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OVERVIEW

On Friday, October 30, 2015, in *Kaplan v. Kratovil*, the Court dismissed a domestic violence temporary restraining order that was based solely on the filing of an OPRA request about a public office. In general, under the Prevention of Domestic Violence Act (“DVA”) a domestic violence temporary restraining order (“TRO”) orders a defendant to not contact the victim in any manner. A violation of a TRO is a criminal offense, and a second violation of a domestic violence restraining order carries a mandatory thirty-day prison sentence.

The hearing was held before Judge Paone in the Family Part of Middlesex County Superior Court.

Mrs. Kaplan had previously sought and received the TRO because Mr. Kratovil had filed an OPRA request with the City of New Brunswick, where Mrs. Kaplan’s spouse is a member of the New Brunswick Rent Control Board. Mr. Kratovil’s OPRA request implicated Mrs. Kaplan’s spouse by requesting documents that could have named him or had been sent to or from him. The OPRA request did not single out Mr. Kaplan; rather, the OPRA request identified a group of New Brunswick officials, which included Mr. Kaplan.

The October 30, 2015 hearing was held to determine whether the TRO should be converted into a final restraining order (“FRO”).

TROs are temporary; a hearing regarding whether a TRO should be converted into an FRO is generally held within thirty days after the TRO has been entered. FROs are indefinite. A violation of an FRO carries the same criminal consequences as violation of a TRO.

New Jersey Foundation for Open Government (“NJFOG”) attended the October 30th hearing. This report is based on our observations at that hearing. NJFOG’s interest in the hearing was that Mrs. Kaplan accused Mr. Kratovil of using an Open Public Records Act (“OPRA”) request as a form of harassment and was seeking a final restraining order against him. Mr. Kratovil, editor of *New Brunswick Today*, has written articles critical of New Brunswick municipal government - including Mr. Kaplan - and the New Brunswick Police Department.

NJFOG was present and willing to video record the meeting to see if there was an actual case of harassment or if a restraining order was being used to prevent a citizen from legally filing an OPRA request.

Domestic violence is a serious matter, and this report and our analysis should not be construed as a minimization of the seriousness of the consequences of domestic violence. Indeed, NJFOG supported the passage of and assisted with the drafting of A1676, which prohibits a public agency from charging copying fees to crime victims when they are seeking copies of their own records and which exempts from OPRA copies of a crime victim’s request for their own records.

However, neither should the DVA be used to prevent or chill citizens from filing OPRA requests for information about public officials.

Mrs. Kaplan was represented by Edward A. Wojciechowski Esq. from the Law Offices of Edward Weinstein. Mr. Kratovil represented himself.

Neither of the parties to this proceeding nor their representatives reviewed or participated in any way in the preparation of this Report.

Regarding our summaries and quotes of the testimony, we have done our best to report accurately what was said. However, we are not court reporters and do not guarantee the accuracy of our summaries and quotes. For those who are interested, a recording of the proceedings can be purchased from the Court for \$10.

VIDEO RECORDING DECISION

The hearing addressed two issues. First, the hearing addressed whether NJFOG could record the proceedings. The second issue was whether the TRO should be converted into an FRO or dismissed. This section discusses the Court's decision to not allow NJFOG to record the proceedings, even though they were granted permission in writing when they formally made such a request on October 15, 2015.

Judge Paone asked information of NJFOG Board member Saul Qersdyn, who was NJFOG's representative at the proceedings and who was going to record the proceedings, about the nature of the organization and the purpose of recording. Judge Paone asked if there was a website and about the group's interest in the case. Mr. Qersdyn stated that the organization was a 501(c)(3) and did have a website. He stated that it was NJFOG's understanding that OPRA was a basis of the restraining order and that a citizen's rights to government documents is an objective of NJFOG.

When asked if there were any objections, Mr. Wojciechowski, representing the plaintiff, stated he had 'many objections', first and foremost being guidelines that required qualified press credentials. The Judge asked what was the date of the guidelines he referred to and the attorney responded they were from October 2003. Judge Paone pulled out a copy of the most recent guidelines, dated February 2015 and noted that no such requirements are listed. The attorney then claimed that he was under the impression that domestic violence proceedings were exempt before hurriedly commenting, "This case hinges on media and what the defendant does with his website and so to subject my client ... to video recording further puts her in fear of domestic violence. This is another tool by the defendant to perpetrate harassment."

Judge Paone asked the plaintiff's attorney, "Your position is that this is going to increase the threat or potential harm?"

Mr. Wojciechowski stated that Mr. Kratovil has gotten up at public meetings and addressed Mrs. Kaplan's husband.

"You feel this is another form of harassment and as a victim of domestic violence she needs some sort of protection?", asked the Judge.

"This is another form of harassment," responded the attorney.

Judge Paone went on to ask what further reason was there to video record if the proceedings are audio taped and available through a public records request to the Judiciary. After about 25 minutes of discussion, the Court reversed the prior permission and declined to allow NJFOG to record the proceedings. Judge Paone stated, "There is an organization, and I ascribe no untoward motives to, who seeks to record these proceedings notwithstanding the fact these proceedings are, in fact, recorded digitally and the transcription could be made. The test here is whether allowing New Jersey FOG to record these proceedings would cause a substantial increase in the potential of harm to the lady

. . . Since the underlying basis of the harassment here is that the defendant sent an OPRA request, not only submitted an OPRA request but notified the media which the plaintiff perceives as some sort of harassment. To allow the New Jersey FOG now to record these proceedings independently of the court's recording, I find, would be indeed intimidating to her. I think that because of the nature of the proceedings, this is a domestic violence hearing, and the basis for the initiation for these proceedings is the fact that the plaintiff felt, in some measure, felt threatened of her rights and also that the peculiar nature that which caused her to initiate this complaint, I find that that is intimidating . . . The nature of this request, even though it may not be purposeful, would in some way continue to, at least in the mind of the plaintiff, be threatening. I'm not going to allow New Jersey FOG to record the proceedings."

RESTRAINING ORDER HEARING: PREDICATE ACT COMPONENT

Judge Paone continued with the hearing and separated it into two components. The first was to determine if there was a predicate act of harassment and the second was if the harassment warranted a final restraining order. For Mrs. Kaplan to receive an FRO, she was required to prove both of these components “by a preponderance of the evidence.” In layman’s terms, that means that she had to present more credible evidence than Mr. Kratovil that her allegations were true (greater than fifty-fifty).

Under the DVA, a domestic violence plaintiff must prove both a predicate act and must show that a final FRO is necessary to protect the victim. The DVA contains a list of predicate acts; the most common predicate act used in domestic violence matters is harassment.

NJFOG’s interest in this proceeding is the OPRA request being deemed the predicate act. The Court had to determine whether the OPRA request could constitute “harassment.”

The following summarizes some of the sworn testimony that was presented.

There was testimony from Mrs. Kaplan that she and Mr. Kratovil were romantically involved from 2006 till 2009. Mrs. Kaplan stated that it was a very emotionally, psychologically, as well as physically tumultuous relationship. She stated that three TROs were filed against Mr. Kratovil, with the first one occurring four years after the end of their relationship, in October of 2013. A second one was filed in May of 2014 and the latest was in September of 2015. The first two did not result in FROs, although civil restraints had been entered by the Court on at least one prior occasion. (A civil restraint can be similar to an FRO, except that a violation of a civil restraint would be contempt of court, not a crime).

According to the first TRO, Mrs. Kaplan alleged that Mr. Kratovil had been putting pictures of her and her husband at public events online. Additionally she alleged that Mr. Kratovil had hacked into her “Fresh Grocer” account where he was an employee at the time.

The second TRO alleged that Mr. Kratovil had taken photos of Mrs. Kaplan and her husband riding bicycles when they were participating in New Brunswick’s Ciclovía Open Streets initiative for the municipality. She stated that Mr. Kratovil jumped in front of them and tauntingly took photographs, adding that she felt overwhelmed and scared.

On September 30, 2014, the second TRO was dismissed via a voluntary withdrawal from Mrs. Kaplan and both parties mutually entered into civil restraint orders.

Mr. Wojciechowski asked Mrs. Kaplan that, if to her knowledge, had Mr. Kratovil ever violated the terms of the order. She responded that he did in May of 2015. Before providing the violation, Mrs. Kaplan’s attorney asked her to read a paragraph of the order:

“Both parties agree and shall be barred and restrained from directly or indirectly following, stalking, threatening to harm or to threaten to negatively impact each other’s careers and/or employment or that of their family.”

Mrs. Kaplan continued that on multiple occasions, Mr. Kratovil had gone after her husband's career, adding that her husband was nominated to the Rent Control Board of New Brunswick. She testified, without providing details of the letter, that Mr. Kratovil created a letter-writing campaign about her husband's character and that he wrote in New Brunswick Today about it as well as NJ.com in the fall of 2014 and that he appeared at City Council in January 2015.

At this point, the Judge re-centered the proceedings, stating, "The issue here is that this defendant made an OPRA request . . . And the OPRA request is from the defendant and is directed to the city clerk of New Brunswick and is requesting all e-mail correspondences from 18 different individuals. Are these all individuals employees of the City of New Brunswick?"

Mrs. Kaplan responded that no, her husband, who is listed, does not work for the City of New Brunswick and that he is only a member of the Rent Control Board. The Judge clarified his question by asking if he was an official of some sort and that all listed were either officials or employees of the City of New Brunswick.

"Sure," was the response from Mr. Wojciechowski.

Judge Paone detailed that the OPRA request asked for email correspondences from all those listed where the defendant, Mr. Kratovil, was named in or referred to; additionally the Judge remarked that two individuals, Raymond Baldino and Brian Amaral, were copied on the email OPRA request.

"Is there anything improper about the OPRA request?", asked Judge Paone.

"Very much so," responded Mrs. Kaplan.

The Judge asked, "What's improper?"

Mrs. Kaplan commented that her husband does not have a municipal e-mail address.

The following is an exchange between Judge Paone and Mrs. Kaplan.

Judge Paone asked, "If this OPRA request came from someone else, would it be a problem?"

Mrs. Kaplan replied, "I don't think so. No."

"So why is there a problem?"

"I think it's a problem because Mr. Kratovil is using any chance he can to destroy me and my husband and attack us and harass us."

“How is it that you feel that this OPRA request is going to destroy you or your husband?”

“I think he is using it to write something about how... Charlie seems to think that there’s a big conspiracy happening in this city against . . . that somehow because of the fact we have had proper restraining orders that somehow we are co-conspiring with the city”

“Well, you don’t know what he thinks, do you?”

“I think based on the articles that he’s published before and the fact that he stood up at city council and said these sort of things.”

“Said what?”

“About my husband. About us.”

“What has he said about you?”

“He has said that I make a mockery of victims of domestic violence.”

“He said this at where?”

“He said this in NJ.com as well as in his letters to the city council as well as in person.”

“But he was commenting on a litigation that was ongoing.”

“That he was not supposed to comment on because he had civil restraints.”

After the back-and-forth, Judge Paone questioned whether the supposed predicate act was harassment or something else.

Mr. Wojciechowski responded, “Basically we feel, to sum it up, this OPRA request, not in and of itself . . . would be harassment. The problem with this one is he consciously chose to include my client’s husband in it. He could have left him out. There were 17 other individuals. I don’t know exactly he thinks he’s getting from my client . . . He’s the only one from the Rent Control Board listed . . . He handpicks my client’s husband out knowing that it’s a problem.”

“Your contention is [that] this OPRA request was made [and] included the plaintiff’s husband,” stated Judge Paone, “Not necessarily anything improper there but then he carbon copies a member of the press which in the plaintiff’s mind suggests that he is trying, in some way, to embarrass her husband in the media which causes harassment to her?”

“Correct,” was the reply. The attorney continued by claiming that there were civil restraints which barred Mr. Kratovil from making comments to the media and that he commented on prior litigation that he was restrained from doing. The intimidation, according to Mr.

Wojciechowski, was in the act of Mr. Kratovil filing an OPRA request and purposely copying Mr. Amaral, a reporter for NJ.com, for no relevant purpose knowing that the clerk was going to tell the plaintiff's husband. At one point, the attorney stated, "I'm saying that the OPRA request in and of itself was harassment."

Mrs. Kaplan added in her testimony as to the reason for the OPRA request, "I think it was to attack me, to continue to harass me, continue to make his presence known with me, to make me scared and threaten. You know, that he has power here and he's going to do everything in his path to destroy me and my husband as well . . . attacking my husband and his career."

The Judge then asked Mrs. Kaplan if Mr. Kratovil ever made any statements about the prior domestic violence act after both parties entered into mutual civil restraints. She answered yes, stating, "He said that I made a mockery of victims of domestic violence."

In addition, Mrs. Kaplan stated that Mr. Kratovil painted a distorted picture of events, even mentioning that previous restraining orders had been dismissed.

Judge Paone then read aloud from the section of the civil restraint order, "Both parties agree and shall be barred and restrained from publicly blogging or posting . . . representing any of the parties or their families on any internet website or in the media unless it is objectively newsworthy."

When asked how she felt when she saw her husband's name included in the OPRA request, Mrs. Kaplan said, "I just thought, here we go again. My heart sank. This person is going to just not stop."

She was then asked by Judge Paone how she felt when she noticed Mr. Amaral being copied on the request. She responded, "I felt that he is probably planning on writing another article about me and I got very scared that this person is out to destroy my and my husband's careers and reputation."

Mr. Wojciechowski attempted to proceed with other testimony but Judge Paone cut to the chase by stating, "We don't get to the restraining order unless I'm satisfied there's been a predicate act."

Mr. Kratovil was asked by Judge Paone why he submitted the OPRA request and why Mr. Amaral was copied on it.

Mr. Kratovil stated that he has filed numerous OPRA requests and that he filed this particular request on the advice of a friend in order to find out what, if anything, was being discussed about Mr. Kratovil.

Mr. Wojciechowski proceeded to question Mr. Kratovil, “You said those TROs were dismissed, but that’s not correct. They were voluntarily withdrawn because of the civil restraints.”

In continuing, he asked if the focus of the OPRA request was to sue the Kaplans or the municipality. When Mr. Kratovil asked if he was not allowed to sue, Mr. Wojciechowski contradicted himself by asking, “My question is, the Temporary Restraining Order October of 2013, that was voluntarily dismissed by Mrs. Kaplan, correct?”

RESTRAINING ORDER HEARING: RULING

After asking if there was anything else he should know about the case, the Court issued its ruling. The Court stated that the defendant filed an OPRA request and in that OPRA request he identified 18 people where he sought e-mail correspondences with those people. According to the plaintiff, she perceived that to be harassment. Judge Paone stated that he found Mr. Kratovil's explanation for the OPRA request credible and sincere.

The Judge laid out three questions that he needed to ask to determine the predicate act.

First, he asked if there was a legitimate reason for the communication and the Judge believed that there appeared to be a legitimate reason.

Secondly, was the communication substantively harassing as to content? The Judge ruled it was not.

The third question dealt with whether it was directed to the plaintiff. Judge Paone stated that it was not, it was directed to the city clerk.

He summed up the questions by ruling, "Merely because the plaintiff feels that she is harassed by virtue of the filing of this complaint is not enough for a final restraining order. The evidence must reflect that this defendant had the purpose to harass, annoy, and bother. And the focus that the court must engage in analyzing harassing speech is not necessarily upon the effect the speech had upon the victim but rather on the purpose the actor had in making the communication and here it appears that the purpose in sending the OPRA request was not to necessarily harass the plaintiff but was to gather information and to share this tactic with a colleague in the same way that the defendant has done in the past. So the court does not find that this conduct constitutes harassment and because the plaintiff failed to prove a predicate act, the complaint is dismissed and the restraining order is vacated."

The Judge did state that another order can be filed if a predicate act is determined but that this restraining order was no longer in place.

CONCLUSION

The hearing was a combination of disappointment and success.

On the one hand, NJFOG feels that video-recording was important to show the transparency in court. Since the hearing is a public matter, having a video recording to show exactly what was stated - independent of the Court's official recording - would remove any faulty recall or interpretative memory. The video recording would have shown what happened and what was stated. If the TRO had been successful, the video would have shown that. It would also have recorded all parties and not simply one side of the matter thereby giving the complete story independent of government. As was the case with the refusal to video record after being granted permission, what's to say that the Court's audio recording would not have been refused? We fully respect the right of anyone asking the Court for protection for a clear cut case of domestic violence but, on the surface and as justified by the ruling, this TRO never even passed the first stage of establishing a predicate act. It should be noted that the sole predicate act was the OPRA request itself.

On the other hand, we are glad that Judge Paone listened to the testimony and ruled that under the circumstances of this case the OPRA request did not constitute harassment. The plaintiff's argument that requesting public information that *might* be used for a news article to objectively report on an issue fails in that a citizen's right to information does not require that a requestor provide an explanation as to the intent. The document, if allowable under the Open Public Records Act, is, in effect, already the property of the citizenry and the only thing required is that someone request access to it.

The argument appeared to be that because of a previous relationship with someone, any relative in government who is the custodian or responsible party of that document is permitted to refuse access to public property under the guise of harassment. The question that was never addressed is "How could the OPRA request be a violation since no article was written yet?"

There was also testimony that was downright erroneous, such as when Mrs. Kaplan stated that Mr. Kratovil stated that she made "a mockery of victims of domestic violence". The article actually quoted Mr. Kratovil as saying, without naming anyone, "False complaints do an extraordinary disservice to genuine survivors of domestic violence."

Unfortunately, under the Court's reasoning, the Court left the door open for future victims to claim that OPRA requests about them or their families constitute harassment. By focusing on the intent of the request, the Court left open the possibility that an OPRA request could be the basis for a TRO or FRO, if the Court were to determine that the purpose of the request was to harass the victim.

The prospect of facing a domestic violence TRO or FRO in response to an OPRA request will chill any records requestor who might have had a dating relationship with someone in government. For example, if a person's ex-spouse works for the Department of Law, does an OPRA request by one spouse about the other's compensation constitute harassment?

Under the Court's reasoning in this case, it might, depending on the requestor's state of mind.

It is our view that the use of the DVA in response to OPRA requests will almost certainly chill requests because most requestors will want to avoid even the possibility of incurring the expense, risks, and inconvenience associated with domestic violence proceedings.

Such costs and risks might encourage requestors to use third parties to make requests, make requests anonymously or not make them at all. To the extent this occurs, transparency is harmed.

There was also a piece of testimony that was overlooked but does give some speculation as to the reason for the TRO. It was when Mrs. Kaplan stated that the OPRA request, in violation of the civil restraints, had gone after her husband's career, and thereby her livelihood. This is a questionable charge when the OPRA request asked about e-mails from Mr. Kaplan in his capacity as a member of the New Brunswick Rent Control Board - a non-paying appointed position. By her own testimony, Mrs. Kaplan stated that her husband was not an employee. If such is the case, what 'career' was being threatened, unless the position itself was a stepping stone to becoming part of the municipal government somewhere down along the line?

In closing, we are satisfied that such action by members of government and/or their relatives, in this case, was struck down. We remain observant that what amounts to the equivalent of a government SLAPP (Strategic Lawsuit Against Public Participation) action - to deny citizens their rightful access to documents - will not be employed in any wider scope.

Domestic violence is a serious issue. The access to public documents is also a serious issue. As is the case where access to records does not infringe on victim's rights, neither should the protection rightfully afforded to victims of domestic violence be used to prevent the public access to what rightfully belongs to them.