

NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

FILED
JUL 30 2018
BONNIE J. MIZDOL, A.J.S.C.

DANIEL B. RAPPOPORT,

Plaintiff,

v.

TOWNSHIP OF TEANECK, ISSA A.
ABBASI, in his official capacity as
Township Clerk and JENNIFER
JACKSON, in her official capacity as
Senior Clerk

Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
BERGEN COUNTY

DOCKET NO. BER-L-4257-18

CIVIL ACTION
ORDER

THIS MATTER having come before the court pursuant to R. 4:67-1 and 2(a) by plaintiff, Daniel B. Rappoport, represented by Gale L Price, Esq., (Price, Meese, Shulman & D'Arminio P.C.), by Verified Complaint and Order to Show Cause for an Order requiring Defendants, Township of Teaneck, Issa A. Abbasi, in her official capacity as Township Clerk and Jennifer Jackson, in her official capacity as Senior Clerk to provide Plaintiff with copies of certain public records, and upon notice to and opposition having been filed by Township of Teaneck, Issa A. Abbasi and Jennifer Jackson, represented by Michael D. Witt, Esq., (Chasan Lamparello Mallon & Cappuzzo, PC) and the court having heard oral argument on July 26, 2018; and for the reasons set forth on the record and in the court's written opinion annexed hereto, and for good cause shown,

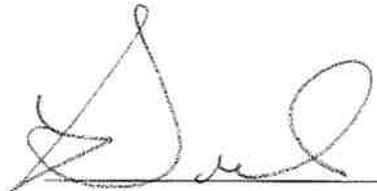
IT IS on this 30th day of July, 2018, ORDERED:

1. Plaintiff is found to be a prevailing party in accordance with the Open Public Records Act (“OPRA”), N.J.S.A. 47:1A-1, et seq.
2. Defendants shall provide to Plaintiff and the Court within fourteen (14) days of the date hereof a Certification attesting to the facts represented at oral argument that no referrals of any land use/zoning ordinances and amendments to land use/zoning ordinances from May 2017 to the present were made by the Township Council to the Township Planning Board.
3. Defendants shall provide to Plaintiff and the Court within fourteen (14) days of the date hereof a Certification attesting to the fact that no “audio” was made by the Township Planning Board with regard to land/use zoning ordinances from May 2017 to the present, or in the alternative, Defendant shall produce all such “audio” within fourteen (14) days of the date hereof.
4. Defendants shall submit a Vaughn Index of all redactions to the documents produced on July 16, 2018, in response to request no. 4 which follows:


Full copies of any and all documents and e-mails by and between Township Clerk, Township Manager, Township Zoning Officer of the Township of Teaneck, including but not limited to Teaneck Township Mayor, Teaneck Township Clerk, Teaneck Township Manager, Teaneck Township Planning Board Chairman, Teaneck Township Planning Board Members, and the applicant “Levine” and its counsel, David Carmel, Esq., for property known as 195 Norma Road, Teaneck, NJ, from May 2017 to the present, including those sent exclusively by and between Teaneck Township Officials

so that this Court can determine the applicability of any exemption, exception, or privilege outlined in N.J.S.A. 47:1A-1 et. seq.

5. As a prevailing party, Plaintiff is entitled to attorney's fees under N.J.S.A. 47:1A-6. Counsel shall attempt to agree upon a reasonable quantum of fees. Failing to accomplish same, counsel for plaintiff shall submit a certification of services to the Court within thirty (30) days of the date hereof and Defendants a response within forty (40) days.
6. A copy of this Order shall be served upon all counsel of record within two (2) days of the date of this Order.



Hon. Bonnie J. Mizdol, A.J.S.C.



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DANIEL B. RAPPOPORT,

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TOWNSHIP OF TEANECK, ISSA A.
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Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
BERGEN COUNTY

DOCKET NO. BER-L-4257-18

CIVIL ACTION

OPINION

Argued: July 26, 2018

Decided: July 30, 2018

Honorable Bonnie J. Mizdol, A.J.S.C.

Introduction

On June 8, 2018, Daniel B. Rappoport (“Plaintiff”) filed a Verified Complaint and Order to Show Cause against the Township of Teaneck, (“Teaneck” or the “Township”), Issa A. Abbasi, in his official capacity as Municipal Clerk of the Township of Teaneck, (“Municipal Clerk”) and Jennifer Jackson, in her official capacity as Senior Clerk, (the “Senior Clerk” or “Defendants” when referred to collectively) alleging violations of N.J.S.A. 47:1A-1 et seq. (“OPRA”). Plaintiff seeks to compel production of specified documents regarding the premises more commonly known as 195 Norma Road, Teaneck, New Jersey.

Facts

On April 13, 2018, Plaintiff, a Teaneck resident, submitted a written OPRA request pursuant to N.J.S.A. 47:1A-1 et seq. and the common law right of access seeking:

1. Full copies of any and all land use/zoning ordinances and amendments to land use/zoning ordinances adopted from May 2017 to the present, including the following ordinances:
 - a. Ordinance No. 14-2017
 - b. Ordinance No. 15-2017
 - c. Ordinance No. 26-2017
 - d. Ordinance No. 27-2017;
2. Full copies of any and all minutes of the Township Council and the Township Planning Board which discussed and/or reviewed or adopted land use/zoning ordinances and amendments to land use/zoning ordinances and amendments to land use/zoning ordinances from May 2017 to the present;
3. Full copies of any referrals of any land use /zoning ordinances and amendments to land use/zoning ordinances from May 2017 to the present from the Township Council to the Township Planning Board and written or on the record findings (audio) made by the Township Planning Board with regard to said land use/zoning ordinances from May 2017 to the present; and
4. Full copies of any and all documents and e-mails by and between Township Clerk, Township Manager, Township Zoning Officer of the Township of Teaneck, including but not limited to Teaneck Township Mayor, Teaneck Township Clerk, Teaneck Township Manager, Teaneck Township Planning

Board Chairman, Teaneck Township Planning Board Members, and the applicant "Levine" and its counsel, David Carmel, Esq., for property known as 195 Norma Road, Teaneck, NJ, from May 2017 to the present, including those sent exclusively by and between Teaneck Township Officials.

At the time of plaintiff's OPRA request, Teaneck had catalogued 228 prior outstanding OPRA requests for satisfaction.

On April 24, 2018, (the seventh business day) Senior Clerk Jackson advised plaintiff by e-mail that a seven (7) day extension was required for production. On May 3, 2018, Teaneck advised that another ten (10) day extension was needed. Shortly after receipt of defendants' second unilateral extension, counsel for plaintiff on May 7, 2018, sent defendants notice of violation of OPRA and again requested production of the specified documents.

Approximately ten (10) days thereafter, on May 16, 2018, Senior Clerk Jackson informed plaintiff that an additional fifteen (15) day extension was required.

It is undisputed that on June 1, 2018, Teaneck produced documents responsive to request nos. 1 and 2.

On June 23, 2018, Teaneck made a second document production in response to request no. 3, with redactions.

At oral argument it was revealed that on June 29, 2018, Senior Clerk Jackson, in writing, informed plaintiff that the production of documents in response to request no. 4 would be made by July 16, 2018, and, in fact, redacted documents were produced on the 16th.

Plaintiff disputes whether a complete production has been made as to request nos. 3 and 4.

Law

A. OPRA

a. Generally

The purpose of OPRA, N.J.S.A. 47:1A-1 to -13, is plainly set forth in the statute: “to insure that government records, unless exempted, are readily accessible to citizens of New Jersey for the protection of the public interest.” Mason v. City of Hoboken, 196 N.J. 51, 57 (2008) (citing N.J.S.A. 47:1A-1). The Act replaced the former Right to Know Law, N.J.S.A. 47:1A-1 to -4 (repealed 2002), and perpetuates “the State’s long-standing public policy favoring ready access to most public records.” Bent v. Twp. of Stafford Police Dep’t, 381 N.J. Super. 30, 36 (App. Div. 2005) (quoting Serrano v. S. Brunswick Twp., 358 N.J. Super. 352, 363 (App. Div. 2003)). To accomplish that objective, OPRA establishes a comprehensive framework for access to public records. Mason, supra, 196 N.J. at 57. Specifically, the statute requires, among other things, prompt disclosure of records and provides different procedures to challenge a custodian’s decision denying access. Ibid.

OPRA mandates “all government records shall be subject to public access unless exempt.” N.J.S.A. 47:1A-1. Therefore, records must be covered by a specific exclusion to prevent disclosure. Ibid. The Act defines “government record” as follows:

[A]ny 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, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not

include inter-agency or intra-agency advisory, consultative, or deliberative material.

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

The OPRA framework contemplates a swift timeline for disclosure of government records. Mason, supra, 196 N.J. at 57. Unless a shorter time period is prescribed by statute, regulation or executive order, a records custodian must grant or deny access to a government record “as soon as possible, but not later than seven business days after receiving the request.” N.J.S.A. 47:1A-5(i). Failure to respond within seven business days “shall be deemed a denial of the request.” Ibid. If the record is in storage or archived, the custodian must report that information within seven business days and advise when the record will be made available. Ibid. Courts have repeatedly found a providing redacted documents is also a denial and each redaction must have an exemption. See e.g., Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 148 (App. Div. 2011) (holding the redacted portions of the records must be disclosed as they did not meet the trade secret exemption).

If access to a government record is denied by the custodian, the requestor may challenge that decision by filing an action in Superior Court or a complaint with the Government Records Council (“GRC”). N.J.S.A. 47:1A-6. The right to institute any proceeding under this section, however, belongs solely to the requestor. Ibid. If the requestor elects to file an action in Superior Court, the application must be brought within forty-five days of the denial. See Mason, supra, 196 N.J. at 70 (holding, explicitly, a 45-day statute of limitations applies to OPRA actions). The Act, however, specifically provides “a decision of the [GRC] shall not have value as precedent for any case initiated in Superior Court,” N.J.S.A. 47:1A-7, though such decisions are normally considered unless “arbitrary, capricious or unreasonable, or [violative of] legislative policies expressed or

implied in the act governing the agency.” Serrano, supra, 358 N.J. Super. at 362 (citing Campbell v. Dep’t of Civil Service, 39 N.J. 556, 562 (1963)).

In OPRA actions, the public agency bears the burden of proving the denial of access is authorized by law. N.J.S.A. 47:1A-6. As such, an agency “seeking to restrict the public’s right of access to government records must produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality.” Courier News v. Hunterdon Cnty. Prosecutor’s Office, 358 N.J. Super. 373, 382–83 (App. Div. 2003). Absent the necessary proofs, “a citizen’s right of access is unfettered.” Ibid. In assessing the sufficiency of the proofs submitted by the agency in support of its claim for nondisclosure, “a court must be guided by the overarching public policy in favor of a citizen’s right of access.” Ibid. If it is determined access has been improperly denied, such access shall be granted, and a prevailing party shall be entitled to a reasonable attorney’s fee. N.J.S.A. 47:1A-6.

b. Substantial Disruption to Agency Operations

Failure to respond within seven business days “shall be deemed a denial of the request.” N.J.S.A. 47:1A-5(i). However, if complying with the seven (7) day rule would “substantially disrupt” the agency’s operations, the agency is authorized to offer a “reasonable” solution for production at a later date. N.J. Builders Ass’n v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 171 (App. Div. 2003). This basis for denial finds its roots in N.J.S.A. 47:1A-5(g). “[I]f a request would substantially disrupt agency operations, the custodian may deny it and attempt to reach a reasonable solution that accommodates the interests of the requestor and the agency.” Unfortunately, the Act does not define “substantially disrupt.” Courts have determined “[d]isruption may simply be inferred from the breadth, generality, and complexity of the request at issue, which “necessitates work by [agency] employees that are neither assigned by the agency

nor envisioned by OPRA.” Spectraserv, Inc. v. Middlesex County Utilities Authority, 416 N.J. Super. 565, 579–80 (App. Div. 2010) (quoting N.J. Builders Ass'n, supra, 390 N.J. Super. at 181). The Appellate Division has held that an impermissible “request that does not comply with OPRA and demands assessment and preliminary inquiry,” such as interviews of agency employees, “is sufficient to give rise to an inference that compliance will disrupt agency operations.” N.J. Builders Ass'n, supra, 390 N.J. Super. at 181. Accordingly, a request that requires a custodian to interview employees, employ additional manpower or require a custodian’s undivided attention to comply with the seven-day time period would “disrupt” an agency’s operations. Thus, if defendants’ delay was premised upon the exhaustive nature of plaintiff’s requests, defendants could have issued a denial on the basis that the requests would substantially disrupt agency operations and worked with plaintiffs in order to reach a solution that accommodated both parties. Bent v. Township of Staffor Police Dept., Custodian of Records, 381 N.J. Super. 30, 37 (App. Div. 2005) quoting N.J.S.A. 47:1A-5(g) (“[I]f a request ‘would substantially disrupt agency operations, the custodian may deny . . . [it and] . . . attempt[] to reach a reasonable solution . . . that accommodates the interests of the requestor and the agency’”).

“OPRA most certainly permits consideration of demands on agency operations, and encourages compromise and efforts to work through certain problematic requests by accommodating one another.” Spectraserv, supra, 416 N.J. Super. at 579 quoting Mason, supra, 196 N.J. at 76. (internal quotation marks omitted).

B. New Jersey Common Law

In addition to OPRA, disclosure can be sought under the common law. The Act provides “[n]othing contained in [OPRA] shall be construed as limiting the common law right of access to a government record.” N.J.S.A. 47:1A-8. Thus, even if the information requested falls within one of the exceptions to access under the statutory construct of OPRA, requestors may still prevail by resorting to the common law right to access public records. To constitute a government record under the common law, the item must be:

[O]ne required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office. The elements essential to constitute a public record are * * * that it be a written memorial, that it be made by a public officer, and that the officer be authorized by law to make it.

[S. Jersey Pub. Co. v. N.J. Expressway Auth., 124 N.J. 478, 487–88 (1991) (quoting Nero v. Hyland, 76 N.J. 213, 222 (1978)).]

To reach this broader class of documents, requestors must satisfy a higher burden than required under OPRA: “(1) the person seeking access must establish an interest in the subject matter of the material; and (2) the citizen’s right to access must be balanced against the State’s interest in preventing disclosure.” Mason, supra, 196 N.J. at 67–68 (quoting Keddie v. Rutgers, 148 N.J. 36, 50 (1997)) (internal quotations and citations omitted). The Supreme Court has articulated several factors for a court to consider in performing its balancing:

(1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government; (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance

that their identities would not be disclosed; (3) the extent to which agency self-evaluation, program improvement, or other decision making will be chilled by disclosure; (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers; (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials.

[S. Jersey Pub., supra, 124 N.J. at 488 (quoting Loigman v. Kimmelman, 102 N.J. 98, 113 (1986)).

Analysis

A. OPRA

(i) Government Records

There is no dispute that the records requested by plaintiff fall squarely within OPRA's definition of "government records" subject to public access, unless exempt. See N.J.S.A. 47:1A-1.1.

The central dispute is whether the records were timely provided or whether the multiple extensions sought by Teaneck amount to an unreasonable delay in production and effectively denial of the records.

(ii) Substantial Disruption of Agency Operations

OPRA provides that once a request for records is made, an agency must grant or deny access to a government record ". . . not later than seven business days after receiving the request." N.J.S.A. 47:1A-5(i). N.J.S.A. 47:1A-5(g)(2) states: "[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request and promptly return it to the requestor." Id. If complying with the seven (7) day rule would "substantially disrupt" the agency's operations, the agency is authorized to offer a "reasonable"

solution for production at a later date. N.J. Builders Ass'n, supra, 390 N.J. Super. at 171. “OPRA most certainly permits consideration of demands on agency operations, and encourages compromise and efforts to work through certain problematic requests by accommodating one another.” Spectraserv, supra, 416 N.J. Super. at 579 quoting Mason, supra, 196 N.J. at 76. (internal quotation marks omitted).

Teaneck’s time extension requests specifically assert that the Township needed extensions of time to comply due to a confluence of factors the majority of which were outside of the Township’s control. Namely, at the time plaintiff’s OPRA request was received, the Township had approximately 228 outstanding OPRA requests to process; that 175 of the 228 outstanding requests were filed by a single vexatious litigant whose actions patently demonstrated a willful desire to disrupt Township operations and absorb Township resources; that that Township had held a municipal election on May 8, 2018 and another primary election on June 5, 2018; that the Township’s 33 liquor licenses were up for renewal in May and June, 2018, and that defendants’ preliminary search resulted in over 200 potentially responsive records contained in 807 pages, requiring review for exempt or privileged content. Defendants argue that all of these factors disrupted agency operations and made their unilateral extension requests far from excessive, but rather quite reasonable.

As was noted in New Jersey Builders Ass’n v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166, 183-84 (App. Div. 2007):

Federal courts addressing non-compliance with deadlines included in FOIA may grant extensions when “the agency has been diligently working on the request, but has been unable to meet the deadline due to exceptional circumstances...” (citation omitted)... While the New Jersey legislature did not include the same exceptional circumstances rule in OPRA, OPRA’s exception based on substantial disruption is analogous... N.J.S.A. 47:1A-5(g) permits

consideration of demands on agency operations imposed by the document request at issue.

The Court is guided by Thomas E. Ciccarone v. NJ Department of Treasury, GRC Complaint No. 2013-280 (July 29, 2014). Therein:

[] the Custodian requested, and the Complainant approved, four (4) extensions of the time totaling twenty-five (25) days beyond the date of the request. On the last day of the fourth extension, the Custodian granted and denied access to some of the requested records and then requested yet another seven (7) business day extension of time in order to address the balance of the Complainant's request. Even though the Complainant again agreed to the extension of time, he made it clear that he would agree to no further extensions. Despite the Complainant's objection, the Custodian availed herself to three more extensions of time totaling an additional twenty-seven (27) business days. These twenty-seven (27) business days were on top of the agreed upon thirty-two (32) business days the custodian already had available to her to respond to the request. The Custodian in this complaint required a total of fifty-nine (59) business days to complete her response to the request.

In Ciccarone, the GRC held that “[e]xtending the response time by an additional twenty-seven (27) business days following expiration of the last agreed-upon extension of time in order to address the balance of the Complainant's request is clearly an excessive amount of time and flies in the face of OPRA's mandate to ‘... “promptly comply...” with a records request and to grant or deny access ‘... as soon as possible...’ N.J.S.A. 47:1A-5(g), N.J.S.A. 47L1A-5(i).” Id. at 9.

Unlike Ciccarone, there were no agreed-upon extensions between plaintiff and the Township. While plaintiff may have tacitly agreed to the initial seven (7) day extension, it made clear via letter dated May 7, 2018, that no further extensions would be considered and that defendants' failure to respond was deemed a denial.

Through a series of correspondence, defendants sought to unilaterally extend the statutory response time on four (4) separate occasions amounting to a forty-two (42) business day delay.

On June 1, 2018, the thirty-fifth (35th) business day from plaintiff's initial request, but seven (7) days before plaintiff's complaint filing, Teaneck supplied Plaintiff with a partial response, satisfying request nos. 1 and 2 in their entirety.

On June 29, 2018, the fifty-fifth (55th) business day from the original request, Teaneck supplied a partial response addressing request no. 3, with unexplained redactions and due to the volume of records potentially responsive to request no. 4, defendants opposition stated: "[w]ith regard to the fourth request, Defendants responded that the preliminary search had resulted in over 200 potentially responsive records. As of the date of this Certification, there are now 807 pages of potentially responsive records. Those records still need to be reviewed for exceptions to production and by counsel for the Township, where appropriate." Defendant's Opposition, at 3, 4 (June 29, 2018). Teaneck represented that documents responsive to request no. 4 would be produced by July 16, 2018.

Documents in response to request no. 4 were, in fact, produced on July 16, 2018. Plaintiff asserts that like documents supplied in response to request no. 3, the documents produced in response to request no. 4 also contained unexplained redactions.

At oral argument, plaintiff asserted that defendants' production with respect to request no. 3 was limited to three (3) zoning ordinances introduced at the May 23, 2018, Township Council meeting. The production did not address any referrals of any land use/zoning ordinances and amendments to land use/zoning ordinances from May 2017 to the present from the Township Council to the Township Planning Board nor any "audio" made by the Township Planning Board

with regard to land/use zoning ordinances from May 2017 to the present. Defendants represented that there were no such referrals made and that defendants needed to confirm that no “audio” existed.

As to request no. 4, plaintiff argued that though documents were provided on July 16, 2018, they were heavily redacted without the benefit of an explanatory Vaughn Index and that certain documents generated by plaintiff’s counsel’s firm responsive to request no. 4 were not included in the production, causing concern over the thoroughness of the search conducted. Defendants retorted that all redactions were personal identifiers, specifically exempted by OPRA, and that they would gladly furnish a Vaughn Index or a Certification attesting to same.

The Court finds that Teaneck’s unilateral extensions of time in excess of fifty-five (55) business days exceeds the prompt compliance requirement of OPRA, amounting to a wrongful denial of access. Defendants’ argument that they have had to comply with numerous other OPRA requests is insufficient. If defendants’ argument was accepted, a government agency, could seek unlimited time extensions citing the OPRA requests of others. Such reasoning flies in the face of OPRA’s legislative intent. While a brief extension could support such rationale, it cannot be countenanced for what was over a two (2) month delay.

B. Common Law:

As plaintiff has been found to be a prevailing party under OPRA, this Court need not reach the issue of production of documents pursuant to the common law right of access. Asbury Park Press v. Cnty. of Monmouth, 406 N.J. Super. 1, 4 (App. Div. 2009) (holding that if the Court finds for disclosure of the requested record under OPRA, the Court does not reach the issue regarding the common law right of access).

Conclusion

For the foregoing reasons, the court finds plaintiff a prevailing party. Repeated unilateral extensions of time, without assent or attempt to reach a compromised solution cannot be countenanced regardless of the confluence of factors cited. The burden was upon defendants to facilitate assent or compromise and all evidence demonstrates that rather than having done so, they attempted to unilaterally dictate the timeframe for production.

Defendants shall produce all certifications and a Vaugh Index as outlined in the Order accompanying this opinion.

As a prevailing party, Plaintiff is entitled to attorney's fees under N.J.S.A. 47:1A-6. Counsel shall attempt to agree upon a reasonable quantum of fees. Failing to accomplish same, counsel for plaintiff shall submit a certification of services to the Court within thirty (30) days of the date hereof and Defendants a response within forty (40) days of the date hereof.

In considering attorney fees, the court remains mindful that defendants partially complied with OPRA prior to plaintiff's complaint filing, and by and large were prepared to comply with the remaining requests, albeit late; which facts will be considered in the reasonable award of counsel fees.

The appropriate Order has been executed.

A handwritten signature in black ink, appearing to read 'B. Mizdol', written over a horizontal line.

Bonnie J. Mizdol, A.J.S.C.