

**IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA**

**MICHAEL BARFIELD, and
THOMAS LAUGHLIN,
Plaintiffs,**

v.

Case No. 2012 CA 7195

**CITY OF SARASOTA,
Defendant.**

FINAL ORDER GRANTING MANDAMUS RELIEF

THIS CAUSE came on for hearing September 18, 2012, upon plaintiffs' Emergency Complaint for Mandamus Relief. Upon the evidence presented and after argument of counsel, the Court **FINDS:**

In the early morning hours of August 4, 2012, Jason Dragash was arrested by Sarasota Police Officer Scott Patrick for disorderly intoxication and resisting arrest without violence. The arrest occurred at the Ivory Lounge, a bar located in the City of Sarasota. The owners of the bar had a video camera which captured the scuffle that occurred between the arrestee and the officer.

Sarasota Police Lieutenant Jason Reed, who was on duty that night as a supervising officer, responded to the scene after the arrest occurred. Reed spoke with the managers of the Ivory Lounge and asked to see the video. Reed viewed the video in the presence of two bar employees. The video showed some of the conduct for which Mr. Dragash was arrested and the degree of force used to subdue him. Reed requested a copy of the video, but the bar could not comply at that time.

The next day, Reed obtained the duplicate video from the bar and logged the disk into the evidence locker under the case number of the criminal case against Dragash. Based on what he saw on the video, Reed initiated an internal affairs investigation by completing a complaint form and depositing it in the police department's internal affairs drop box. The written complaint referenced the video and the Level of Resistance Report Form submitted by Officer Patrick.¹

On August 6, 2012, Lt. John LeBlanc, commander of the internal affairs division, received Reed's complaint form. LeBlanc reviewed the materials, met with the Chief of Police, and on August 7th was authorized by the Chief to commence an internal affairs investigation.

In the meantime, Mr. Dragash had hired experienced criminal defense attorney Fred Mercurio, who learned of the existence of the video tape on August 6th. Mr. Mercurio notified the police

¹ Under the circumstances of Dragash's apprehension, the General Orders of the Sarasota Police Department require the arresting officer to complete a Level of Resistance Report Form. Officer Patrick had done so and the form was made part of the documentation pertaining to the criminal case.

department to secure the video because it might contain exculpatory evidence. The lawyer then demanded that the police department produce both the Level of Resistance Report Form and the video tape. The report was provided to the attorney on August 7th, but the video was not, as the police department asserted it was evidence in an active criminal investigation relating to Dragash.

By August 23, 2012, the day of Mr. Dragash's arraignment, no information had been filed by the State. As a consequence of discussions among the defense attorney, the office of the state attorney, and the internal affairs officers, at the arraignment the assigned prosecutor announced an oral decline of all charges. The state attorney filed a Notice of Case Disposition on August 28, confirming the State's intent not to proceed with charges against Mr. Dragash.

While the criminal case was progressing, the internal affairs officers were starting their investigation. They wanted to take a statement from Mr. Dragash, and they wanted to do so before he viewed the video. This was to ensure that the arrestee's independent recollection would not be influenced by the video. The internal affairs officers contacted Mr. Dragash's attorney with the request. Absent a grant of immunity, Mr. Mercurio declined to allow his client to cooperate.

During the last week of August, the state attorney agreed to issue a subpoena compelling Mr. Dragash to testify. This satisfied Mr. Mercurio as this would confer testimonial immunity and protect his client from prosecution, should the State decide to revive the dismissed charges within the speedy trial time. The police agreed to show the video only to Mr. Mercurio after Mr. Dragash gave his statement.

Mr. Dragash's statement was taken on August 29. On August 30, the video was viewed by Mr. Mercurio. Both events occurred after the charges against Dragash were officially dropped.

The court concludes that law enforcement's production of the Level of Resistance Report Form to Mercurio while the charges were pending against Mr. Dragash, and the voluntary disclosure of the contents of the video to a third party (i.e., Mr. Mercurio) *after* all charges had been dismissed, was a waiver of any exemption conferred by the public records law. The parties have raised other aspects of the public records law and the Police Bill of Rights, section 112.533, Florida Statutes, but resolution of this issue is dispositive.

Section 119.011(3)(c)5, Florida Statutes, says the public records exemptions do not include criminal investigation or intelligence information when the otherwise exempt items are "given to the person arrested."² Once exempt items are made available to the person arrested (or his attorney), they lose their special status. See, *WFTV, Inc. v. School Board of Seminole County*, 874 So. 2d 48 (Fla. 5th DCA 2004); and *Times Pub. Co. v. State*, 903 So. 2d 322 (Fla. 2d DCA 2005) (recognizing that once the state has gone public with information exempt under Chapter 119 the protection dissipates).

² Section 119.011(3)(c)5 says investigative information is not protected except as provided in 119.071(2)(h), which is not pertinent here.

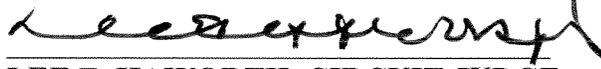
In fairness to the city, it should be noted that at the time the video was shown to attorney Mercurio, there was no criminal case pending against Mr. Dragash, nor could one based on the same incident be sustained against him later - this as a consequence of the statement compelled by the state attorney's investigative subpoena. However, section 119.011(3)(c)(5) removes the exemption from public records disclosure when exempt information is given "to the person arrested," and the statute apparently does not require the arrestee to be in jeopardy of criminal prosecution at the time the disclosure is made. This conclusion is supported by the established principle that the Public Records Act is to be liberally construed in favor of open government, and exemptions from disclosure are to be narrowly construed so as to limit them to their stated purpose. See *National Collegiate Athletic Association v. Associated Press*, 18 So. 3d 1201, 1206 (Fla. 1st DCA 2009), review denied, 37 So. 3d 848 (Fla. 2010); *Krischer v. D'Amato*, 674 So. 2d 909, 911 (Fla. 4th DCA 1996); *Seminole County v. Wood*, 512 So. 2d 1000, 1002 (Fla. 5th DCA 1987), review denied, 520 So. 2d 586 (Fla. 1988).

The city's contention that the video is exempt as evidence gathered in connection with an active administrative or criminal investigation of Officer Patrick is unpersuasive. If, after the criminal case against Mr. Dragash had ended, the video had been kept from third persons who had no interest in the internal affairs investigation, the city's case to maintain confidentiality might be stronger. Assuming for the sake of argument, as the city contends, that the video was exempt before it was viewed by attorney Mercurio, it lost that status after he was given access.

The showing of the Ivory Lounge video to arrestee's counsel did not contribute in any way to the administrative or potential criminal case being pursued against Officer Patrick. If the disk was privileged at that point, by sharing it with the attorney the city, perhaps inadvertently, has made the video public.

NOW, THEREFORE, the Complaint for Mandamus Relief is **GRANTED**, and the City of Sarasota shall provide a copy of the video and the Level of Resistance Report to plaintiffs within five days of this order. The court reserves jurisdiction to assess attorney fees and costs.

**DONE AND ORDERED THIS 2d DAY OF OCTOBER, 2012, IN SARASOTA,
SARASOTA COUNTY, FLORIDA.**


LEE E. HAWORTH, CIRCUIT JUDGE

cc:

Andrea Flynn Mogensen, Esq.
Attorney for Plaintiffs

Sarah Warren, Esq.
Attorney for City of Sarasota

James B. Lake, Esq.
Amicus