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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0537-21

HELEN ZEZZA,

Plaintiff-Respondent,

v.

EVESHAM TOWNSHIP
BOARD OF EDUCATION,

Defendant-Appellant.

Argued March 6, 2023 – Decided June 29, 2023

Before Judges Gooden Brown and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law
Division, Burlington County, Docket No. L-1475-21.

Kasi M. Gifford argued the cause for appellant (Cooper
Levenson, PA, attorney; Kasi M. Gifford, on the
briefs).

Ted M. Rosenberg argued the cause for respondent.

PER CURIAM

This appeal arises from a citizen request, pursuant to the Open Public Records Act (OPRA or the Act), N.J.S.A. 47:1A–1 to –13, and the common law right of access, for approximately thirty-five seconds of surveillance footage taken from two cameras on the premises of Rice Elementary School in Evesham Township (Rice). Defendant, Evesham Township Board of Education, denied the request based on the security exception to OPRA established in N.J.S.A. 47:1A-1.1. On appeal, defendant argues that Gilleran v. Twp. of Bloomfield, 227 N.J. 159 (2016) created a categorical OPRA exception for public surveillance videos. We disagree and affirm, substantially for the reasons set forth in Judge Covert's, well-reasoned written decision. We add the following remarks.

On May 15, 2021, plaintiff attended her grandson's baseball game at Rice. Plaintiff alleges in her complaint that, at approximately 11:00 a.m., after the game concluded and she took her grandson to the school playground, she was confronted by Colleen McCullough, who verbally accosted and threatened her, poking her "in the chest and bump[ing] into her back." This incident was purportedly captured on two Rice security cameras, one attached to the exterior of the school building, and another suspended from a lamp post on school grounds. As a result, a municipal complaint was issued against McCullough for

the disorderly persons offense of simple assault, in violation of N.J.S.A. 2C:12-1(a)(3), and the petty disorderly persons offense of harassment, in violation of N.J.S.A. 2C:33-4(a).

On May 18, 2021, Ted M. Rosenberg, Esq., submitted an OPRA request to defendant seeking video footage from "2 possible video cameras" that "may have captured all or a part of" an "incident" on the Rice playground "that occurred between 11:00 to 11:20 a.m." on May 15, 2021, which involved "a middle-aged female conversing with, following[,] and striking another woman who is approximately 82 years of age." The OPRA request states that Rosenberg, now counsel for plaintiff in this appeal, was acting for his "client [who] is the son of the 82 year old woman." By letter dated May 26, 2021, defendant denied the request, stating that security footage "is exempt from OPRA pursuant to N.J.S.A. 47:1A-1.112."

Plaintiff filed a verified complaint seeking an order to show cause against defendant on July 9, 2021, requesting the court grant plaintiff's OPRA request and require defendant to produce the requested security footage. Plaintiff's complaint also claimed a common law right of access to the security footage "that outweighs the governmental need for confidentiality" and sought attorney's fees.

On July 12, 2021, Judge Covert issued an order to show cause setting a date for defendant to respond to plaintiff's complaint. On August 20, 2021, a hearing was held before Judge Covert, at which she found for plaintiff under both OPRA and the common law right of access. Judge Covert ordered defendant to produce the surveillance video for in camera review by September 3, 2021, found that plaintiff was the prevailing party and entitled to attorney's fees and costs, and ordered plaintiff to file a certification of attorney's fees.

On September 28, 2021, Judge Covert issued a written decision and order denying defendant's motion for reconsideration. The judge ordered defendant to deliver to plaintiff approximately thirty-five seconds of the requested video footage. The judge also awarded plaintiff attorney's fees of \$8,046.50.¹

In her September 28, 2021, ruling, Judge Covert held that plaintiff had the right to disclosure of the video footage under both OPRA and the common law right of access. First, on the OPRA claim, the judge held that Gilleran, 227 N.J. at 176, allowed for production of a record or portion of a record that does not reveal information about the security scheme of the public building. Judge Covert reasoned that, in the OPRA context, "Gilleran draws a fine, but important

¹ Due to a clerical error, the judge issued an amended order on November 16, 2021.

line between circumstances that require 'the need, in some instances, to deny access to only a portion of a government record' and instances where 'access to the videotape product of the surveillance medium itself reveals security-compromising information.'" (quoting Gilleran, 227 N.J. at 176).

The judge found that it was defendant's burden to demonstrate that the footage would reveal "security compromising information" which defendant did not meet, (quoting Gilleran, 227 N.J. at 176). As the judge noted, defendant failed to support its arguments with any certifications attesting to actual security concerns related to the release of the video. Further, the judge's own review of the footage "shows such a limited snapshot of the capability of the school's security system that it could not jeopardize security by exposing surveillance weaknesses." Moreover, the judge found that using the "OPRA security exception to prevent evidence of an assault captured with security footage installed to capture evidence of criminal activity from reaching the courtroom would be an absurd result."

Defendant appeals from the September 28, 2021 order denying reconsideration, presenting the following contentions for our review:

POINT I

SECURITY FOOTAGE IS EXEMPT FROM
DISCLOSURE PURSUANT TO OPRA[.]

POINT II

ATTORNEY'S FEES ARE NOT MANDATORY UNDER THE COMMON LAW RIGHT OF ACCESS AND SHOULD HAVE BEEN DENIED AS THE BOARD'S DECISION TO WITH[H]OLD THE SECURITY VIDEO WAS REASONABLE[.]²

Motions for reconsideration are "an opportunity to seek to convince the court that either 1) it 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." Kornbleuth v. Westover, 241 N.J. 289, 301 (2020) (quoting Guido v. Duane Morris LLP, 202 N.J. 79, 87-88 (2010)). The moving party must "state[] with specificity the basis on which [the motion] is made" and supply "a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred." Rule 4-49:2. On review, the trial court's ruling on a motion for reconsideration should not be overturned absent a "clear abuse of discretion." Kornbleuth, 241 N.J. at 301 (quoting Hous. Auth. of Morristown v. Little, 135 N.J. 274, 283 (1994)). "An abuse of discretion 'arises

² Defendant concedes for purposes of this appeal that plaintiff was entitled to the surveillance video pursuant to the common law right of access. Therefore, we need not address the judge's reasons why the common law was an independent basis for the relief sought.

when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Id. at 302 (quoting Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2014)).

We "exercise plenary review over issues of statutory interpretation." In re N.J. Firemen's Ass'n Obligation to Provide Relief Applications Under Open Pub. Recs. Act, 230 N.J. 258, 273 (2017) (citing State v. Williams, 218 N.J. 576, 586 (2014)). "[D]eterminations about the applicability of OPRA and its exemptions are legal conclusions," and, accordingly, such determinations are reviewed de novo. Id. at 273-74 (citing O'Shea v. Township of West Milford, 410 N.J. Super. 371, 379 (App. Div. 2009)).

Under OPRA, the "public policy of this State" is that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions." N.J.S.A. 47:1A-1. "The statute defines 'government record' broadly" Mason v. City of Hoboken, 196 N.J. 51, 65 (2008). Government records include:

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

[N.J.S.A. 47:1A-1.1.]

OPRA exempts from disclosure certain enumerated "information which is deemed to be confidential. . . ." Ibid. Relevant to this appeal, OPRA expressly exempts from disclosure "emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein;" and "security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software" Ibid.

"A person who is denied access to a government record by the custodian of the record . . . may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court" N.J.S.A 47:1A-6. In such a proceeding, "[t]he public agency shall have the burden of proving that the denial of access is authorized by law." Ibid.

Guided by these principles, we reject defendant's contention that Gilleran created a blanket exception for all surveillance videos. Gilleran addressed the same kind of government record—surveillance video. Gilleran also analyzed the same security exceptions to OPRA and was explicitly relied upon by

defendant in denying plaintiff's record request. In Gilleran, the Court was asked to determine whether OPRA required disclosure of "a day's worth of video footage from a stationary security camera attached to the second-story rear area of Bloomfield Town Hall, adjacent to the police station." Id. at 163. Bloomfield Township rejected the OPRA request citing exemptions for security information under N.J.S.A. 47:1A-1.1, and thereafter the plaintiff sued under OPRA and the common law right of access to force disclosure of the requested video footage. Id. at 165.

In asserting that security footage was exempt from disclosure under OPRA, the Township relied on a certification from its administrator that: the camera provided security for both the municipal building and the adjacent police station; the cameras were placed in strategic locations and a smoked glass covering prevented the public from determining what area is being surveilled; the area surveilled is used by township employees, police officers, confidential informants, witnesses, domestic violence victims, and members of the public seeking to report crimes, and those persons would be jeopardized by the release of security footage. Id. at 165-66. Thus, according to the Township, release of the footage "would disclose security information that reveals the security system's operation and vulnerabilities[,]" id. at 169, contrary to the provisions

of OPRA that exempt from disclosure "emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein; [and] security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software[.]" Id. at 164 (quoting N.J.S.A. 47:1A-1.1).

Ruling in favor of the Township on the OPRA issue, the Gilleran Court found that the above security exemptions can apply to prevent the disclosure of security camera footage, which the Court assumed, as undisputed by the parties, was a "government record." Id. at 172. However, to "achieve exemption for such a category of security information, the governmental entity must establish that the security tool (here, the camera) produces information that, if disclosed, would create a risk to the security of the building or the persons therein because of the revealing nature of the product of that tool." Id. at 174. Under the specific facts in Gilleran, the Court found the Township satisfied its burden.

However, the Court explicitly rejected claims that the Legislature "creat[ed] a blanket exception for any and all information about security measures." Id. at 173. Rather, the provision of surveillance footage is only categorically barred when "the public-security concern is that access to the

videotape product of the surveillance medium itself reveals security-compromising information" Ibid. Notably, although the Court in Gilleran remanded for further development of the common law right of access issue because "[p]laintiff's common law right of access claim was never reached in this matter and so that balancing-of-interest analysis was not performed," id. at 177, nothing in Gilleran restricts plaintiffs to a common law remedy where, as here, the government entity has simply failed to establish any security concerns to prevent disclosure under OPRA.

Critically, nothing in Gilleran relieves the government of its burden to "establish that the security tool (here, the camera) produces information that, if disclosed, would create a risk to the security of the building or the persons therein because of the revealing nature of the product of that tool." Id. at 174. "In surveillance video cases, as in all OPRA cases, the government retains the burden of proving that the denial of access is authorized by law." N.J.S.A 47:1A-6. We conclude Judge Covert did not err in her finding that, in this case, defendant simply failed to satisfy its burden.

Because it is undisputed that OPRA statutorily mandates a fee award to the prevailing party, defendant's remaining argument that the judge abused her

discretion by awarding attorney's fees on a stand-alone common-law right of access claim is moot.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION