

NOT FOR PUBLICATION WITHOUT APPROVAL  
FROM THE COMMITTEE ON OPINIONS

BETSY CROSS,

Plaintiff,

v.

TOWNSHIP OF WALL and LORRAINE  
KUBACZ IN HER PERSONAL  
CAPACITY,

Defendants.

SUPERIOR COURT OF NEW JERSEY

MONMOUTH COUNTY  
LAW DIVISION

DOCKET NUMBER:  
MON-L-1041-13

**OPINION**

Argued: May 28, 2013  
Decided: June 21, 2013

Richard Gutman, Esq., appearing on behalf of Plaintiff Betsy Cross

Sean Kean, Esq., appearing on behalf of Defendants Wall Township and Lorraine Kubacz

**LAWSON, A.J.S.C.**

This matter comes before the Court by Plaintiff, Betsy Cross, seeking the release of certain records by way of Order to Show Cause pursuant to R. 4:67-1. Plaintiff demands that Defendants be required to show cause why an order should not

issue compelling Defendants to release the records requested by Plaintiff.

The Court has reviewed the moving papers, engaged in colloquy with counsel, reserved decision, and now accordingly makes the following findings of fact and conclusions of law pursuant to R. 1:7-4.

**I. Statement of Facts**

Plaintiff, Betsy Cross, filed an Order to Show Cause seeking that the Township of Wall and Lorraine Kubacz grant Plaintiff access to records requested containing previously redacted transfer information with the last four digits of the bank account numbers disclosed. Additionally, Plaintiff now requests that the Court impose a penalty against the Township's record custodian, Lorraine Kubacz, in her personal capacity, in the amount of \$1,000.00, and award Plaintiff attorney's fees and costs.

The First Count of Plaintiff's Complaint seeks access to the records under the Open Public Records Act. The Second Count of Plaintiff's Complaint seeks the records under the Common Law Right to Access.

Ms. Cross previously requested from the Township the check registers and bank statements for the past six (6) years for the account "Wall Recreation." That request is not the subject of this litigation. On December 11, 2012, the Township granted Ms.

Cross access to those 72 pages of bank statements for the "Wall Recreation" account. Of the eight (8) transfers of large sums of money, the Township disclosed each one, without any redaction, including the entire bank account number to which funds were being transferred.

Thereafter, on December 12, 2012, Plaintiff requested check registers and bank statements from the Township's "Water and Sewer Department" (hereinafter "Department") for the past six (6) years. That request was subsequently narrowed to include only the years 2010 through 2012. The Township's record custodian, Lorraine Kubacz, complied with the request and provided Plaintiff with the Department's bank statements for the years 2010 through 2012, but redacted various bank account numbers.

Thereafter, Ms. Cross requested the disclosure of the last four (4) digits of those redacted bank account numbers to which the money was transferred. On February 1, 2013, the Township and record custodian denied access to the last four (4) digits for the following reason:

Our Township Attorney, Sean Kean, has advised that disclosure of the last four digits of the bank accounts are exempt under OPRA as per N.J.S.A. 47:1A-1.1 and as such will not be disclosed: Security measures and surveillance techniques which, if disclosed, would create a risk to the safety or (sic) persons, property, electronic data or software.

Ms. Cross responded:

While I understand why the full account number may need to be suppressed, not providing me with the last four digits prevents me from distinguishing between the Township's various accounts and disclosure of a partial account number does not appear to violate any legitimate need for confidentiality. Indeed, if you consult the Rules of Court the courts have resolved the tension between the government's need to keep its bank account numbers secret and the public's need to distinguish accounts from one another by adopted of R. 1:38-7(b), which holds in part that "an active financial account number may be identified by the last four digits when the financial account is the subject of the litigation and cannot otherwise be identified." Given the public policy behind OPRA and the liberal construction that courts are required to give to it, would you kindly reconsider the denial of my request? If you believe that disclosure of four digits is "too many," I will accept disclosure of two or three digits, since I only need to distinguish between accounts and have no interest in knowing (or being able to figure out) the entire account number.

The Township and record custodian responded February 28, 2013 by repeating its February 1, 2013 email, that the last four digits of the bank account numbers qualified for the OPRA exemption for security measures and surveillance techniques.

The Complaint in this matter was filed on March 18, 2013.

After careful review of the exhibits in this matter, the Court draws attention to Exhibit F, a letter dated March 22,

2013 from Mr. Kean, attorney for Defendants, to Mr. Gutman, attorney for Plaintiff.

In that letter, Mr. Kean offered to provide a legend for each bank account so that Ms. Cross would be able to match each transaction to each account. That letter indicated that the Township was willing to work with Ms. Cross in providing her the information she was looking for in the correspondence quoted above, but in a manner that took financial security into consideration.

Four (4) days later, by letter dated March 26, 2013, Mr. Gutman responded to Mr. Kean's letter, wherein he indicated that the offer of providing a legend was unacceptable. He also stated that Ms. Cross had filed a lawsuit eight (8) days prior. See Exhibit G.

## **II. Applicable Law**

Actions are permitted to be brought in a summary manner where permitted by rule or by statute. R. 4:67-1(a). OPRA specifically permits that a proceeding appealing a records request denial can be brought in a "summary or expedited manner." N.J.S.A. 47:1A-6. In addition, Plaintiff has verified the complaint filed, pursuant to R. 4:67-2(a) and R. 1:6-6. Thus, this action may properly proceed in a summary manner by way of an order to show cause.

OPRA provides for the public access to government records, furthering a public policy of openness and hostility to secrecy in government. N.J.S.A. 47:1A-1 to -13. OPRA intends that "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. . . ." N.J.S.A. 47:1A-1; see Tractenberg v. Twp. of West Orange, 416 N.J. Super. 354, 366 (App. Div. 2010) (OPRA intended to insure ready access to government records, unless exempted, and meant to maximize public awareness about governmental affairs and minimize the "evils inherent in a secluded process"). In relevant part, OPRA defines a "government record" as:

[A]ny paper, written or printed book, document, . . . data process or image processed document, information stored or maintained electronically . . . 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 her 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.

[Ibid.]

In passing OPRA, the Legislature declared that it is the State's public policy that "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." N.J.S.A. 47:1A-1. The burden of proof is upon the government agency. N.J.S.A. 47:1A-6.

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 which shall be heard in the vicinage where it is filed by a Superior Court Judge who has been designated to hear such cases because of that judge's knowledge and expertise in matters relating to access to government records; or, in lieu of filing an action in Superior Court, file a complaint with the Government Records Council established pursuant to section 8 of P.L.2001, c.404 (C.47:1A-7). N.J.S.A. 47:1A-6.

Executive Order 26, Section 4(b)(3) (Gov. McGreevey, 2002) exempts from OPRA: "information describing a natural person's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness, except as otherwise required by law to be disclosed."

Here, the Township denied Ms. Cross' request, asserting OPRA's exemption for security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data, or software.

N.J.S.A. 47:1A-1.1. The burden of proof is upon the Township to prove its assertion that the disclosure of the last four digits of the bank account numbers "would create a risk to the safety of persons, property, electronic data, or software." N.J.S.A. 47:1-6.

The Township attorney in his March 5, 2013 letter to Ms. Cross' attorney stated that "this information is arguably not discoverable pursuant to the exemption for proprietary commercial or financial information." In order to establish that the records are proprietary, the Township has the burden of proving that a bank account number is a complex product of considerable experience, time and/or money. Newark Morning Ledger Co. v. New Jersey Sports & Exposition Auth., 423 N.J. Super. 140, 169 (App. Div. 2011).

"[P]rior to allowing access to any government record, the custodian thereof shall redact from that record any information which discloses the social security number, credit card number, unlisted telephone number, or driver license number of any person; ... except that a social security number contained in a record required by law to be made, maintained or kept on file by a public agency shall be disclosed when access to the document or disclosure of that information is not otherwise prohibited by" law, N.J.S.A. 47:1A-5(a); see also N.J.S.A. 47:1A-1.1. Burnett v. County of Bergen, 198 N.J. 408, 422 (2009).



Defendants raise privacy concerns with regard to providing bank account numbers. On December 20, 2012, Plaintiff contacted Ocean First Bank (the Township's banking institution) and asked various questions on how to acquire bank statements that are in archives and those that are available online. Plaintiff certified that the only reason she contacted the bank was to learn the costs of retrieving bank records. However, that incident gave rise to the Township's concerns about what future actions Plaintiff (or any litigant) may take to obtain secure, private information.

Notwithstanding those concerns, the Township offered to provide a legend, which would show, via an identifier, which accounts received what, when, and in what amount. That offer was rejected by Plaintiff. In response to Plaintiff's contention that the Township waived confidentiality because it previously provided unredacted bank account numbers, the Township states that the previous disclosure was in error. Following that error, the Township decided to redact bank account numbers and provide identifiers if necessary.

This Court agrees that the disclosures of complete bank account numbers may very well risk financial security. Therefore, the bank accounts must be partially redacted so that the any potential risk is minimized. The real issue here is which part of the bank account numbers should be redacted. The

Plaintiff is requesting access to the last four (4) digits, while the Township is redacting the last four (4) digits.

Rule 1:38-7(b) provides that any active financial account number may be identified by the last four digits when the financial account is the subject of the litigation and cannot otherwise be identified. This Court will apply that rule to this situation. Plaintiff is entitled to redacted bank account numbers, displaying only the last four (4) digits of those bank account numbers.

**A. Whether the Township waived confidentiality by voluntarily disclosing identical, or the same type of bank account numbers to Plaintiff.**

The Township previously granted Ms. Cross complete bank account numbers. Ms. Cross requested the check registers and bank statements for the past six years for Wall Recreation. On December 11, 2012, the Township granted Ms. Cross access to the 72 pages of bank statements without any redaction. Seven weeks later, the Township and the record custodian denied Ms. Cross access to the last four digits of the bank account numbers regarding 25 transfers from the Water and Sewer Account. At the same time, each page of the records in the upper right hand corner contain the full bank account number of the account from which the transfers were made. Additionally, the Township failed to redact any portion of the bank account numbers of two of the transfers.

Plaintiff now argues that the Township waived confidentiality regarding the last four digits of the bank account numbers. Plaintiff relies on this Court's previous unreported decision Cross v. Township of Wall, Docket Number, MON-L-4785-11, January 3, 2013, in support of its argument that prior disclosure waives future application of an exemption. However, this case is distinguishable from this Court's previous decision. In that case, the Township never argued that the prior release of the records was in error. The records had been "freely released in the past," and the Township was objecting to the release of the records to Ms. Cross. This Court ruled that the Township could not claim an exemption to some parties, but not to others.

Here, the Township, upon releasing the entire bank account number realized it had made a mistake. An "error" does not create precedent for future disclosures. Bank account numbers, similarly to credit card numbers, are protected financial information. Plaintiff's additional argument that bank account numbers appear on checks and are therefore public fails for the following reasons.

Financial information is quite commonly shared during transactions. The most simplest example is when a person uses a credit card in a store. The store clerk is made aware of the

credit card number on the card, but that transaction does not make the credit card number public information.

Any sort of financial transaction involving a check is a secured transaction. Misappropriation of the financial information contained on the check would give rise to criminal liability. Simply because the bank account number appears on the check does not render that number available for other purposes. Confidentiality is not waived by the Township's prior error in releasing the bank account numbers.

As stated previously, Plaintiff is only entitled to the last four digits of the bank account. The error in previously releasing the entire bank account number does not create a precedent.

**B. Whether the record custodian deserves sanctions because this Court had previously warned her that denying access to record types previously disclosed has the appearance of a "purposeful denial of access to public records."**

N.J.S.A. 47:1A-5(g) states that if a custodian is unable to comply with a request for access, the custodian shall "indicate the specific basis therefore" on the request form and promptly return it to the requester. When a record is being withheld in its entirety, custodians must reply to the OPRA request and explain the reason why the custodian cannot comply with the request.

This Court in its January 3, 2013 Opinion Betsy Cross v. Township of Wall, et al., noted that it was concerned about the appearance of purposeful denial of access to public records where records have been previously disclosed.

Civil penalties may be imposed when a custodian knowingly and willfully violates OPRA. N.J.S.A. 47:1A-11. If the request is unreasonably denied, under the totality of the circumstances, a civil penalty of \$1,000 may be imposed. Mason v. City of Hoboken, 196 N.J. 51, 67 (2008).

There is a contentious history between these two parties. Defendant maintains that Ms. Kubacz provided the requested documentation, but with a redaction of the bank account numbers. This Court does not find that the Township or the records custodian intentionally tried to prevent Plaintiff from obtaining the information. Ms. Kubacz redacted the bank account numbers relying on advice from Township Council. Therefore, this Court will not sanction Ms. Kubacz, as she was not knowingly and/or willfully violating OPRA.

#### **C. Abuse of OPRA and Attorney's Fees**

If it is determined that access has been improperly denied, the court or agency head shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee. N.J.S.A. 47:1A-6.

A requestor is not a "prevailing party" entitled to attorney's fees under N.J.S.A. 47:1A-6 if it cannot be said that its OPRA complaint caused the production of documents that would not have been produced otherwise. Spectraserv, Inc. v. Middlesex County Utilities Authority, 416 N.J. Super. 565 (App. Div. 2010).

Where a newspaper sought a copy of an examination application for a law enforcement position submitted by a mayor's daughter, but was only entitled to a redacted copy that deleted all information except the daughter's name, signature, and education qualifications, it was not the "prevailing party" and thus was not entitled to attorney fees under N.J.S.A. 47:1A-6. North Jersey Media Group Inc. v. State, Dept. of Personnel, 389 N.J. Super. 527 (Law Div. 2006). In that case, the Mercer County Court held that the plaintiff was not entitled to attorney fees under the Rule because it did not prevail on its claim that the entire application had to be provided. Sections of the records were redacted.

Here, Ms. Cross initially requested the bank statements from the Department for the past six (6) years. That request was subsequently narrowed to include years 2010 through 2012. The Township of Wall complied with that request, but redacted the bank account numbers.

This Court finds that the Township was proper in denying the entire bank account number. Ms. Cross modified her request and asked for the last four digits of the bank account numbers. The Township then sent a letter to Mr. Gutman regarding the possibility of providing a ledger, however, this lawsuit had already been filed.

This Court finds that the Defendant was not purposefully denying Plaintiff access to the requested documents. In fact, Plaintiff was provided with the documents, albeit they were partially redacted. The Township then offered to provide a legend, which would show which accounts received what, when, and in what amount. That offer was rejected by Plaintiff.

The Custodian was not purposefully denying access to public records. In fact, the Custodian was trying to work with Plaintiff. However, the letters between Mr. Gutman and Mr. Kean illustrate that Plaintiff was unwilling to work with Defendants, and quick to jump to litigation. This Court brings attention back to Exhibit F and Exhibit G, wherein Defendants indicated they were willing to provide Plaintiff with a legend and Plaintiff responded that she had already filed a lawsuit. This Court finds that Ms. Cross received the documents she requested, albeit partially redacted. Therefore, this Court will partially award attorney's fees and costs.

Defendants allege that Plaintiff's requests over the years to obtain documentation have amounted to an abuse of OPRA. Beginning on June 7, 2010 until the present, there have been four hundred and ninety-nine (499) requests of information under OPRA. Since December 12, 2012, Plaintiff has made eighty-eight (88) requests. Case law provides that the Courts have the inherent power to prevent abuse of OPRA. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). Inspection is subject to reasonable controls, and courts have inherent power to prevent abuse and protect the public officials involved. DeLia v. Kiernan, 119 N.J. Super. 581, 585 (App. Div. 1972).

This Court previously eluded to the contentious nature of the relationship between Plaintiff and Defendants. OPRA was enacted to promote transparency in government and Ms. Cross is a concerned citizen.

**D. Whether the Township of Wall violated Ms. Cross' Common Law Right of Access**

The common law right is determined by balancing the requestors' need for the record versus the government's need for secrecy. Michelson v. Wyatt, 379 N.J. Super. 611, 624 (App. Div. 2005). The common law interest of the record requestor can either be a personal interest or a public interest. Rosenberg v.



State Department of Law and Public Safety, 396 N.J. Super. 565, 578 (App. Div. 2007).

Plaintiff contends that her need for the requested records outweighs any Township need for secrecy. She argues that the public needs to be able to identify whether the transfers of \$23,132,534.00 in public funds were in accordance with statutory and regulatory requirements.

In the instant matter, the Court is satisfied that OPRA provides the mechanism for access to the records Plaintiff seeks. This is discussed in detail above. Therefore, it is unnecessary to analyze the same requests under the rubric of a common law right of access.

### **III. Conclusion**

Based on the aforementioned reasons, this Court finds that Plaintiff is entitled to the redacted bank account numbers displaying only the last four digits of those numbers. The Township's prior error in releasing the entire bank account number did not create a precedent wherein Plaintiff (or any other litigant) would be entitled to the entire bank account number. This Court will not sanction Defendant Lorraine Kubacz, as it finds that Defendant was willing to work with Plaintiff to provide her with the information she sought. This Court will partially award attorney's fees and costs, as Plaintiff was only partially successful in this application.

Mr. Gutman is hereby directed to prepare and submit the proper proposed form of order consistent with this Opinion pursuant to R. 4:42-1. Mr. Gutman is further directed to provide this Court an affidavit of attorney's fees and costs.

# SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF  
**LAWRENCE M. LAWSON**  
ASSIGNMENT JUDGE



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June 21, 2013

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Re: Cross v Wall, et als  
Docket No: L-1041-13

Dear Counselors;

Relative to the above captioned matter, enclosed please find the Opinion of this Court. Counsel are directed to prepare and submit the proper form of order consistent with the Opinion.

Very truly yours,

A handwritten signature in black ink, appearing to read "L. Lawson", written over a circular embossed seal.

LAWRENCE M. LAWSON, A.J.S.C.

LML:nr

enc