SUPERIOR COURT OF NEW JERSEY

HUDSON VICINAGE

CHAMBERS OF
BERNADETTE N. DE CASTRO
JUDGE

Hudson County Administration Building
595 Newark Avenue
Jersey City, New Jersey 07306

October 22, 2010

RE: Mark's Advanced Towing

Docket # L-864-10

This matter is before the court on a complaint in Lieu of a Prerogative Writ brought by plaintiff, Mark's Advanced Towing, against the City of Bayonne and the municipal clerk, Robert Sloan. Plaintiff sought certain documents under the Open Public Records Act (OPRA) from the clerk that plaintiff claims were wrongfully withheld until ordered to be turned over by this court. Plaintiff also claims that defendants acted arbitrarily and capriciously by not issuing him a towing license for 2010. Furthermore, plaintiff claims that Bayonne wrongfully issued towing licenses to two other towing companies despite the fact that their applications were untimely and incomplete.

Plaintiff, Mark's Advanced Towing is engaged in the municipal towing business and has been licensed to tow within the City of Bayonne. The City of Bayonne has an Ordinance, No. 4-29 which governs application procedures for the issuance of towing licenses within Bayonne. The Police Chief is responsible for reviewing and investigating each application and making a determination as to whether or not an application should be granted. The Police Chief may deny, suspend or revoke a license for violations of the ordinance, on the basis of the application or for good cause. . Any decision regarding the issuance of a towing license may be appealed to the Municipal Council within 14 days of the denial

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notice. Ordinance 4-29.1 (j). Copies of applications for towing licenses must be kept with the Municipal Clerk pursuant to 4-29.1(b) (l) of the Bayonne General Ordinances.

Once a company is licensed, that company must follow the renewal process set forth in Ordinance 4-29.1(f)(3) which directs all licensees to submit an application for renewal no later than December 1 of each year. The ordinance does not require any adverse action against an applicant who does not file their renewal application by December 1.

In May 2009, Mark's Advanced Towing, a towing licensee in the City of Bayonne, was accused of overcharging for their police towing services. Similar complaints received by the city followed a temporary revocation of Plaintiff's license in 2008 for charging $4,495.00 in excessive towing fees. The Police Chief requested invoices from the plaintiff and attempted to schedule an administrative hearing in order to determine whether the new allegations of overcharging were true. The hearing, which was orlginally scheduled for August 13, 2010, was adjourned because of vacation schedules. According to plaintiff, his attorney was told by the Chief of Police to contact the City on August 26, 2009 to reschedule the hearing. Plaintiff's attorney states in his certification that he then left phone messages on September 24th, October 5th and October 7th which were never returned. Plaintiff's attorney also states that he went to the Corporation Counsel's office to obtain a meeting with Charles D'Amico but that this meeting request was never responded to either. Assistant City Attorney Donna M. Russo made several requests for invoices and other documents from the plaintiff but was unsuccessful in obtaining them. The hearing was never rescheduled by the city.

On October 19, 2010, this Court ordered that the Police Chief review the documents provided by plaintiff and hold the hearing within 10 days. Thereafter, if necessary, an appeal shall be heard by the Municipal Counsel within 20 days after the hearing. This Court retained jurisdiction.

There remain two issues. The first is whether the City of Bayonne and Robert Sloan, the municipal clerk, violated the Open Public Records Act (OPRA) by failing to timely provide requested public record to plaintiff. On January 6, 2010, the Plaintiff's principal, Mark Borkowski, requested that the city provide him with "any and all applications for towing license for the City of Bayonne including

renewals for license year 2010." The City Attorney Charles M. D'Amico refused this request in a letter dated on January 8, 2010 stating it was unduly burdensome, vague and onerous but agreeing to comply if the request could be narrowed. According to the city, prior to being served with Plaintiff's complaint, the City did not receive any further correspondence from Mr. Borkowski narrowing his OPRA request. Plaintiff's counsel however, claims that he sent a letter on January 12, 2010 narrowing his request to only applications for towing license renewals for the year 2010.

Plaintiff's counsel also states that on February 5, 2010, he spoke with Attorney Donna Russo regarding Plaintiff's OPRA request. The Defendants maintain that Ms. Russo knew nothing about the OPRA request and was merely trying to obtain the necessary documents for the plaintiff's administrative hearing investigating plaintiff's violations regarding excessive pricing. The plaintiffs allege that Ms. Russo intentionally ignored their OPRA request stating that she would not turn over the OPRA documents in exchange for the documents necessary for the administrative hearing.

The Legislature's enactment of the Open Public Records Act ("OPRA"), was intended to enhance the citizenry's statutory rights to government maintained records. *See N.J.S.A.* 47:1A-1 to -13. OPRA (*N.J.S.A.*47:1A-1 to -13), declares that it is the public policy of New Jersey that, subject to certain exceptions, government records shall be readily accessible for inspection, copying, or examination by its citizens. *N.J.S.A.*47:1A-1.

Under OPRA, as under its predecessor statute, the Right to Know Law, *N.J.S.A.* 47:1A-2 to -4, repealed by *L.* 2001, c. 404, the Legislature continued "the State's longstanding public policy favoring ready access to most public records." *Serrano v. South Brunswick Tp.*, 358 N.J. Super. 352, 363 (App.Div.2003). As noted in *Serrano*, in examining case law under the prior Right to Know Law, "New Jersey has a history of commitment to public participation in government and to the corresponding need for an informed citizenry." *Ibid.* (quoting *South Jersey Pub. Co. v. New Jersey Expwy. Auth.*, 124 N.J. 478, 486-87(1991)). Thus, *N.J.S.A.* 47:1A-

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1 specifically provides that "all government records shall be subject to public access unless exempt." Furthermore, the custodian of the government record has the burden of proving that the denial of access is authorized by law. *N.J.S.A.* 47:1A-6.

OPRA's definition of "government record" demarks the outer limits of the statute's reach. Importantly, OPRA limits its definition of "government record" to:

> 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 . . . official business . . . or that has been received in the course of . . . official business . . .
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> [*N.J.S.A.* 47:1A-1.1.]

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records "readily accessible for inspection, copying, or examination," *N.J.S.A.* 47:1A-1. Even then, inspection is subject to reasonable controls, and courts have inherent power to prevent abuse and protect the public officials involved. *See DeLia v. Kiernan*, 119 N.J. Super. 581, 585 (App.Div.), *certif. denied*, 62 N.J.74 (1972). In fact, if 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. *N.J.S.A.* 47:1A-5(g). In fact, defendant argues that plaintiff rebuked its attempt to resolve the issue and instead filed the within complaint.

Under OPRA, agencies are required to disclose only "identifiable" governmental records not otherwise exempt. Wholesale requests for general information to be analyzed, collated and compiled by the responding government entity are not encompassed therein. In short, OPRA

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does not countenance open-ended searches of an agency's files. *MAG Entertainment LLC v Div. of Alcoholic Beverage Control*, 375 N.J. Super. 535, 549 (App. Div. 2005)

To qualify under OPRA then, the request must reasonably identify a record and not generally data, information or statistics. Nor does OPRA "authorize a party to make a blanket request for every document" a public agency has on file. Access to a public record under OPRA must specifically describe the document sought. *MAG supra*, 375 N.J. Super. at 546-49. OPRA operates to make identifiable government records "readily accessible for inspection, copying, or examination." *N.J.S.A.* 47:1A-1. As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting *all* of an agency's documents. OPRA does not authorize unbridled searches of an agency's property. In fact, if 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." *N.J.S.A.* 47:1A-5(g). Rather, a proper request under OPRA must specify with reasonable clarity only those documents that are desired. *Bent v. Twp. of Stafford Police Dep't*, 381 N.J. Super. 30, 38-39, (App. Div. 2005) A party cannot satisfy this requirement by simply requesting all or any of an agency's documents because OPRA does not authorize random "unbridled searches" of an agency's property. *Id.*

Defendants argue that plaintiff did not specifically identify the records sought and response to the document requests would have required research, analysis or evaluation in order to determine what specific records plaintiff was requesting. Thus, the clerk informed plaintiff to clarify his request by letter dated January 8, 2010. Plaintiff, did in fact, narrow his request by letter dated January 12, 2010, which he faxed to the defendants. Defendants claim that they did not receive this letter. Under OPRA, the public agency bears the burden of proving the denial of access is authorized by law. *N.J.S.A.* 47:1A-6.

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In *MAG Entertainment LLC v. Div. of Alcoholic Beverage Control*, 375 N.J. Super., *supra*, the court emphasized that OPRA requires agencies to disclose only "identifiable" governmental records not otherwise exempt. "Wholesale requests for general information to be analyzed, collated and compiled by the responding government entity are not encompassed therein. In short, OPRA does not contenance open-ended searches of an agency's files." Id. at 549. The Court in *MAG* determined that the trial court had failed to apply these governing principles and erred in granting *MAG*'s OPRA request, as the request failed to identify with specificity or particularity the governmental records sought.

In this instance, the government records at issue are the applications for towing licenses which are required to be kept with the Municipal Clerk of Bayonne. The city's January 8, 2010 letter which denied the plaintiff's OPRA request as overbroad and directed the plaintiff to submit a more specific request was not reasonable.

Plaintiff has presented sufficient evidence to show that the defendants were aware of plaintiff's narrowed OPRA request. Plaintiff's January 12, 2010 letter clarifying his request and Ms. Russo's conversations with plaintiff's attorney, regarding the requests lead the court to believe that the City was aware of what documents that plaintiff had requested. Since the City did not produce the OPRA documents until March 23, 2010 when it was compelled to do so by this court, it is reasonably to infer that the City intentionally violated OPRA, and that the present litigation was a catalyst for compliance by the defendant, and that the OPRA documents were willfully withheld.

Moreover, this Court finds that the City has not articulated a legitimate reason for its continued denial for plaintiff's requests. Notably, "[t]he fact that litigation was pending between the [requestor and the agency] when [the requestor] made its public records request, does not, in itself, relieve the government agency of its obligation to comply with OPRA." MAG Entertainment LLC, 375 N.J. Super. at 544-545.

OPRA allows the court to impose attorney's fees under certain circumstances. Defendant objects to plaintiff's application for attorneys fees arguing that N.J.S.A. 47:1A-6 only authorizes reasonable attorneys' fees to a "requestor who prevails in any proceeding." According to Defendant the

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plaintiff cannot be deemed to have prevailed since their request was overly broad and defendants responded in a timely fashion. However, according to case law, requestors qualify for attorney's fees under OPRA if they can show that the lawsuit was casually related to the relief obtained had a basis in law, with the burden shifting to the agency if it fails to respond within seven business days. *Mason v. City of Hoboken*, 196 N.J. 51 (2008). The Court has already determined that defendants wrongly withheld the requested documents.

Pursuant to N.J.S.A. § 47:1A-6 which governs proceedings challenging the denial of access to records, a "requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." In Warrington v. Village Supermarket, Inc., , the court held that "[a] plaintiff is considered a prevailing party 'when actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." 328 N.J. Super. 410, 420 (App. Div. 2000) (quoting Farrar v. Hobby, 506 U.S. 103). In this action, plaintiffs can be deemed prevailing parties because the defendants had to be ordered to provide the plaintiff with the documents after the within action was filed.

Defendants further maintain that the attorney's fees at hourly rates are excessive and unreasonable. Defendants point to charges for time spent regarding the production of the invoices related to the administrative hearing into the allegations of plaintiff's violations for overcharging the City. Additionally, defendants point out that council seeks compensation for attorney's fees at an hourly rate of $300. Counsel argues that nothing in the certification states that such a fee is reasonable or customary in such cases.

In *New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't of Corr.*, 185 N.J. 137 (2005), the Court reiterated that "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate," a calculation known as the lodestar. Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1939, 76 L. Ed. 2d 40, 50 (1983)). The Court further stated that if a prevailing party has obtained "limited relief in comparison to all of the relief sought,

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the [trial] court must determine whether the expenditure of counsel's time on the entire litigation was reasonable in relation to the actual relief obtained . . . and, if not, reduce the award proportionately." *N. Bergen Rex Transp., Inc. v. Trailer Leasing Co.*, 158 N.J. 561, 572 (1999) (internal quotation marks omitted) (alterations in original). In Hensley v. Eckerhart, the U.S. Supreme Court noted that "the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." 461 U.S. 424, 435 (1983). Because "the critical factor is the degree of success obtained,", "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." New Jerseyans for a Death Moratorium, 185 N.J. at 154. The Court also stated that the trial court should conduct a qualitative analysis that weighs such factors as the number of documents received versus the number of documents requested, and whether the purpose of the OPRA was vindicated by the litigation. 185 N.J. at 153.

In determining the reasonable attorney's fees, the Court held that

> The trial court should conduct a qualitative analysis that weighs such factors as the number of documents received versus the number of documents requested, and whether the purpose of the OPRA was vindicated by the litigation. Further, as we stated in *Bergen Rex*, the court also should consider the factors enumerated in *RPC* 1.5(a), which include the novelty of the issue, the time and labor required to conclude the matter, and whether the representation precluded the attorney from undertaking other employment opportunities. *Id.* at 574. If, after consideration of all the relevant factors, the court concludes that the requester has obtained a high degree of success, the requester should recover the full lodestar amount.
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> ***[Ibid.]***

As the Court made clear, in *Rendine v. Pantzer*, 141 N.J. 292, 317 (1995)

> the attorney's presentation of billable hours should be set forth in sufficient detail to permit the trial court to ascertain the manner in which the billable hours were divided among the various counsel[.]
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> . . . .
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> The trial court must them determine whether the assigned hourly rates for the participating attorneys are reasonable[.]
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> . . . .
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> That determination need not be unnecessarily complex or protracted, but the trial court should satisfy itself that the assigned hourly rates are fair, realistic, and

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accurate, or should make appropriate adjustments.

Id. At 337.

Additionally, the judge should consider whether "the total number of hours expended was far in excess of what was reasonably required to resolve the matter." *In re Estate of Reisen*, 313 N.J. Super. 623, 635 (Ch. Div. 1998).

In the case at bar, the Court cannot consider the factors set forth in *RPC 1.5(a)*, and cannot assess whether the lawyer's fee was reasonable and customary without such information presented to it. Furthermore, defendant is accurate that plaintiff would not be entitled to fees for time spent on unrelated matters regarding the production of documents for the administrative hearing concerning the overcharging claim. Thus, attorney's fees are denied.

The second issue is whether the City improperly issued licenses to two other towing companies, Logan and Tumino. The City of Bayonne licensed only two applicants towing licenses for 2010. These licenses were issued to Logan Automotive, Inc. and Tumino Towing Inc. Plaintiff argues that since Logan's Towing, Inc. and Tumino's Towing, Inc. submitted incomplete and untimely applications the City of Bayonne wrongfully issued them towing licenses.

Although, the two towing contractors filed untimely and incomplete applications, the Police Chief certified that it was in the city's best interest, especially to issue these towing licenses because the Plaintiff, the City's only other towing contractor on the city's approved list had not yet been issued a license due to their pending hearing for Ordinance violations. Nonetheless, the parties admitted that Mark's Advanced Towing is still in the rotation and continues to tow for the City of Bayonne. The City submits that the plaintiff lacks standing to challenge the city's issuance of licenses to Logan and Tumino

The Court agrees with defendants that plaintiff lacks standing to challenge the issuance of towing licenses to Logan and Tumino. Municipal actions are presumed valid and are entitled to deference by a reviewing court. Fanelli v City of Trenton, 135 N.J. 582,589 (1992). For this reason, a party challenging a municipal action must demonstrate that the action in question was arbitrary, capricious or unreasonable. Bryant v. City of Atlantic City, 309 N.J. Super. 596, 610 (App.Div. 1998).

The Municipal Ordinance in Bayonne sets out Application Procedures for obtaining licenses within the City. The Ordinance also gives the Police Chief the responsibility of investigating and reviewing such applications and determining if they are satisfactory. The Ordinance states that the police chief may consider what he "deems necessary for the protection of the public health, welfare and safety..." Ordinance 4.29.1(d)(1). While the City has developed a checklist titled "Mandatory Documents and Forms to be Submitted with Application", this checklist is not listed as an absolute requirement for approval in the ordinance. Even if the ordinance is to be read strictly to require every listed qualification for approval of an application, given the circumstances in this case the Police Chief cannot be said to have been arbitrary and capricious in approving the applications of Logan's and Tumino's Towing. Since the only other applicant for a towing license within the City of Bayonne had a pending hearing for allegations of charging excessive rates, the Police Chief determined that Logan's Towing and Tumino's Towing were qualified and that their applications should be granted to serve the public's needs. Due to the deference courts are required to give to municipal action like granting or denying an application for a towing license, a jury cannot find that the Police Chief acted arbitrarily and capriciously in issuing towing licenses to Logan's Towing and Tumino's Towing.

Additionally, even if the town improperly issued the towing licenses to Logan and Tumino, since the town can issue as many licenses as it deems necessary, the plaintiff was not injured sufficiently by this action to provide standing. The plaintiff argues by issuing licenses to Logan and Tumino, those towers have been able to tow in Bayonne "to the detriment" of plaintiff but this is not so since plaintiff has continued to be in the rotation for towing within the City during 2010.

BERNADETTE DECASTRO, J.S.C.

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