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GANNETT SATELLITE INFORMATION : SUPERIOR COURT OF NEW JERSEY
NETWORK, INC. d/b/a NEW JERSEY : LAW DIVISION, CIVIL PART
NEWSPAPERS/COURIER NEWS : SOMERSET COUNTY
Plaintiff, : DOCKET NO. SOM-L-1798-09
vs. :
BOROUGH OF RARITAN, :
Defendant, :
: OPINION

Decided: August 15, 2012

Thomas J. Cafferty, Attorney for Plaintiff (Gibbons, P.C., attorneys)

Mark S. Anderson, Attorney for Defendant (Woolson Sutphen Anderson,
P.C., attorneys)

YOLANDA CICCONE, A.J.S.C.

Dear Counsel:

The Court held a plenary hearing on April 3rd and 4th in 2012.

Please allow this letter to serve as my opinion on the matter and find
my Order enclosed.

I. Procedural History

Plaintiff Gannett Satellite Information Network, Inc. ("Gannett")
is the publisher of the Courier News newspaper. In October of 2009,
Gannett's counsel sent a written request to the Borough of Raritan
under the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 to -13,
seeking: [Page 2]

Digital (non-PDF) computerized copies of the
following:

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which is on-line at <http://ogtf.lpcnj.org/2012/20122300B//SOML0017809GANRARSCAN.pdf> Bracketed page
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the text within this version is identical to the original, such accuracy is not guaranteed.*

A master payroll list of all employees paid in 2008 showing: Last name, first name, MI, department, section, hire date, job title date, job title, base pay at the end of 2008, total overtime pay for 2008, and total pay for 2008. The list asked to be compiled was to include anyone who received a W-2 Statement.

All the above information for the time frame of Jan. 1, 2008-June 1, 2008.

All of the above information, for the time frame between Jan. 1, 2009-June 1, 2009.

Please include any code sheets and field maps, if necessary.

Upon receiving Gannett's request, the Borough's counsel responded that same day in a letter stating:

Your client was advised that the Borough did not maintain the records in the requested format (digital non-PDF computerized) and that the project would take a minimum of four hours at a cost of \$275.00 per hour for a total of \$1,100.00. If you wish immediate access, you may visit Borough Hall to review the information in the format in which it is kept. If you wish. the information to be in the format as requested, payment must be made.

Exhibit P-3.

Gannett declined the Borough's invitation to review the payroll records in hard copy form and also declined to pay the quoted charge of \$1,100,00 to convert the records from "PDF" to "non-PDF". Gannett represented to the Appellate Division that it preferred to have the records in non-PDF electronic form so that it could more readily analyze and reorganize the data contained within them. See App Div. decision at pg. 4.

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Gannett then filed a verified complaint and an accompanying Order to Show Cause before this Court, asserting three counts. In the First Count, Gannett asserted that the Borough's failure to provide the payroll records in non-PDF electronic form in addition to the \$1,100 conversion fee constituted a violation of Gannett's common law right of access to government records. The Second Count alleged a violation of OPRA based upon the Borough's withholding of the documents in the non-PDF formula. [Page 3] Gannett also asked this Court to find that the \$1,100 conversion fee to be an excessive "special service charge". The Third Count sought declaratory and injunctive relief.

The return date of the Order to Show Cause was adjourned to allow for some preliminary discovery. In particular, the parties took the deposition of Robert Barker, the chief operating officer of Action Data Services ("ADS"). ADS is a private vendor the Borough retained to maintain its payroll records. During the course of Barker's deposition, Barker asserted that the payroll records are only accessible electronically in PDF format and that an ADS programmer would need to convert the data from a so-called "master file" into non-PDF format. He also explained that ADS was entitled to be paid on an hourly basis for the programmer's time in performing the conversion. Following the deposition, a telephone conversation took place involving Barker and one of the attorneys representing Gannett, by which according to the attorney's certification, Barker allegedly stated that the "raw payroll

data" for, the Borough is, in fact, "maintained on the ADS Master File in non-PDF format." Shortly thereafter, Barker transmitted a letter to Gannett's counsel, stating that each of the earnings reports in question "is a PDF file only". After Barker's deposition, this Court heard oral argument on the Order to Show Cause.

This Court denied the preliminary injunctive relief sought by Gannett. The Court found that Gannett failed to demonstrate it was entitled to a free version of the Borough's payroll records in non-PDF format or that the special charge quoted by the Borough for converting those records to non-PDF format was unjustifiable. This Court confined its analysis to the OPRA issues and did not reach the newspaper's common law right of access claims. Subsequent to the Court's denial of the preliminary injunction, Gannett appealed.

The Appellate Division dismissed the Gannett's appeal without prejudice and remanded the case back to us for a plenary hearing, because the Appellate Division found the appeal to be interlocutory and remanded for a final order disposing of all issues. [Page 4].

II. Discussion

On April 3rd and 4th of 2012, this Court held a plenary hearing to determine: (1) whether Gannett made a request for a specific identifiable government record, and (2) whether that request was denied. The issues of redaction, Gannett's common law right of access, and whether the conversion fee is an excessive "special service charge"

were specifically not considered at the initial Order to Show Cause nor where they considered at the plenary hearing.

a. The Borough denied Gannett's request

The first issue is whether the Borough even denied Gannett's OPRA request. As stated above, in October of 2009 Gannett sent a written request to the Borough of Raritan seeking "Digital (non-PDF) computerized copies of the following: A master payroll list of all employees paid. in 2008 . . ." The Borough contends that no denial was ever made, because the Borough offered Gannett immediate access to its payroll records in the format in which they are maintained. Gannett, on the other hand, argues that the non-PDF computerized files of the master payroll list were in fact maintained by the Borough's Third Party agent ADS.

Here, Gannett has proven, at trial and through its submissions, that the Borough unequivocally "denied" Gannett's request for "digital (non-PDF)" copies of the master payroll list based on the premise that the files simply did not exist.¹ Gannett has extensively illustrated to the Court the numerous instances in which the Borough denied the OPRA request. See Exhibit 9 (where Raritan's clerk, Pamela Huefner, certified that on July 22, 2009, she advised Gannett that Raritan's payroll vendor did not maintain the payroll records in non-PDF format);

¹This Court's previous finding that the "Borough of Raritan met its burden" under OPRA in providing Gannett with the records that it had requested was based on inaccurate information provided by the Borough. It should be noted that in denying Gannett's OTSC application on December 15, 2009, the Court made its findings without the benefit of substantial discovery, expert reports and a plenary hearing.

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See also Exhibit P-3 ("Your client [Gannett] was advised that the Borough did not maintain the records in the requested [] format"); See also Exhibit P-10 (Def.'s Br. in Opp. to PL's OTSC) ("The Borough of Raritan does not maintain its records in non-PDF, nor is it required to do so. The Borough is not required to maintain records in such format, and does not maintain records in such. format ... they are [Page 5] maintained in an electronic medium, and the records were offered in that medium."); See finally Exhibit P-14 (Letter from Mark Anderson, dated 1/28/2010) ("the facts do not show, and the Court did not find, that ADS maintains the information in the type of non-PDF format requested by Gannett . . . There is no evidence, not even a suggestion, that ADS or Raritan maintains the information in the specific format that Gannett requests."). Based on the Court's finding that the Borough denied Gannett's OPRA request, the next inquiry involves whether the denial was authorized by law.

b. Whether the Borough's denial was authorized by law

OPRA "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). In cases involving a denial of access under OPRA, the burden of proof is on the public agency to demonstrate by a preponderance of the evidence

that its denial was authorized by law. N.J.S.A, 47:1A-6. Here, the Borough contends that its denial was lawful, because the non-PDF information is not a "government record" under OPRA.² As defined in N.J.S.A. 47:1A-1.1, a "Government record", in relevant part, means:

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 .

. . .
(emphasis added) [Page 6].

The Borough advances several arguments in support of its position that the requested non-PDF information is not a "government record". First, the Borough argues the "computer files", as they exist, are not designed for human understanding and use. During the plenary hearing, the Borough's expert explained that ADS must execute a programming method by which the computer files must be converted to put them into a useful format. As explained in Gannett's Exhibit P4-A, ADS converts the "print file" into PDF and then turns over the PDF file to the Borough.

²It is important to note that prior to the institution of this lawsuit the Borough did not advance the argument that a digital, non-PDF "master payroll list" was not a "government record" under OPRA. See Exhibits P-3, P-10, P-11, P-12, 3, P-14, P-15 and P-16.

Upon ruling in favor of Gannett in the Motion in Limine, the Court found that the sole issue to be decided at trial was whether or not the records were maintained in the form requested. Because the determination regarding whether the Borough's denial is authorized by law is inherently intertwined with defining "government record" and "information stored and maintained electronically", the Court finds that this threshold determination must be and can competently be made on the parties' extensive trial summation briefs.

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See Steps 7-8. The Borough argues that the electronically produced "master payroll list" is processed through extraction and only is readily ascertainable to a human at Step 8. Because Step 8 compiles the "master payroll, list" in PDF form, the Borough believes that the request for the "master payroll list" in non-PDF form amounts to a request for information that is not "stored or maintained electronically". In furtherance of its position, the Borough asks the Court to apply principles of statutory interpretation, specifically ejusdem generis, in deciding the meaning of "information stored or maintained, electronically". Finally, the Borough asks the Court to find that the requested non-PDF information (1) is not an identifiable record, (2) requires the creation of a new record, or (3) is not made, maintained, or kept on file in the course of Raritan's official business.

In response, Gannett advances several points. First, Gannett argues that the Borough's expert (Hitchcock) never examined the master payroll file (Exhibit D-6), and therefore, his testimony regarding the same is erroneous and completely irrelevant to any analysis of whether the actual print file would have been responsive to the newspaper's request. Gannett asks the Court to find that despite Hitchcock's surrebuttal testimony³ his conclusions should be stricken as a net

³See T2, p. 118, 1.16 -p. 119 1.4 (wherein Hitchcock opines that notwithstanding the fact that the file examined was the payroll master file and not the print file his conclusions would be unchanged).

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opinion. Additionally, Gannett also urges the Court to find that "information stored or maintained electronically" does not have to be useable/understandable to a human in order to constitute a "government record". Furthermore, Gannett points out that even though Exhibit D-6 was not humanly understandable when opened in Notepad, it would be humanly understandable if opened in an appropriate program. [Page 7]

Upon review of all of the submissions and the testimony elicited during the plenary hearing, the Court finds that the non-PDF computerized master payroll lists are "government records" under OPRA. The doctrine of ejusdem generis provides that when there is a list of specific items, accompanied by a general term, one should look to the common characteristics of the specific terms in order to determine the scope of the general term. *Wilson v. City of Jersey City*, 209 N.J. 558, 584 (2012). Here, because the term "information stored or maintained electronically" is a distinct term that is specifically identified as a "government record", the meaning of that term is clear and unambiguous and the doctrine of ejusdem generis does not apply. Through expert testimony, Gannett established at the plenary hearing that at Steps 6, 7 and 9, non-PDF responsive data exists and can be retrieved as "information stored or maintained electronically". See Exhibit P4-A.

The Court accepts and adopts Gannett's position that "government records" under OPRA do not have to be understandable to a human. The Court is convinced that just as "microfilm", which is specifically

identified as a "government record" under OPRA, cannot be used by a human without the assistance of a machine, the same is true about the non-PDF computerized data. At the plenary hearing, the Borough's expert even testified that Gannett would be able to convert the non-PDF information into a humanly readable format. See T2, p. 89, 1.18 – p.89, 1.10 and p. 91, 1.11-15. Furthermore, Gannett's expert testified that not only could the non-PDF information be easily converted but that the programs required to do so were readily available. See T2, p. 115, 1.14-17. The Court rejects the Borough's argument that Gannett's request seeks information or data that is not an "identifiable public record". The Court reiterates its initial holding that the non-PDF information exists. It is undisputed that the Borough's payroll information is, by definition, a public record. The process of search and retrieval of the electronically maintained data is no less a part of the retrieval process than locating a document in a bound book and retrieving it. Therefore, the Borough's argument that "compiling Gannett's request amounts to the creation of a new record" fails and is without merit.

Finally, the Borough's argument that the records are not "made, maintained or kept on file in the course of Raritan's official business" because the records are in the [Page 8] hands of the Borough's Third Party Agent, ADS, also fails. In *Burnett v. County of Gloucester*, 415 N.J. Super. 506, 508 (App. Div. 2010), the requestor

sought "any and all settlements, releases or similar documents entered into, approved or accepted from January 1, 2006 to the present." The Burnett court held that the fact that the County was not physically in possession of the requested records, did not excuse the County from complying with its OPRA obligations. Id. at 516. The court explained:

[T]he settlement agreements at issue here were "made" by or on behalf of the Board in the course of its official business, Were we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply delegate their creation to third parties or relinquish possession to such parties, thereby thwarting the policy of transparency that underlies OPRA.
N.J.S.A. 47:1A-1.

Id. at 517. Here, it is clear that ADS, acting as the Borough's agent, produces and maintains these government records on behalf of the Borough in the course of its official business. Therefore, the fact that the payroll records were not technically in the Borough's possession does not relieve the Borough of its duties under OPRA.

III. Conclusion

For the reasons stated in this Opinion, the Court has no choice but to find that the Borough of Raritan improperly denied Gannett's right to access the subject government records. Pursuant to N.J.S.A. 47:1A-6, the Borough of Raritan is ordered to provide Gannett with the subject government records and Gannett will be entitled to reasonable attorney's fees.

A case management conference is scheduled for September 13th, 2012 at 9:00AM to discuss the remaining issues in this matter.

Very truly yours,

/s/ Yolanda Ciccone, A.J.S.C.