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NORTH JERSEY MEDIA GROUP, INC., d/b/a *THE RECORD*, *Plaintiff* v. BERGEN COUNTY ECONOMIC DEVELOPMENT CORPORATION and JOANNE CIMILUCA, Bergen County Economic Development Corporation Custodian of Records *Defendants.*	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY DOCKET No. BER-L-6593-10 CIVIL ACTION OPINION

Argued: September 10, 2010

Decided: September 14, 2010
Honorable Peter E. Doyne, A.J.S.C.

Dina L. Sforza, Esq. appearing on behalf of the plaintiff, North Jersey Media Group, Inc. (North Jersey Media Group, Inc.).

Frank DeVito, Esq. appearing on behalf of the defendant, Bergen County Economic Development Corporation (Francis J. DeVito, P.A.).

Michael D. Witt, Esq. and Raymond J. Siegler, Esq. appearing on behalf of the defendant, Joanne Cimiluca, Bergen County Economic Development Corporation Custodian of Records (Chasan Leyner & Lamparello, P.C.).

Introduction

On July 9, 2010, the North Jersey Media Group, Inc., d/b/a *The Record* ("plaintiff" or "NJMG") filed a verified complaint and an order to show cause.[1] NJMG

[1] Although the complaint is entitled "Verified Complaint," it was not properly verified due to a technical error by plaintiff's counsel. On August 13, 2010, counsel filed a cross-motion to amend verification to verified complaint pursuant to R. 4:9-1. See legal analysis section for a full discussion.

seeks a judgment declaring defendants, the Bergen County Economic Development Corporation and Joanne Cimiluca, the then Bergen County Economic Development Corporation Custodian of Records ("BCEDC" and "Cimiluca" when addressed individually, "defendants" when referenced collectively), in violation of the Open Public Records Act, N.J.S.A. 47:1A-1 to -13 ("OPRA" or the "Act"), imposition of a civil penalty of $1000 on Cimiluca pursuant to N.J.S.A. 47:1A-11a, and directing the release of certain receipts and emails. Additionally, plaintiff seeks a sworn statement as to the completeness of previous responses by defendants as well as counsel fees and costs.

Facts/ Procedural History

Plaintiff, NJMG, is a New Jersey corporation which publishes approximately fifty publications including daily newspapers, weekly community based newspapers, magazines, etc. NJMG publishes a daily newspaper called *The Record* which is circulated throughout Northern New Jersey and more specifically, Bergen County. Plaintiff is currently engaged in the gathering, editing and reporting of information for the publication of news stories. It devotes significant time and resources to covering the County, its public officials, and the conduct of public business within the County, as well as the expenditures of taxpayer funds by the County and its various departments/divisions. This dispute arises from requests for (1) receipts to the BCEDC from the Stony Hill Inn, (2) email correspondence between Cimiluca and Eva Tucci ("Tucci") dated July, August, and September 2008, and (3) email correspondence between Cimiluca and Ciro DiScalfini ("DiScalfani") dated July, August, and September 2008.

On March 1, 2010, Michael Gartland ("Gartland") a reporter for *The Record*, submitted a request to the BCEDC to produce copies of the following government records: (1) receipts from the Stony Hill Inn from 2006 to the present; (2) email correspondence between Cimiluca and Tucci; and (3) email correspondence between Cimiluca and DiScalfini.[2] (Pl.'s Ex. B.)

On March 4, 2010, Francis J. DeVito, Esq. ("DeVito") responded to the request on behalf of the BCEDC. (Compl. ¶ 10; Def.'s Opp'n Br. 2.) The BCEDC produced two receipts from the Stony Hill Inn: (1) a receipt for $7,306.00 dated May 22, 2008, and (2) a receipt for $10,800.00 dated May 20, 2009.[3] (Id.; Pl.'s Ex. C.) The BCEDC denied the requests to produce email correspondence because they were not requests for specific, identifiable government records and compliance would substantially disrupt government operations.[4] (Id.) Additionally, the BCEDC asserts that the request would "violate protected employment information and personnel records that are OPRA exempt."[5] (Pl.'s Ex. C.)

Thereafter, on or about April 23, 2010, a confidential source purportedly informed Gartland the BCEDC failed to fully respond to his OPRA request. (Compl. ¶ 11.)

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[2] Gartland requested other government records that are not at issue here.

[3] The BCEDC explains that Gartland and Cimiluca engaged in telephone conversations prior to the first request regarding two specific events held at the Stony Hill Inn and Cimiluca believed that Gartland's OPRA request sought receipts for these two events. (Def.'s Opp'n Br. 1.) However, the request as written did not limit production to any specific receipts. Therefore, the response to the first request was incomplete.

[4] The BCEDC response to the request for email correspondence indicated that a "request cannot be a fishing or discovery exercise." (Pl.'s Ex. C.)

[5] The BCEDC need be more specific as to the reason for denial if the denial was based on this exemption. See Courier News v. Hunterdon County Prosecutor's Office, 338 N.J. Super. 373, 383 (App. Div. 2003). Here, the March 4th letter merely states that the emails are exempt from disclosure and gives the general reason that requested records must not be exempt from disclosure. Although the defendant's opposition brief clarifies its position by stating the denial was based on attorney-client privilege (Def.'s Opp'n Br. 2), the response did not so specify. (Pl.'s Ex. C). Therefore, the BCEDC reason was insufficient under the law. However, this point is moot as the BCEDC provided at least part of the requested information upon receipt of Plaintiff's second request. The remaining issue is whether the response was complete.

Specifically, it failed to produce all of the receipts requested in the March 1, 2010 request. (Compl. ¶¶ 9, 11.)

Consequently, on May 5, 2010, Dina Sforza, Esq. ("Sforza"), in-house counsel for *The Record*, sent a letter to DeVito requesting a written certification indicating the two receipts produced were "the only documents responsive to [the] request." (Pl.'s Ex. D.) The letter also limited the request for email correspondence between (1) Cimiluca and Tucci and (2) Cimiluca and DiScalfani to correspondence for the months of July, August, and September 2008. (Pl.'s Ex. D.)

In response to plaintiff's revised request for emails, Cimiluca, with the help of the BCEDC staff, performed a search for emails, including any emails that may have been stored on the BCEDC computers assigned for Cimiluca's and Tucci's use. Cimiluca also contacted the Bergen County Information Technology Department and asked if emails from the requested time period could be retrieved from the BCEDC's email server. She was advised the County could not retrieve the emails as it did not host the BCEDC's email as the BCEDC is a separate, not-for-profit organization. Cimiluca determined the BCEDC's email was hosted by a private company.[6] Accordingly, she contacted the private company and inquired about retrieving emails. She was advised retrieval for the dates given was not possible.

On May 11, 2010, DeVito requested via email "a few weeks" additional time to respond to the May 5, 2010 request. (Pl.'s Ex. E.) Sforza orally granted the request on May 14, 2010. (Compl. ¶ 13.) On May 27, 2010, the BCEDC responded to Sforza's May

[6] No name was given for the "private company" in the papers or at oral argument.

5, 2010 request by providing access to[7] ten (10) additional receipts from the Stony Hill Inn[8] and two (2) emails, both of which Plaintiff asserts appear to be correspondence between Cimiluca and Tucci.[9] (Pl.'s Ex.'s G, H, I.)

On June 7, 2010, plaintiff again requested a certification that the response to its request was complete. (Compl. ¶ 15; Ex. J.) Plaintiff requested the certification because the BCEDC produced fewer receipts in response to the March 1st request than it did in response to the May 5th request even though the requests were for the same receipts. (Compl. ¶¶ 9, 15.) The BCEDC explains that "there was a misunderstanding as to scope of that which was requested." (Def.'s Opp'n Br. 3.) The BCEDC "initially produced only two Stony Hill receipts because . . . Cimiluca discussed the same with . . . Gartland and as a result understood that he was seeking . . . the two receipts that were initially provided." (Id. 2.)[10] Nevertheless, plaintiff alleges a sufficient basis exists for a finding the BCEDC has "willfully and knowingly failed to provide all documents responsive to the requests." (Compl. ¶ 17.) The BCEDC denied the request for a certification on June 11, 2010 because it was "unaware of any such requirement." (Compl. ¶ 17; Ex. K.)

On July 9, 2010, plaintiff filed (1) a verified complaint, (2) an order to show cause, and (3) a brief in support of the order to show cause. Plaintiff requests the release of government records of a public agency as defined by OPRA pursuant to N.J.S.A. 47:1A-5.

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[7] The documents were too large to attach to an email, but they were ready for pickup at DeVito's office. (Pl.'s Ex. G.)

[8] Plaintiff finds significance in the fact that 7 of the 10 additional receipts received were for expenses incurred by Cimiluca. (Compl. ¶ 14.)

[9] The presumption is based on the signature "Eva" in one of the two emails. (Compl. ¶ 14.) Although no surname is attached to the signature, it appears the emails were sent by Tucci.

[10] Although the explanation is plausible, the court considers the written request to be self-explanatory and the defendants' response understandable. In this case, the written request was not limited to the two receipts provided. Therefore, the response to the first request was concededly incomplete.

Plaintiff seeks judgment directing the BCEDC to provide within ten (10) days of the court's order all receipts from Stony Hill Inn from 2006 to present, email correspondence between Cimiluca and Tucci dated July, August, and September 2008, and email correspondence between Cimiluca and DiScalfini dated July, August, and September 2008.[11]

Additionally, plaintiff seeks a judgment directing the BCEDC to submit a sworn written statement to the court and *The Record* within ten (10) days of the court's order setting forth: (i) the identity of all individuals involved in responding to requests and the basis for each such person's involvement; (ii) the efforts undertaken to locate responsive documents; (iii) all responsive documents found and produced; (iv) any responsive documents that were withheld from production and the basis of such withholding, set forth in an index[12]; and (v) whether any responsive documents were destroyed, the date of such destruction, and the reason thereto. NJMG also seeks a judgment imposing a civil penalty of $1,000.00 upon the Custodian of Records and/or other appropriate public official, officer, or employee of the BCEDC for his/her knowing and willful denial of access. Finally, NJMG seeks an order awarding counsel fees and costs pursuant to N.J.S.A. 47:1A-6.

On July 30, 2010, the BCEDC filed (1) an answer and (2) a brief in opposition to plaintiff's order to show cause. On the same date, Cimiluca filed (1) a motion in lieu of

[11]Two requests were made for email correspondence between (1) Cimiluca and Tucci and (2) Cimiluca and DiScalfini. The first request, dated March 1, 2010, did not list the specific dates for which the records were sought. The second, and most recent, request, dated May 5, 2010, specified the dates in connection with the requested records. This is relevant as the first request was denied based on lack of specificity.

[12] This index is sought pursuant to the requirements set forth in Paff v. Dep't of Labor, 392 N.J. Super. 334, 341 (App. Div. 2007). See legal analysis section for further discussion.

answer to dismiss and (2) a brief in opposition to plaintiff's application for specific performance and civil penalties and in support of her motion to dismiss.

On August 13, 2010, plaintiff filed (1) a cross-motion to amend verification to verified complaint and (2) a brief in opposition to Cimiluca's motion to dismiss and in further support of the order to show cause. In its brief, plaintiff made an argument, for the first time, defendants failed to maintain files as required by the Destruction of Public Records Law, N.J.S.A. 47:3-15, ("PRL") and were thereby in violation of OPRA.

Defendants each were permitted to file a sur-reply solely as it related to the PRL. The BCEDC and Cimiluca filed their respective sur-replies on September 1, 2010.

Oral argument was entertained by the court on September 10, 2010.

Three matters/motions are currently presented: the first is the return of plaintiff's order to show cause; the second is Cimiluca's motion in lieu of answer to dismiss; the third is plaintiff's cross-motion to amend the complaint.

Legal Standards

1. OPRA Legislation

The Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 to -13, "plainly identifies its purpose at the outset: to ensure that government records, unless exempted, are readily accessible to citizens of New Jersey for the protection of the public interest. To accomplish that aim, OPRA sets forth a comprehensive framework for access to public records. Mason v. City of Hoboken, 196 N.J. 51, 57 (2008).

OPRA provides "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access [under this

Act], shall be construed in favor of the public's right of access." N.J.S.A. 47:1A-1. A government record is defined as:

> any 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 (emphasis added).

Excluded from this definition, however, are twenty-one categories of information which are deemed confidential and are not to be disclosed. Additionally, there are two exclusions provided in separate sections of the Act. None of the exclusions apply on these facts.

Records are typically available during the public agency's regular business hours with an exception for smaller towns, agencies, and school districts. N.J.S.A. 47:1A-5. The records may be redacted to protect personal information. Ibid. The records custodian ("custodian") may charge a fee for copying and related services. Ibid. Typically, any request for a record must be made using the agency's official request form. Ibid. The custodian must respond to all requests within seven days, unless applicant fails to provide necessary contact information. Ibid.

If access to a government record is denied, the person denied access may challenge the decision by filing a complaint in superior court before the appropriate judge. N.J.S.A. 47:1A-6. Only the requestor may bring the application. Ibid. The Supreme Court has held "a 45-day statute of limitations should apply to OPRA actions, consistent with the limitations period in actions in lieu of prerogative writs." Mason, supra, 196 N.J. at 68.

The proceeding will go forward in a summary or expedited manner. N.J.S.A. 47:1A-6; see Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373, 378 (App. Div. 2003). As such, "the action is commenced by order to show cause supported by a verified complaint." Courier News, supra, 358 N.J. Super. at 378. In Courier, the Appellate Division held the trial court had failed to follow proper procedure when it denied a newspaper its right to summary adjudication on an OPRA action. The trial judge had erroneously applied the standard for preliminary relief to the summary action and dismissed plaintiff's action without prejudice. Id. at 377. As a result, the Appellate Division, recognizing the Act's policy of expediency, invoked original jurisdiction over the matter. Id. at 379.

In OPRA actions, the public agency has the burden of proving the denial is authorized by law. Id.; see also N.J.S.A. 47:1A-6. As such, the agency "must produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality. Absent such a showing, a citizen's right of access is unfettered." Courier News, supra, 358 N.J. Super. at 383.[13] Part and parcel to this, in establishing legal

[13] It should be noted "when a claim of confidentiality or privilege is made by the public custodian of the record" the court must "inspect the challenged document in-camera to determine the viability of the claim." MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 551 (App. Div. 2005).

support, "[a] decision of the council [Government Records Council] shall not have value as a precedent for any case initiated in Superior Court." N.J.S.A. 47:1A-7. However, "we review final agency decisions with deference and that we will not ordinarily overturn such determinations unless they were arbitrary, capricious or unreasonable, or violated legislative policies expressed or implied in the act governing the agency." Serrano v. S. Brunswick Twp., 358 N.J. Super. 352, 363 (App. Div. 2003) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)). Lastly, "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 was improperly denied, such access shall be granted. Ibid. A successful requestor shall be entitled to reasonable attorney's fees. Ibid.

2. Destruction of Public Records Law

In addition to being subject to OPRA, public agencies are subject to the PRL and to records retention and management regulations as set forth by the New Jersey Division of Archives and Records Management ("DARM").

The PRL was enacted in 1953 to establish an archival program ensuring that basic public records in the State of New Jersey are safely preserved, and to "permit the systematic destruction, under approved schedules, of public records which have outlived their usefulness." N.J. Land Title Ass'n v. State Records Cmty, 315 N.J. Super 17, 24 (App. Div. 1998).

In conjunction with, and as part of, the PRL, the legislature created the State Records Committee and charged it with the responsibility of approving schedules governing the keeping and destruction of public records. N.J.S.A. 47:3-19, 20. Created in 1983, DARM is responsible for "establishing the framework for the management of

public records of the State of New Jersey in a systematic and comprehensive fashion." N.J.A.C. 15:3-1.1.

The PRL and the DARM regulations require all public records to be maintained by agencies pursuant to records retention schedules established by DARM. Additionally, the statute and regulations prohibit the destruction of public records without the permission of DARM, even if the retention for such record has expired. N.J.S.A. 47:3-17; N.J.A.C. 15:3-1.1(a). The PRL and DARM regulations define "records" and "public records" as follows:

> any paper, written or printed book, document or drawing, map or plan, photograph, microfilm, data processed or image processed document, sound-recording or similar device, or any copy thereof which has been made or is required by law to be received for filing, indexing, or reproducing 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 by any such officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, in connection with the transaction of public business and has been retained by such recipient or its successor as evidence of its activities or because of the information contained therein.

N.J.S.A. 47:3-16; N.J.A.C. 15:3-1.2.

While the DARM definition does not specifically refer to emails, the legislature intended to incorporate said documents within the definition. This is reflected in a circular letter entitled "Managing Electronic Mail: Guidelines and Best Practice," ("Guidelines"). (Circular Letter 03-10-ST, attached to NJMG's Brief in Reply.) Pursuant to the Guidelines, any email message that meets the definition of a public record is an official record and must be scheduled, retained, and disposed of accordingly. The Guidelines specifically state government agencies have an obligation to make employees

aware that emails must be retained and destroyed in accordance with the established records management procedures. Under the Guidelines, if a document is a government record under OPRA, it must be available to requestors for the scheduled records retention period unless it falls within an exception set forth in a statute, regulation, Executive Order of the Governor, rule of court, or federal law, regulation or order.

The records retention period for emails depends on the type of information contained in the email. Email records can be of three types: (1) transient, (2) intermediate, and (3) permanent. Transient documents must be maintained until they are no longer of any administrative value. Intermediate documents must be maintained pursuant to a scheduled filed by the county agency record retention schedule. The schedule relevant to the emails at issue requires they be maintained for three years. Finally, permanent documents are required, in most instances, to be retained permanently.

All agencies are "required to make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and to provide prompt and timely access to the same." N.J.A.C. 15:3-1.1.

The DARM regulations define agency as any "department, division, board, bureau, office, commission, district, or institution, or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions [or a]ny independent authority, commission, district, institution, or instrumentality." N.J.A.C. 15:3-1.2.

Analysis

1. Motion to Dismiss

The standard governing a motion to dismiss for failure to state a claim pursuant to R. 4:6-2(e) is the complaint must be examined "in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989). At this preliminary stage of the litigation the court should not be concerned with the ability of plaintiff to prove the allegation contained in the complaint. Id. Plaintiffs are entitled to every reasonable inference of fact. Id. In fact, "[t]he examination of a complaint's allegation of fact required by the aforestated principles should be one that is at once painstaking and undertaken with a generous and hospitable approach." Id. The motion should be based on the pleadings, with the court accepting as true the facts alleged in the complaint. Rieder v. State Dept. of Transp, 221 N.J. Super. 547, 552, (App. Div. 1987). Thus, "[c]ourts should grant these motions with caution and in 'the rarest instances.'" Ballinger v. Delaware River Port Auth., 311 N.J. Super. 317, 322 (App. Div. 1998), quoting Printing Mart, supra, 116 N.J. at 772.

The motion is evaluated in light of the legal sufficiency of the facts alleged in the complaint. Printing Mart-Morristown, supra, 116 N.J. at 745. Hence, the plaintiff's burden is "to make allegations, which, if proven, would constitute a valid cause of action." Leon v. Rite Aid Corp., 340 N.J. Super. 462, 472 (App. Div. 2001). If the plaintiff fails to articulate such legal basis entitling him or her to relief and discovery would not provide one, the complaint must be dismissed. Sickles v. Cabot Corp., 379

N.J. Super. 100, 106 (App. Div. 2005); Camden County Energy Recovery Assoc.'s, L.P. v. N.J. Dept. of Envtl Prot., 320 N.J. Super. 59, 64 (App. Div. 1999). See also Pressler, Current N.J. Court Rules, comment 4.1.1 on R. 4:6-2 (2008). While dismissals pursuant to this motion are ordinarily without prejudice to permit the plaintiff to file an amended complaint, statute of limitations permit a dismissal with prejudice. See Printing Mart-Morristown, supra, 116 N.J. at 772.

a. Timeliness

An initial consideration must be the timeliness of the current action. The statute of limitations for an OPRA case is 45 days. Mason, supra, 196 N.J. at 70 ("Accordingly, we hold that requestors who choose to file an action in Superior Court to challenge the decision of an OPRA custodian must do so within 45 days."). As such, according to N.J.S.A. 47:1A-6, one denied access to a government record by the custodian, has 45 days to: (1) file an action in Superior Court, or (2) in lieu of an action in Superior Court, file a complaint with the Government Records Council ("GRC").

Here, the first request was made on March 1, 2010. On March 4, 2010 the request was partially honored and partially denied. The denial was based on lack of specificity of the request and an unnamed exemption. Subsequently, a second request was made on May 5, 2010. The response to this request (which is the subject of the action) was submitted on May 27, 2010. The complaint was filed on July 9, 2010. As the difference in time is 43 days, the action falls within the 45 day statute of limitations.

The court rejects Cimiluca's argument that 127 days have passed since the complained of response.[14] Cimiluca begins counting days from the March 4, 2010

[14] Although not argued by either defendant, the court recognizes that multiple requests filed by the same entity may relate back to the date of the first submission for purposes of the statute of limitations.

response as it is the only response in which any denials of access for records were asserted by the BCEDC. This argument is flawed for two reasons. First, plaintiff takes issue with the response to the second request, dated May 27, 2010. Second, given the disparity between the responses to the two requests, Cimiluca may not ignore the difficulty arose given the responses submitted.[15] The law requires, and the public's interest is best served, by construing the statute of limitations as starting to run at the time the second request was made.

Thus, the motion to dismiss on this basis is denied.

b. Failure to verify complaint

When an action is initiated in a summary manner, the complaint must be verified pursuant to R. 1:6-6. The rule states:

> [i]f a motion is based on facts not appearing of record or not judicially noticeable, the court may hear it on **affidavits made on personal knowledge**, setting forth only facts which are admissible in evidence to which the affiant is competent to testify and which may be annexed thereto certified copies of all papers or parts thereof referred to therein.

Here, the second request, although arguably filed by the same entity, was separate and apart from the first request as the two differed in substance. While the first request was for receipts and emails, the second request was limited to a specific time period and made an additional request for a certification that the response to the request was complete. Indeed, the second request is the one at issue before the court. The response to the second request starts the clock on the statute of limitations. Therefore, because the action was filed within 45 days of that response, it is timely.

As a side note, R. 1:36-3 provides "[n]o unpublished opinion shall constitute precedent or be binding upon and court" and "no unpublished opinion shall be cited by any court." However, comment [2] states an unpublished opinion "may nevertheless constitute secondary authority." The thrust of the rule is an unpublished opinion may serve as persuasive but not binding authority. As such citation for the proposition above is without citation.

[15] A separate basis for finding the second response to be incomplete is arguably the confidential tip indicating said response was incomplete. At oral argument, counsel for plaintiff stated this information was offered solely for the proposition explaining the approximate two month delay before the second request was made. Counsel concedes the information purportedly provided by the confidential informant is incompetent to show the responses set forth were incomplete.

(Emphasis added). The Appellate Division emphasized that complaints filed pursuant to an order to show cause must be verified by an "affidavit made on personal knowledge." Lippman v. Hydro-Space Tech., Inc., 77 N.J. Super. 497, 504 (App. Div. 1962). There, the court held that because the affidavit submitted in with the complaint stated it was "to the best of the knowledge and belief of the [affiant], true," rather than "based on personal knowledge," it was insufficient to support the action. Ibid.

A plaintiff who has failed to satisfy this requirement may not generally remedy the error by simply filing a cross-motion to amend a complaint. R. 1:6-3 states a "cross-motion may be filed and served by the responding party together with that party's opposition to the motion and noticed for the same return date **only if it relates to the subject matter of the original motion**." (Emphasis added.)

Although, a strict reading of the New Jersey Court Rules does not permit such a cross-motion, the court has discretion to relax the rules in the interests of justice.

> The rules . . . shall be construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. Unless otherwise stated, any rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in injustice.

R. 1:1-2.

Pursuant to R. 4:9-1, "a party may amend a pleading . . . by leave of court which shall be freely given in the interest of justice." Although the cross-motion is procedurally defective, resolution on that basis would ignore the public interest.

As to the substance of the motion, the court has wide discretion under the rule, and the standard in effectuating the same is to be liberally construed. The "broad power

of amendment should be liberally exercised at any stage of the proceeding . . . unless undue prejudice would result." R. 4:9-1[2].

Here, Gartland's original verification stated the "allegations of the Complaint are true to the best of my knowledge, information, and belief and the said Complaint is made in truth and good faith and without collusion, for the causes set forth herein." This language is insufficient, and to remedy its inadequacy, NJMG filed a cross-motion to amend the verification to the verified complaint. Although NJMG did not properly file the cross-motion, plaintiff's error was technical in nature and may be easily remedied. As such, the court will permit and grant the cross-motion

2. Willful Violation of OPRA

In its complaint, plaintiff seeks to impose a civil penalty of $1,000.00 on the Custodian of Records or the BCEDC for a knowing and willful denial of access pursuant to N.J.S.A. 47:1A-11. Plaintiff supports its allegation by illustrating and questioning actions taken by Cimiluca. For example, plaintiff questions why Cimiluca provided two receipts only when more receipts were in its possession and should have been produced. According to plaintiff, Cimiluca should have sought clarification if there was an ambiguity with regard to what was requested, or, alternatively, complied with the request as written. Futhermore, plaintiff implies Cimiluca withheld receipts purposefully as she herself made seven of the ten purchases evidenced by the receipts provided pursuant to the second request. Finally, plaintiff finds meaning in the timing of Cimiluca's resignation. Specifically, plaintiff points out Cimiluca resigned her position with the BCEDC on June 20, 2010, shortly after the NJMG made the OPRA requests at issue and its request for a certification.

Under the OPRA, a "public official, officer, employee or custodian who knowingly and willfully violates" a provision of the OPRA "and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty of $ 1,000 for an initial violation." N.J.S.A. 47:1A-11.

Plaintiff alleges Cimiluca willfully failed to provide a comprehensive response initially to hide her involvement and/or willfully provided a truncated response. The conduct of a plenary hearing to determine the issue of willfulness appears less than advantageous. The court will give the defendants the benefit of a doubt in light of the explanation afforded and concludes there was no willful violation of OPRA. Plaintiff's request for a civil penalty against defendants is denied.

3. Request for a Certification

In its complaint, plaintiff requests a certification as to the completeness of defendants' response. Specifically, the request is for a sworn written statement to the court and *The Record* setting forth (i) the identity of all individuals involved in responding to the requests and the basis for his/her involvement; (ii) the efforts undertaken to locate responsive documents; (iii) all responsive documents found and produced; (iv) any responsive documents that were withheld from production and the basis of such withholding; and (v) whether any responsive documents were destroyed and the date and reason for the destruction.

Plaintiff seeks a certification for two reasons. First, it made two requests for essentially the same information, and the response to the second request was more extensive than the response to the first request. In response to the first request for receipts and emails, the BCEDC provided two receipts and denied the request for emails. In

response to the second request, the BCEDC sent ten additional receipts and two emails. Secondly, a confidential source purportedly informed plaintiff the response to the first request was incomplete. As a result, plaintiff asserts that it cannot be sure the second response was complete.

The issue is not whether the denial of a request for documents was improper. Rather, the issue is whether the BCEDC has fully complied with its obligations pursuant to OPRA when it failed to produce a certification its response was complete.

Plaintiff argues that the answer is in the negative based on Paff v. N.J., 392 N.J. Super. 334 (2007).[16] There, the court held:

> the agency to which [a] request is made shall be required to produce sworn statements by agency personnel setting forth in detail . . . (1) the search undertaken to satisfy the request; (2) the documents found that are responsive to the request; (3) the determination of whether the document or any part thereof is confidential *and* the source of the confidential information; (4) a statement of the agency's document retention/destruction policy *and* the last date on which documents that may have been responsive to the request were destroyed.

Id. at 341. Additionally, the court determined an index shall be attached to the sworn statement listing "all documents deemed by the agency to be confidential in whole or in part, with an accurate description of the documents deemed confidential." [17] Ibid.

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[16] Although not argued by plaintiff, a separate argument could have been made under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (1976). The FOIA requires certifications to be submitted in connection with the production of documents under the FOIA. Cases have applied FOIA principles to OPRA. See, e.g., Educ. Law Ctr. v. N.J. Dept. of Educ., 198 N.J. 274, 284-85 (2009). Applying FOIA to this case, defendants could be required to produce the requested certification.

[17] Although not before the court, plaintiff could have also argued, by analogy, the New Jersey Court Rules call for responses to requests for information to be complete and accurate. For example, R. 4:18-1(b) states the "person making the response shall swear or certify . . . that [the response] is complete and accurate based on personal knowledge and/or upon information if provided by others, whose identity and source of knowledge shall be disclosed." R. 4:18-1(c) provides the contents of the certification:

> I hereby certify (or aver) that I have reviewed the document production request and that I have made or caused to be made a good faith search for documents responsive to the request. I further certify

Defendants disagree with this interpretation and argue that these directives are directed to the GRC. The reasoning is based on the final line of the opinion which refers to directives as relating to prospective rulings by the GRC. Id. at 341-42.

Plaintiff's interpretation appears to be the favored one. Therefore, Paff is applicable and provides authority to require the BCEDC to comply with the request for a certification of completeness.

Specifically, the BCEDC shall provide a sworn statement describing in detail (1) the search undertaken to satisfy the request, (2) the documents found that are responsive to the request, (3) the determination of whether the document or any part thereof is confidential *and* the source of the confidential information, and (4) a statement of the agency's document retention/destruction policy *and* the last date on which documents that may have been responsive to the request were destroyed.

Furthermore, the court notes there is little "downside" in requiring a certification. The statements to be made by way of the certification merely mirror what is required by OPRA and ensure compliance with statutory mandates. Although the failure to provide a certification does not violate OPRA, OPRA is to be construed to benefit the public and disclosure and thus a court has the discretion to compel its production. Paff, supra, 392 N.J. at 341. Here, the disparity in records produced in response to two separate requests

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> (or aver) that as of this date, to the best of my knowledge and information, the production is complete and accurate based on ( ) my personal knowledge and/or ( ) information provided by others. I acknowledge my continuing obligation to make a good faith effort to identify additional documents that are responsive to the request and to promptly serve a supplemental written response and production of such documents, as appropriate, as I become aware of them. The following is a list of the identity and source of knowledge of those who provided information to me:

for the same information provides an adequate foundation something may have been amiss, and a directive to provide a certification is hardly unreasonable.

Accordingly, plaintiff's request for a certification is granted.

4. Violations of Public Records Law

In its reply brief, NJMG argues (for the first time) that by allegedly destroying public records,[18] defendants violated the PRL and the regulations set forth by DARM, and, in turn, OPRA, as they are no longer able to turn over records responsive to NJMG's request. However, NJMG does not provide any legal justification for its position, and the enabling legislation does not provide for the relief plaintiff seeks.

While the PRL, DARM regulations, and DARM guidelines may provide guidance as to the maintenance and regulated disposal of public records, they do not provide a private cause of action for an agency's failure, whether inadvertent or intentional, in maintaining a public record.[19] Where the language of a statute is clear, or, as here, does not exist, the statute may not be re-written to effect some other meaning. Jablonowska v. Suther, 195 N.J. 91, 105 (2008).

The PRL was passed in 1953, and DARM was created in 1983; both sets of legislation predate OPRA by decades. If the legislature intended to provide a citizen with a private cause of action when an agency lost or destroyed a public record, it would have amended the PRL or provided for such a cause of action in OPRA.

As the legislature declined to exercise its power to implement a civil penalty for the breach of the PRL and its regulations and guidelines, the court declines to implement

[18] Both types of documents requested by NJMG constitute public records under the PRL and its regulations as they are documents made or received in the course of the BCEDC's official business.
[19] The BCEDC falls within this definition as it is an instrumentality within or created by Bergen County, which is a political subdivision of the State.

such a penalty. The court does not make policy. Instead, it applies the law as set forth by the legislative body. See Burnett v. County of Bergen, 198 N.J. 408, 421 (N.J. 2009) ("When the language in a statute is clear and unambiguous, and susceptible to only one interpretation, courts should not look to extrinsic interpretative aids.") (Internal quotations omitted.)

At oral argument counsel for the BCEDC advised the BCEDC has no guidelines for the retention of records and conceded they should promulgate such guidelines. As such, it is so ordered.

5. Counsel Fees and Costs

Plaintiff seeks an award of counsel fees and costs pursuant to N.J.S.A. 47:1A-6. OPRA provides that a prevailing party shall be entitled to attorney's fees:

> A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may . . . institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . . If it is determined that access has been improperly denied, the court . . . shall order that access be allowed. A requestor **who prevails** . . . shall be entitled to a reasonable attorney's fee.

N.J.S.A. 47:1A-6 (emphasis added).

Here, the allegation is not denial of access; rather, plaintiff argues the court should require defendants to provide a certification stating the documents provided were in satisfaction of its request. A denial of access is distinguishable from the assertion a certification should be required. To be awarded fees there need be a denial of access. Here, the certification requested has not yet been drafted. Accordingly, there can be no denial of access to a non-existent document. Although relief is afforded to plaintiff, it does not necessitate a finding it is the "prevailing party" entitled to legal fees.

Conclusion

The OPRA statute is intended to be construed in favor of the public's right of access. It is then the burden of the public agency to demonstrate the law permits a withholding of such access. As defendants have not demonstrated the requested information may be withheld, they must satisfy completely both the request for emails and receipts. Additionally, defendants shall provide a certification indicating the request was satisfied completely, and if not, why not.[20]

The PRL is intended to ensure public records in the State of New Jersey are safely preserved. An archival program sets forth the types of records that may be destroyed and when they may be destroyed. As OPRA does not refer to the PRL, nor does the PRL provide a private cause of action, plaintiff's argument that defendants violated OPRA because they violated the PRL is rejected. That said, the BCEDC shall forthwith implement procedures to ensure compliance with applicable statutes and regulations.

For the reasons set forth above, NJMG's application as stated in the order to show cause is partially granted and partially denied. Its requests for (1) access to receipts and emails and (2) for a certification relaying the response to its request was complete are granted. Its requests for (1) the imposition of a civil penalty of $1,000 upon Cimiluca and for (2) counsel fees and costs are denied.

Cimiluca's motion in lieu of answer to dismiss is denied. Plaintiff's cross-motion to amend the complaint is permitted and granted.

The court rejects plaintiff's argument the BCEDC is in violation of the PRL and its regulations set forth a private cause of action warranting relief.

[20] The details of the certification are listed in the analysis section.

Lastly, the BCEDC is directed to implement a policy to maintain and preserve records required by statutes and regulations.

Plaintiff's attorney shall submit the appropriate order pursuant to the 5 day rule.