

NORTH JERSEY MEDIA GROUP V. LYNDDHURST

THE GOOD, THE BAD, AND THE UNCERTAINTY

NEW JERSEY STATE LEAGUE OF MUNICIPALITIES

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NJM v. Lyndhurst Didn't Have to Happen

- The legal facts of the police-involved shooting at issue weren't wasn't controversial
- As per the trial judge all of the four responding law enforcement agencies failed to provide adequate responses to NJMG's request
- Trial court (Doyne, J) issued unprecedented opinion giving access to witness statements, work product
- Appellate Division, in reversing, went further than necessary, including addressing Use of Force Reports
- Supreme Court consolidated too many issues into the appeal, making it hard to give each proper attention

Basic Facts of *Lyndhurst*

- September 2014 early-morning stolen car chase
- Driver allegedly tried to ram a Lyndhurst patrol car
- After driver crashed into a guard rail and police surrounded the car, driver put car into reverse and allegedly tried to accelerate into officers; also seen to be reaching for console
- Officers allegedly shot and killed driver; passenger not hit
- Handgun retrieved in console area
- Passenger later died in unrelated incident
- Grand jury later “no billed” all officers involved

Basic Facts of *Lyndhurst*

- Police calls complex scenes
- Rutherford NJ Multi-agency pursuit suspected car thieves, resulting in Deadly Force
- Towns deferred to NJAG Office, Shooting Response Team investigating.
- 911 Call to North Arlington
- 4 PDs alerted for suspect vehicle
- Located, 4 minute pursuit through towns, crash guardrail, used deadly force.
- 3 levels of government- jurisdictional issues.
- Common Law- not only personal interest, national issue



Basic Facts of *Lyndhurst*

- North Jersey Media Group reporter filed OPRA and common law requests for:
 - Incident/investigation/accident reports
 - Log book notations/activity logs
 - Audio recordings and written transcripts, 9-1-1 tapes
 - Arrest reports
 - Use of Force Reports
 - Dash-cam videos
 - Computer-Aided Dispatch reports

Procedural History of *Lyndhurst*

- OPRA requests sent to Lyndhurst, North Arlington, Rutherford, and Bergen County PDs and to NJSP
- *None of the five provided a timely response!*
- NJMG sued
- After the suit had begun, the agencies produced some records but asserted that others were protected from disclosure by various OPRA exemptions, including “criminal investigatory records” and records of an ongoing investigation

Procedural History of *Lyndhurst*

- OPRA- Towns deferred to NJAG Office
 - 10 items requested from an agency
 - 7 items requested from an agency
 - 4 items from an agency
- Responses
 - ◆ “all the responsive records were exempted”
 - ◆ “not be available for forty-five (45) days”
 - ◆ “part of an ‘ongoing investigation’ denied in its entirety”
 - ◆ referred requestor to Deputy AG (vacation)
 - ◆ “ongoing Attorney General investigation”
 - ◆ “all the responsive records were exempted by the criminal investigatory records”
 - ◆ “still in the process of determining if they made or maintained records, 10 day extension then did not communicate a response”



Procedural History of *Lyndhurst*

- One municipality released some documents, NJSP released some documents including some that municipalities denied.



Procedural History of *Lyndhurst*

- In January 2015, trial court (Doyme, J) said that none of the requested records were “criminal investigatory” because they all were “required to be made.”
- Also held that the responding agencies failed to submit sufficient proof that any exemption applied
- The order interpreted NJMG’s request very broadly to encompass witness statements and other records of the still-in-progress investigation
- Ordered all records released within a very brief time and refused to stay the order pending appeal
- Appellate Division granted emergency stay

Appellate Division's Holdings

- Appellate Division issued broad precedential ruling on June 11, 2015, reversing the trial court
- Examined OPRA's history and found that Legislature, by defining "criminal investigatory records" using the exact same language that exempted such records from disclosure in the old Right to Know Law, intended to leave that exemption undisturbed, even while enacting OPRA to greatly broaden public access to many other kinds of documents
- Adopted broad definitions of when criminal investigations "begin" and "end"

Appellate Division's Holdings

- Appellate Division reached to decide two issues that were not really before it in *Lyndhurst*:
 - AG's Office advised Court that no dash cams recorded the shooting, but App. Div. nevertheless held that when an officer activates a dash cam in response to a report of a crime, that is a "record" of an "investigation," albeit in its earliest stages.
 - AG's Office produced all Use of Force Reports (redacted) and conceded it had no issue with *O'Shea v. Twp. of W. Milford*, where App. Div. had said UFRs were subject to OPRA, but App. Div. disagreed with *O'Shea's* holding that Attorney General directives have the force of "law" for OPRA purposes.

Identifying Officers Involved

- OPRA § 3(b) identifies “categories of information” that “shall be available to the public within 24 hours or as soon as practicable” after request
 - “information as to the identity of the investigating and arresting personnel and agency”
 - “information of the circumstances immediately surrounding the arrest”
- Is a fatal shooting an “arrest,” and can the police officers who discharged their weapons be likened to “arresting officers”?
- If a seizure = an arrest, and Deadly Force = a seizure, then Deadly Force = an arrest.



Identifying Officers Involved

- Law enforcement may withhold § 3(b) information when “it shall appear that the information requested ...will jeopardize the safety of any person or jeopardize any investigation in progress or may be otherwise inappropriate to release.”
- Safety exemption “shall be narrowly construed to prevent disclosure of information that would be harmful to a 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”

Identifying Officers Involved

- Assuming § 3(b) applies to officer-involved shootings:
 - After law enforcement officials “determine that it is necessary to withhold information,” how much deference should judges give that decision?
 - If law enforcement officials can justify their decision with only a “brief statement,” how much more information must they provide to courts in OPRA lawsuits?
 - In particular, if police departments want to withhold the names of officers involved to protect their safety and to avoid stigma, what must they show in order to do so?

Identifying Officers Involved

- AG Directive 2006-5 (revised July 2015)
 - Local law enforcement is excluded from investigating officer's use of force.
 - County Prosecutor's Office conducts a criminal investigation into a local police officer's Use of Deadly Force until presented to a Grand Jury or justifiable facts established and accepted by the AG's Office.
 - As a Chief I would not know for a fact which officer discharged their weapon, nor would I know which officer struck the person and was therefore the "arresting officer" by "seizing" a body.



Supreme Court's Decision

“[T]he record is somewhat limited. It is not clear precisely which documents have been disclosed, which requests remain outstanding, and which of those are pressed on appeal. We therefore focus on what we perceive to be the key questions that require attention in this interlocutory appeal: the scope of the criminal investigatory records exemption in cases that involve a police shooting..., the meaning and scope of the ongoing investigations exemption in those matters, and the application of the common law balancing test to this challenging area.”

“Criminal Investigatory Records”

- Rejected App. Div.’s reliance on Right to Know Law’s use of the same language to define scope of the “criminal investigatory records” exemption
 - “OPRA replaced and significantly expanded the RTKL.”
 - “We therefore interpret OPRA’s criminal investigatory records exemption in light of the current law’s stated purpose, which favors broad access, and not prior case law that analyzed the narrower RTKL.”
- *Editorial observation: No mention of all the case law the AG’s office cited about how to interpret statutes when the Legislature intentionally uses the same language. No reason to believe OPRA was meant to “expand” this area.*

And Then, A Punt

- Because NJMG made its OPRA request just a few days after the incident, at the outset of the investigation, the Supreme Court decided most of the case under the “investigation in progress” exemption, which has temporal limitations, rather than the “criminal investigatory records” exemption, which doesn’t.
- All it really held was that the mere fact a document must be preserved or “maintained” after creation, *i.e.*, because the Destruction of Public Records Law says so, does not take that document out of the criminal investigatory records exemption.

Dash Camera Footage

- NJMG pointed *only* to the DPRL retention requirement as a reason why dash camera footage cannot be a criminal investigatory record; court rejected that claim
- BUT, that's not the end of the story
 - Supreme Court soon will hear *Paff v. Ocean County Prosecutor's Office*, where a 2-1 App. Div. majority held that where a dash camera was turned on pursuant to a police chief's general order to activate the camera whenever overhead lights/flashers are activated, the chief's order had the "force of law," just like the AG's UFR directive at issue in *O'Shea*.
 - The AG issued a body camera directive in 2016.



Thinking About Body Cameras?

- AG Directive does not require body cameras. It only requires departments using them to adopt policies with certain minimum requirements, including when cameras must be activated.
- AG Directive requires retention of records for at least a specified period, but is that any different from the DPRL requirements the Supreme Court said didn't matter in *Lyndhurst*?



Thinking About Body Cameras?

- App. Div. in *Lyndhurst* recognized that the AG can issue directives and regulations. Regulations can exempt documents from OPRA, but directives cannot. It therefore would be incongruous to consider an AG directive to have the force of “law” sufficient to take documents outside the exemption, as the *O’Shea* court had held
- Supreme Court didn’t wrestle with the issue as the App. Div. did. It simply held that UFRs don’t reveal much information and, because the AG requires them, they should be released under OPRA



Thinking About Body Cameras?

- Supreme Court mentioned the upcoming *Paff* appeal but did not tip its hand:
 - “we do not know whether the officers in this case acted pursuant to any local directives, [so] the intriguing issue raised in *Paff* is not before the Court here”
 - The AG’s body camera directive technically is not before the Supreme Court in *Paff*, either; only the chief’s order
 - That directive, however, is the elephant in the room
 - *Paff* should be argued early next year



Thinking About Body Cameras?

Editorial observation:

Every document created during the course of a criminal investigation is, at some level, the product of a superior officer's "order." If every superior's order, including the AG's, means that documents created as a result of those orders was "required" and therefore cannot be a "criminal investigatory record" exempt from OPRA, that exemption is meaningless. That's exactly the result the Supreme Court refused to reach when it rejected application of the DPRL tables. Will they reach that same conclusion in Paff? We don't know.



Identifying Officers Involved in Shootings

- Supreme Court:
 - “Section 3(b) uses ‘name’ and ‘identity’ interchangeably”
 - Meaning of “identity” in § 3(b) is “plain: it refers to the names of the investigating and arresting officers”
 - “To distinguish between an officer who ‘shoots’ and one who ‘arrests’ makes little sense
- Consequently, unless § 3(b)’s exemptions for safety or integrity of an investigation apply, police must identify officers involved in shooting incidents upon receipt of a § 3(b) request



Identifying Officers Involved in Shootings

- AG's Office submitted declaration from top official saying that to ID officers is to subject them to harsh and harmful media coverage and to the risk of retaliation and other threats to their safety
- Supreme Court:
 - “The carefully detailed reasons Chief Morris outlines apply to nearly all cases in which a law enforcement officer uses deadly force”
 - “[G]eneric reasons alone cannot satisfy the statutory test. A more particularized showing is required.”
- Applies to UFRs, too, so officer names cannot be redacted absent particularized showing of harm



Identifying Officers Involved in Shootings

Editorial observation:

What this means in practice is anyone's guess. At the very least, police departments would be wise to pool their resources and research all instances nationwide in which officers identified as (good) shooters have faced threats, or worse, to their safety, so they can present those examples to courts. No court to have considered this issue has said we need to wait for an officer actually to be harmed for this exemption to apply. But they do need to be convinced that the need to protect officers from this disclosure is real.

What If a Police Camera Records a Shooting?

“As recent events across the nation make clear, shootings that involve law enforcement officers generate widespread interest—when an officer, a civilian, or both are harmed. In such matters, “the public interest” encompasses various strands. Officer safety is always a vital concern. The need for a prompt, thorough, and reliable investigation is likewise important. And the need for transparency, which OPRA is designed to foster, also weighs heavily, particularly when law enforcement uses its most awesome authority—deadly force. Courts must balance those interests to assess whether disclosure would be inimical to the overall public interest.”



What If a Police Camera Records a Shooting?

- “[I]n the case of a police shooting, non-disclosure of dash-cam videos can undermine confidence in law enforcement and the work that officers routinely perform. It can also fuel the perception that information is being concealed—a concern that is enhanced when law enforcement officials occasionally reveal footage that exculpates officers.”
- The Supreme Court held that footage is exempt from OPRA as a criminal investigatory record (which may or may not hold post-*Paff*), **BUT . . . footage of a shooting shoot presumptively be produced under the common law after witness interviews.**



The Common Law and Investigation Records

- Common law balances public interest in disclosure against law enforcement interest in confidentiality
 - “interest in the integrity of investigations is strongest when it comes to disclosure of investigative reports, witness statements, and other comparably detailed documents,” so those need not be disclosed
 - BUT, “[f]ootage of an incident captured by a police dashboard camera..can inform the public’s strong interest in a police shooting that killed a civilian. It can do so in a typical case without placing potential witnesses and informants at risk..[and] without undermining the integrity of an investigation” after witnesses have been interviewed



SO, WHAT DOES ALL THIS MEAN?



First Key Takeaway

- Stay out of OPRA litigation if you can
 - Certain records, including 9-1-1 tapes, are clearly subject to OPRA
 - *Lyndhurst* now just as clearly has held that most investigative work product is not subject to OPRA
 - If you receive a request for body camera footage, the AG Directive requires you to notify the County Prosecutor but does not require you to withhold disclosure absent direction from the County Prosecutor or the Division of Criminal Justice to do so
 - Most requests, therefore, should be “routine”

Second Key Takeaway

- If you are withholding information for public safety or investigative integrity reasons, create a good record
 - The Supreme Court required a “particularized showing” but didn’t say what that means
 - Ensure decision-making at the highest appropriate level, and base the decision on demonstrable, citable evidence
 - Courts are unlikely to second-guess legitimate law enforcement decisions if they see particularized decision-making and not just application of an across-the-board policy of confidentiality

Third Key Takeaway

- Prepare for a future where officers involved in shootings are publicly identified very quickly after an incident occurs
 - Governor Christie's Attorneys General conducted mandatory grand jury investigations but did not identify officers involved in shootings unless indicted
 - In the past, officers sometimes were identified and sometimes were not
 - *Lyndhurst* made it harder to withhold officers' names, and there is no guarantee that future Attorneys General will try to do so



Fourth Key Takeaway

- If you are using or considering body cameras, consider whether the forthcoming *Paff* decision, or subsequent legislative action, may change how OPRA applies to body camera footage
 - Current risk is that some kinds of footage (shootings, high-profile arrests) may be of such “public interest” that the common law balancing test compels disclosure
 - Common law requests are easier for municipalities to litigate; no prevailing party fees (yet)
 - Post-*Paff*, the possibility exists that much more footage may be subject to 7-day disclosure under OPRA.

Fifth Key Takeaway

- Releasing Use of Force Reports is not new O'Shea v. Township of West Milford (App. Div. 2009)
 - Still subject to other Exemptions (Medical, Juvenile).
- If you receive a request which appears more global than local, contact other Borough Clerks.
- Police Chiefs are coordinating responses to OPRA & Common Law requests and in some cases, legal advice is being provided by the New Jersey State Association of Police Chiefs.
- Consult with your Municipal Attorney on complex or high profile requests.



Sixth Key Takeaway

- **Criminal Investigatory**
- Reports: Officers' Daily, Incident, Operation, Investigation, Offense, Supplemental
- Logs: vehicle, notations, daily activity logs,
- Daily bulletins, statistical & tally sheets
- CAD dispatch - criminal information
- Officer communications
- MVR recordings (initiated part Criminal Investigation)



Sixth Key Takeaway (cont.)

- **Not Exceptions to the Criminal Investigatory Exemption**
- 911 recordings
- CAD reports
- Use of Force Public (Lyndhurst & O'Shea)



Future Supreme Court Decision Paff v Ocean County Prosecutor

- Topic: Mobile Video Recording MV K9
- OPRA & Common Law Request
- K9 deployed during the arrest of a MV driver
- Officer subsequently charged Aggravate Assault, Official Misconduct
- Summonses Provided- Criminal Eluding & MV
- Custodian's reasons denying the MVR:
 - Ongoing Investigation- made pre-investigation
 - AG IA Guideline- made pre-IA
 - Criminal Investigatory- made pre-investigation
 - Expectation of Privacy victim driver consented

Note: Public document can not be retroactively shrouded as Criminal Investigatory



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