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14 pages VIA FAX: (609) 883-1746

AND FIRST-CLASS MAIL

Honorable Roger T. Haley, P.J.M.C.
Ewing Municipal Court
2 Jake Garzio Drive
Ewing, NJ 08628

Re: State v. Kelly Yaede
Complaint No.: S-2019-001819
Motion to Dismiss

Your Honor:

Please accept this letter in lieu of formal brief in support of Ms. Yaede's motion to dismiss the complaint.

STATEMENT OF FACTS

Kelly Yaede is the current Mayor of Hamilton Township. On June 4, 2019 she won the GOP primary election and is running for re-election which will be conducted on November 4, 2019. On September 3, 2019 a complaint was filed by the Mercer County Prosecutor's Office against Mayor Yaede and her campaign manager Dan Scharfenberger for a violation of N.J.S.A. 2C:52-30, a disorderly persons offense. The pendency of these charges so close to the election creates a risk of irreparable harm to Mayor Yaede and to the outcome of the election.

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Specifically, it is alleged that on or about May 28, 2019 through June 6, 2019 Mayor Yaede “did reveal to another the existence of an arrest, conviction or related legal proceeding with knowledge that the records and information pertaining thereto have been expunged or sealed, specifically by posting expunged records on the HAMILTONNJNEWS.BLOGSPOT media/newspaper and through the continued publication of expunged records on HAMILTONNJNEWS.BLOGSPOT media/newspaper and Facebook.

The basis for the allegations involves an expungement order purportedly obtained in 2008 by an adversary John Doe.¹ Sometime in March 2019, an OPRA request was made and fulfilled by the clerk’s office of Hamilton. This request was for records of arrests of John Doe. The records were disclosed by the clerk as there was no indication in the Police Department sealed files or the Township database that the records were ever expunged. They were in the public domain section of the department and no expungement order was ever noted in the database.

Sometime in March 2018, it is alleged that the content of these lawfully obtained records were posted on a campaign blog supporting Mayor Yaede in the Primary election. The blog was taken down the day after the successful primary, on or about June 5, 2019.

After an investigation by Eric Hastings of the Mercer County Prosecutor’s Office, he authored a report dated September 4, 2019. He reports that the order of expungement

¹ Despite the fact that the recipient of the purported expungement order him/herself gave a press conference on or about March 28, 2019 disclosing the contents of the allegedly expunged information, as reported by the Trentonian, counsel will use a pseudonym to protect his/her identity.

was apparently served upon Hamilton Township police department on July 2, 2008². The day before, former Deputy Chief Zimmer, the individual then in charge of the expungement and sealing of records committed suicide. As a result, Detective Hastings concluded the order was never acted upon and the records were never sealed. In fact, the Prosecutor's office recently put out a press release directing "anyone who may have served an expungement order with Hamilton police between July 1 and July 8, 2008 should contact the police department to make sure it was completed." (See attached). Based upon the undersigned's investigation It was not until June 14, 2019 (after the time period in the complaint) that the expungement process commenced in the Hamilton Township police department and John Doe's records were officially sealed there.

On or about May 30, 2019 John Doe served upon Hamilton Township a Notice of Tort Claim announcing an intention to sue the public entity for disclosing his/her records.³ Tort claims notices are filed with the Office of the Municipal Clerk as directed on Hamilton's website. (See attached). They are not personally served upon the Mayor.

It is the position of the prosecutor that Mayor Yaede violated N.J.S.A. 2C:52-30 by not taking down the blog after being served with notice of tort claim. They concede the

² It should be noted that the Prosecutors Office had none of these documents either and had to rely upon the records provided from the attorney for John Doe who petitioned for the expungement in 2008.

³ Parenthetically, disclosing expunged records does not subject the entity to civil liability as no civil cause of action exists for same. "The expungement statute does not contain a provision that enables an individual aggrieved by the unauthorized disclosure of expunged records to file a private cause of action to recover civil damages from the public entity that failed to preserve the confidentiality of expunged records." K.S. v. Verrecchio, 2019 WL 2157632, at *3 (App. Div. 2019) (unpub).

Mayor's absence of knowledge of an expungement order when the blog was originally posted in March 2019.

The following is submitted in support of a motion to dismiss the complaint as being meritless, without legal authority, and filed as a result of being misled by political enemies of the Mayor. Due to the impending imminent and irreparable harm, immediate action is sought of the Court.

LEGAL ARGUMENT

POINT I

THE RECORDS WERE NOT EXPUNGED RECORDS WITHIN THE MEANING OF THE STATUTE UNTIL AFTER THE BLOG WAS TAKEN DOWN AND THUS THE COMPLAINT MUST BE DISMISSED AS A MATTER OF LAW

An expunged record is defined as “the **extraction and isolation** of all records on file within any court, detention or correctional facility, law enforcement or criminal justice agency concerning a person's detection, apprehension, arrest, detention, trial or disposition of an offense within the criminal justice system.” N.J.S.A. 2c:52-1(a). See also, N.J.S.A. 2C:52-15. Clearly, the order of expungement itself does not expunge the record. It simply directs that it be done. It is the sealing and removal of the information from the courts records that constitutes an expungement of criminal records.

Here, Mayor Yaede is charged with violating N.J.S.A 2C:52-30. This statute provides in pertinent part that “any person who reveals to another the existence of an arrest, conviction or related legal proceeding with knowledge that the records and

information pertaining thereto have been **expunged or sealed** is a disorderly person.” Id (emphasis added).

Purportedly, on July 2, 2008, an order of expungement of John Doe’s records was served upon the Hamilton Township Police Department. However, due to the untimely demise of the Deputy Chief in charge of the expungement orders, the order was never executed, and the records were never extracted and isolated until on or about June 14, 2019. This was after the blog on which the records were disseminated was already taken down.

While a record can be ordered expunged, it is not expunged until, it is extracted and isolated as defined in the statute. N.J.S.A. 2c:52-1(a). Consequently, the records in question were never “expunged or sealed” until after the blog was taken down. The complaint alleges that between May 28, 2019 and June 6, 2019, Mayor Yaede disclosed expunged or sealed records. By the State’s own concession, the records were not extracted or isolated during the time period in the complaint. While they might have been subject to same, they were still in the public domain and not sealed during that time frame. As such, Mayor Yaede did not disclose records that were “expunged or sealed”. The information posted on the blog and shared on Facebook was publicly accessible to any person and could have been lawfully be disseminated without repercussions. Since the records that were released do not fit the statutory definition of “expunged” as they were not “extracted and isolated” until after the blog was taken down, the complaint should be dismissed as a matter of law.

POINT II

MAYOR YAEDE CANNOT BE PROSECUTED UNDER N.J.S.A. 2C:52-30 FOR REVEALING THE CONTENTS OF EXPUNGED RECORDS LEGALLY OBTAINED

Assuming arguendo, as alleged by the State, that somehow the filing of a notice of tort claim provides actual knowledge of an expunged record ⁴, not yet expunged and legally obtained, the law does not criminalize disclosure of same by one who lawfully obtained the records.

In G.D. v. Kenny, , 205 N.J. 275 (2011) our Supreme Court took the occasion to address a similar fact pattern, albeit in the context of a lawsuit for defamation. A political candidate's prior expunged criminal conviction was discovered by his opponent and placed in campaign flyers. In finding that the conduct was not defamation, the Court also addressed the intent and purpose of N.J.S.A. 2C:52-30 and found that it did not apply to persons who have lawfully obtained the records, **even with** knowledge of its expungement. "We cannot conceive that the Legislature intended to punish, under our Criminal Code, persons who have spoken truthfully about **lawfully acquired information** long contained in public records, **even if they know** of the existence of an expungement order. We cannot conclude that *N.J.S.A. 2C:52-30* transforms political debate between neighbors and friends and discourse on matters of public interest into disorderly conduct, just because the subject of the discussion is contained in a record known to be expunged." *Id* at 300. (emphasis added). The Court went on to note that "a literal and overly broad reading of that statute likely would violate free-speech rights guaranteed under the First

⁴ See Point III Below.

Amendment and Article I, Paragraph 6 of the New Jersey Constitution.” Id at 299. “The most extreme reading of *N.J.S.A. 2C:52–30* would criminalize truthful speech on matters of public interest and concern.” Ibid.

Accordingly, the New Jersey Supreme Court mandates dismissal of the within charge. The State concedes that the records were lawfully obtained through an OPRA request. As such, the Mayor’s campaign had the absolute right to post them on their blog. “We understand that past offenders who have had their records expunged look forward to placing their mistakes behind them and having a new start in life, and that society benefits from their rehabilitation. Nevertheless, G.D.’s background and association with a candidate for public office became fodder for a political campaign.” Id at 302-03.

Curiously, the State maintains that the failure to take down the blog after service of Notice of Tort Claim, and hence purported knowledge of expungement, somehow violates N.J.S.A. 2C:52-30. This position is meritless. As cited above, the Supreme Court made it clear that lawfully obtained records can be published even if at the time of publishing they have knowledge of the expungement order. The fact that this knowledge was purportedly obtained months after the original posting does not criminalize the posting nor obligate the publisher to take it down. As the Court noted, the expungement statute “does not require the excision of records from the historical archives of newspapers or bound volumes of reported decisions or a personal diary. It cannot banish memories.” Id at 302. Significantly, John Doe himself conducted a press conference in March 2019 disclosing his prior arrests. A google search would reveal this press conference and discussions about his arrests.(due to confidentiality concerns, the article can be provided upon request).

Moreover, there is no authority for the State's position that a civilian not subject to the expungement order had a duty to direct the blog be taken down after purportedly gaining knowledge of the expungement order through the tort claims notice.

In E.A. v. New Jersey Real Estate Com'n, 208 N.J.Super. 65 (App. Div.1986), the court noted the limited reach of an expungement order. There, a real estate agent had received an expungement order but the Real Estate Commission continued to make the records public and refused to honor the order. He thereafter brought an action against the Real Estate Commission and Department of Insurance to "remove and destroy" records in their possession which were the subject of the expungement order. The Appellate Division refused to direct those agencies to expunge the records as they were beyond the reach of the expungement order, noting the limited reach of the order. "Although plaintiff argues that 'all persons and all entities must comply' with the expungement order, both the order and the enabling legislation clearly have a more limited reach. The expungement order here is directed solely to the Clerk of the Superior Court and 'any law enforcement agency' which possesses relevant records. That focus of the order is consistent with the statutory definition of expungement, *i.e.*, the extraction and isolation of records on file within 'any court, detention or correctional facility, law enforcement or criminal justice agency.' Plaintiff does not contend, nor do we find any reason to conclude, that either of the defendants is a law enforcement or criminal justice agency. *Id* at 68. See, N.J.S.A. 2C:52-15.

Here, Mayor Yaede is neither a law enforcement agency nor a criminal justice agency. Despite the fact that the records were lawfully obtained and not sealed or isolated during the time frame in the complaint, any subsequent knowledge of the

expungement order did not obligate her to extract and isolate the records herself. She was not subject to the limited reach of the expungement order. The suggestion that she had an obligation to remove content in a blog which was lawfully obtained and had a constitutional right to post is meritless.

Mayor Yaede did absolutely nothing wrong, let alone violate the expungement statute. To further prolong this frivolous allegation so close to the election would create irreparable harm to her and her constituents. This charge must to be dismissed forthwith.

POINT III

NOTICE OF TORT CLAIM FILED WITH THE TOWNSHIP CLERK DOES NOT GIVE MAYOR YAEDE KNOWLEDGE THAT THE RECORDS WERE EXPUNGED.

An element of the offense is that at the time the actor is alleged to have revealed the expunged records, he or she had actual knowledge that he records were expunged. The State's theory of the liability is that the May 30, 2019 Notice of Tort Claim somehow provided her with this knowledge. This theory is devoid of both facts and logic.

“A person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist, or he is aware of a high probability of their existence. A person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result. N.J.S.A. 2C:2-2. This is not a civil case where constructive knowledge suffices for some causes of action. Here, actual knowledge is required to be proven.

As outlined above, the records in question were received legally as a result of the OPRA request. The State concedes that there existed no record of expungement in the Police Department at the time of the disclosure. They further concede that Mayor Yaede had no knowledge of an expungement order when the records were disclosed. Hundreds of Notice of Tort claims are received a year by the Township, most of which are frivolous. To suggest somehow that the filing of a political rival's notice to sue the Township constitutes actual knowledge that the records lawfully received were expunged is completely and utterly meritless. By their own concession, the State concedes that at the time the Notice of Tort Claim was filed, the police department had no record of sealing or expungement. How then can they possibly allege that the Mayor should have that knowledge over the very Department in charge of the sealing of the records? In fact, as noted in Point I infra, the records were not expunged by definition of the statute until on or about June 14, 2019, 8 days after the blog was taken down.

Moreover, there is no evidence that the Mayor received any Notice of Tort Claim. These notices are served with the Office of the Clerk and forwarded to the insurance companies for coverage. In addition, her adversary has a known history of asserting baseless and unfounded allegations. (Not attached due to confidentiality concerns but can be provided upon request). To suggest that a notice to sue by a person of this character constitutes knowledge strains credibility. Even if the Mayor was made aware of the intent to sue the Township, the only thing it would give her knowledge of is the fact that another frivolous tort claim was being made.

POINT IV

THERE IS NO EVIDENCE THAT MAYOR YAEDE POSTED THE EXPUNGED RECORDS ON THE BLOG

Detective Hastings interviewed Dan Scharfenberger, the campaign manager for the re-election of Mayor Kelly Yaede. Mr. Scharffenberger advised Detective Hastings that he was “the only person who had access to manage the content of the website.” (Hastings report on p. 9.) While it may be argued that the blog was for the benefit of the Mayor’s campaign, there is no evidence that she personally did the posting of any of its contents. Accordingly, for this basis alone, the charge against her must be dismissed as she did not personally post the purportedly expunged material, nor did she have access to remove its contents.

CONCLUSION

For the reasons set forth above, defendant’s motion to dismiss the complaint should be granted.

Respectfully submitted,

s/ Robin Kay Lord

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cc: Kathleen Petrucci, Mercer County AP

N.J. mayor charged with revealing opponent's expunged arrest, posting it on campaign blog she controlled

Updated Sep 4, 2019; Posted Sep 3, 2019

..... REDACTED.

“It should be noted that there was no criminal wrongdoing found on the part of the Hamilton Police Division in responding to the OPRA request and releasing the records,” the prosecutor’s office said in a statement.

Prosecutor’s detectives found that the issue dates to July 2008.

Then, Hamilton police’s Deputy Chief George Zimmer was responsible for expungement orders and maintaining proper disposition of those orders.

Mercer County Prosecutor Angelo Onofri said in a statement that the person’s notice of expungement, which is signed by a judge, was received by Hamilton police, but not appropriately delivered to the records clerk due to Zimmer’s sudden death on July 1, 2008.

Yaede is set to face Democrat and Hamilton Council President Jeffrey Martin in the November general election for mayor.

Anyone who may have served an expungement order with Hamilton police between July 1 and July 8, 2008, should contact the police at 609-581-4120 to verify the order was received and appropriate action was taken, the prosecutor’s office said.



Hamilton Township

Department of Law

Welcome to the webpage for the Hamilton Township Department of Law. Under the direction of the Township Attorney, Michael Balint, the Department of Law is responsible for providing legal counsel and advice to the Administration and various municipal departments, as well as the legislative branch of municipal government, the Township Council. Additionally, the Department provides opinions and procedural guidelines to the Township's various advisory boards and commissions.

Note: The Department of Law represents the Township as a municipal corporation of the State of New Jersey and is neither authorized nor permitted to provide legal advice to residents concerning their private matters. In those cases, the public may call the Mercer County Bar Association Lawyer Referral Service at (609) 585-6200, or if unable to afford the services of a private attorney, they may call the Legal Aid Society of Mercer County at (609) 695-6249.

The Department is also responsible for defending the Township in litigation commenced against the municipality in Federal District Court, State Superior Court, State worker's compensation court and the Administrative Law courts, as well as in tax appeals commenced against the municipal tax assessor's real property tax assessments with the Mercer County Board of Taxation and the New Jersey Tax Court. Please note: The deadline for filing an appeal of property taxes is April 1st. Appeal petitions can be obtained from the Township's Tax Assessor's office.

For administrative purposes the Municipal Public Defender and Municipal Prosecutor are assigned to the Department of Law. However, Municipal Court matters must be addressed through the Municipal Court, which can be reached at (609) 581-4071.

In the event there is an incident/occurrence where negligence is alleged against the Township of Hamilton or where you believe the Township of Hamilton is at fault, a

Notice of Claim form must be filed within ninety (90) days of the date of the incident/occurrence, pursuant to N.J.S.A. 59:8-1 et seq. The Notice of Claim form must be completed in its entirety, signed and returned to the Office of the Municipal Clerk, whose address is listed at the top of page one of the claim form. To obtain a Notice of Claim form please contact the HamStat Call Center at (609) 586-0311.

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