. Defendant has an interest in

confidentiality here, but not one that outweighs the legitimate private interests of the Plaintiff. Where the interest in confidentiality is 'slight or non-existent,' standing alone suffices to require disclosure. Keddie, 148 N.J. at 51.

The Court recognizes that the files reviewed *in camera* contain, at times, confidential or sensitive information. To that end, disclosure of the Nutley Police Department records of the missing person's file of Susan Walsh is ordered with the following exceptions:

1. All confidential identifiers such as social security numbers, driver's license numbers or other confidential identifiers are to be redacted.
2. All domestic violence incident reports are to be redacted in full.
3. The names, badge numbers, and other identifiers of investigating officers are to be redacted in the interest of public safety.
4. The names, addresses and telephone numbers of any hotline tipsters are to be redacted, though the information that they provide may be provided in unredacted form, including location last seen and other information provided to the hotline.

Attorney's Fees

Plaintiff is entitled to counsel fees. "To be entitled to such fees under OPRA, a plaintiff must be a prevailing party in a lawsuit...brought to enforce his or her access rights." Smith v. Hudson Cty. Register, 422 N.J. Super. 387, 393 (App. Div. 2011). Defendant has failed to establish that the denial of access, here, is authorized by law, pursuant to N.J.S.A. § 47:1A-6. Therefore, Plaintiff is entitled to reasonable attorney's fees in accordance with the relevant provisions of this statute. Plaintiff's counsel shall prepare a certification of services in conformance with and addressing all factors set forth in R.P.C. 1.5(a) 1-8 in detail and submit same to the Court for review.