

Town Insurers Fear Effects of Ruling Limiting OPRA Charges to Actual Costs

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The impact of a Mercer County ruling in a class-action suit that drastically limits document-production charges under the Open Public Records Act is reverberating around the state.

Assignment Judge Linda Feinberg ruled on May 21 that there was "a clear intent by the Legislature to limit copying charges to the actual cost of duplication under OPRA," regardless of whether the records custodian makes the copies or lets requesters make their own.

Though OPRA includes a fee schedule, its sole function is to set a maximum cost, unless the agency can show that its actual cost is higher, Feinberg said.

The decision allows discovery to determine the Mercer County clerk's actual copying costs, which will be markedly lower than the 50 cents per page it was charging Brian Getts, the title searcher who brought the suit.

The ruling, in *Getts v. Mercer County Clerk's Office*, MER-L-696-07, got quick attention. On June 26, the lawyer for joint insurance funds covering more than 70 municipalities in four counties warned the ruling is "highly likely" to become law, and when it does, the towns might have to refund any overcharges.

JIF solicitor David DeWeese issued the warning in an "OPRA Bulletin" to municipal clerks in the ACMJIF, which includes 39 Atlantic County towns, and TRICOJIF, which encompasses another 34 in Gloucester, Salem and Cumberland.

In the suit, which Feinberg has certified as a class action, Getts claimed the county was unjustly enriched by charging 50 cents per page on its self-service copying machines and asked for a refund or disgorgement on behalf of everyone who used the copy machines since March 13, 2001, OPRA's effective date.

Getts alleged that OPRA allows custodians to charge only the "actual cost" for the copies, which he reckoned at about 5 cents per page.

Mercer contended the 50-cent charge — at least for the first 20 pages copied — fit within the OPRA fee schedule: 75 cents for the first 10 pages, 50 cents for the next 10 and 25 cents thereafter. The county argued that 25 cents was OPRA's default rate and that the actual cost of copying was relevant only if the county charged above the fee schedule.

On May 21, Feinberg disagreed, denying the county's motion for partial summary judgment.

Mercer County has not appealed because the issue is already headed to the Appellate Division, says the county's lawyer, Steven Menaker of Chasan Leyner & Lamparello in Secaucus.

Argument is scheduled for Sept. 16 in two appeals from decisions that came out the other way.

Superior Court Judges Stephen Rubin, in *Gench v. Hunterdon County Clerk's Office*, HUNT-L-307-07, and Edward Gannon, in *O'Shea v. Sussex County Clerk's Office*, SSX-L-655-06, held that OPRA allows a 25-cent-per-page charge for self-service copies. Feinberg mentioned those decisions in her opinion but reached a contrary conclusion.

Also scheduled for argument on Sept. 16 is an appeal in another copying cost case dismissed on a different basis, *Smith v. Hudson County Register*, HUD-L-5261-07. Superior Court Judge Shirley Tolentino disqualified class plaintiff Dean Smith under the voluntary payment rule. Menaker, who also represents Hudson County, says the rule denies reimbursement to someone who pays money to the government knowing he does not have to do so. It applies to Smith, who has acted as named plaintiff in several other suits against counties, all brought by the firm of Friedman Doherty in West Berlin, says Menaker.

Smith's lawyer, Donald Doherty, says his firm sued the clerk in every county except Warren, which did not charge for its self-service copier but asked for donations instead.

The first suit, filed against Burlington and Camden counties, led to an appellate ruling, *Dugan v. Camden County Clerk's Office*, 376 N.J. Super. 271 (2005), that "[w]hen copies of public records are purchased under the common law right of access doctrine, the public officer may charge only the actual cost of copying, which ordinarily should not include a charge for labor."

Dugan reversed a lower court decision that self-service copying fell under a different statute, N.J.S.A. 22A:2-29, applicable to court and county clerks, which sets a \$2 fee for "comparing and making copies, per sheet" and "copies of all papers, typing and comparing of photostat, per page."

Doherty says Dugan settled in 2005, with Burlington and Camden counties agreeing to charge 5 cents per page for five years and paying a combined \$1.6 million into a pot against which people who overpaid could file claims, subject to county objection. About 80 percent of the money was paid out, with the rest going to purposes approved by Burlington County Assignment Judge John Sweeney, such as a battered women's shelter. Subsequent settlements with other counties, including Gloucester, Atlantic and Cape May, have followed that model, Doherty adds.

Figuring out the actual cost of copies, which tends to run about 5 cents a page, involves looking at the components of paper, ink and electricity, Doherty says. He notes that Staples makes a profit charging 7 cents a page and asks why the government feels it needs to charge 75 cents.

Mercer County lawyer Menaker says a fee schedule is more practical than repeatedly calculating actual costs. Also, "how many people will seek refunds of 25 cents?" he asks, noting that copying costs incurred by title searchers are ultimately paid by home buyers at closings.

DeWeese, of Stagliano, DeWeese & Fucellaro in Wildwood, did not return a call for comment.