

NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

STEPHEN E. BURKE,

Plaintiff,

v.

IRENE RYAN, CLERK OF THE
BOROUGH OF MANTOLOKING,
CUSTODIAN OF RECORDS;
BOROUGH OF MANTOLOKING;
AND JOHN DOES 1-10 BEING
AGENTS, SERVANTS AND
EMPLOYEES OF THE ABOVE AS
A CONTINUING INVESTIGATION
MAY REVEAL (WHO ARE
FICTITIOUSLY NAMED BECAUSE
THEIR TRUE IDENTITIES ARE
UNKNOWN),

Defendants.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION

OCEAN COUNTY

DOCKET NO. OCN-L-1642-13

CIVIL ACTION

OPINION

Argued: July 31, 2013

Decided: September 17, 2013

Vincent J. Grasso, A.J.S.C.

Donald F. Burke, Esq. appearing on behalf of the plaintiff, Stephen E. Burke (Law Office of Donald F. Burke)

Jill L. Thiemann, Esq. appearing on behalf of the defendants Borough of Mantoloking, et al. (Law Offices of O'Malley, Surman & Michelini)

Introduction:

Plaintiff, Stephen E. Burke (Burke), brings this action under the Open Public Records Act, N.J.S.A. §§ 47:1A-1-47:1A-13 (OPRA) seeking to compel the Borough of Mantoloking

(Borough) to disclose documents relating to municipal work conducted by the Borough. At issue is whether plaintiff's OPRA requests are overly broad or constitute a request for information obtained through research, as to which OPRA is inapplicable, or constitute a request for a specific document or documents, triggering OPRA'S disclosure requirements.

Facts:

On April 15, 2013, Burke submitted an OPRA request with eleven numbered paragraphs, seeking the release of documents: (1) relating to easements between the Borough and beachfront property owners, sought by the Borough in order to assist it in beachfront replenishment projects necessary due to Hurricane Sandy (Sandy); (2) relating to the repopulation of the Borough; and (3) regarding closing and opening roads within the Borough

After various communications with the Borough, Burke received documents for all of his requests with the exception of numbers 7 and 8, which were framed as follows:

Request # 7: Correspondence and communications between officials or employees of Mantoloking and officials or employees of the State of New Jersey between October 28, 2012 and the present regarding closing and opening roads in the Borough of Mantoloking.

Request # 8: Correspondence and communications between officials or employees of Mantoloking and officials or employees of the County of Ocean between October 28, 2012 and the present regarding closing and opening roads in the Borough of Mantoloking.

The Borough responded that Request #7 and #8 are vague, overly broad, and therefore invalid pursuant to OPRA. Nevertheless, plaintiff claims that the denial based on these reasons is not valid given what plaintiff maintains is the Borough's apparent ability to retrieve and provide other records that had been requested. As a result, plaintiff instituted this action by way of verified complaint for declaratory judgment and injunctive relief on June 10, 2013. Following oral argument on the return date on July 16, 2013, the court determined in accordance with R:

4:67-5 that a plenary hearing was necessary to address certain factual issues raised by the certification of the Borough's custodian of the records, Irene H. Ryan.

The certification of Ryan which raised a factual issue more appropriately addressed through a plenary hearing was contained in paragraph 14 which states:

[A]s to the paragraphs of the OPRA requests which was still at issue, paragraphs #7 and #8, it would be impossible for me or any other municipal employee to provide responses without literally reading each and every piece of correspondence transmitted by the Borough of Mantoloking to either the County of Ocean or the State of New Jersey, in order to determine that the content of that correspondence in anyway relates to the opening and closing of roads within the municipality.

(emphasis supplied by Ryan).

At the plenary hearing conducted on July 31, 2013, Irene H. Ryan testified that she has been employed by the Borough of Mantoloking for over twenty-six (26) years and is a licensed and registered municipal clerk for the Borough. As custodian of the records, she currently maintains over 10,500 e-mails which have been retained since 2009 as well as seven (7) file cabinets containing paper files categorized either by the Borough department or sender. Ryan stated that the various department heads are trained to maintain records for OPRA compliance. The various departments include the Police Department; Fire Department; Office of Emergency Management (OEM); Construction Department; Department of Public Works; and Zoning and Land Use Department. Ryan acknowledged the obligation of the departments to maintain their records in order that the records are readily accessible as required by OPRA.

Ryan explained that as a records manager, when she receives a request for a public record she will pass it on to the department that she believes may have the information along with a request that the department respond by a certain date. In response to questioning regarding her efforts to respond to requested items in #7 and #8 of plaintiff's OPRA request, Ryan produced

her e-mail dated April 16, 2013 which forwarded plaintiff's request to the mayor, police department and the Borough's special council, Christopher Nelson, Esq. Nelson had been retained following Sandy to assist the Borough with hurricane-related issues.

In response to her April 16, 2013 e-mail, Ryan testified that the mayor responded verbally that he had no records with respect to any of the requested records which included items #7 and #8. Special counsel Nelson responded verbally as well as Police Chief Wright who both indicated they had no records regarding road openings or closings. Ryan stated she never requested documents or records from the construction or road departments regarding plaintiff's request #7 and #8. At the hearing, Ryan reaffirmed her position that the request for documents or records regarding "road openings or closings" within the Borough was vague and overly broad. She felt that there are a couple of definitions of a "road opening or closing" which left her unable to determine the nature of plaintiff's request. She acknowledged, however, that she never requested clarification of plaintiff's request after she sent out the plaintiff's request the following day to the mayor, special counsel, and the police chief. Ryan also stated that she assumed that they had conducted a search for those records as none of those parties ever requested clarification of the requested records as well.

In response to questions by the Borough attorney, Ryan pointed out that on October 28, 2012, Governor Christie had declared a state of emergency in advance of Sandy which occurred on October 29, 2012. Presently, the Borough of Mantoloking is still under a state of emergency. Following Sandy, municipal functions in the Borough Hall were abandoned and office space in adjoining Brick Township was secured on November 17, 2012 although not operational until December 15, 2012. Sandy damaged over two hundred (200) boxes of files in Borough buildings which required the Borough to engage a company to freeze-dry these records in order

to salvage same. She testified that the Borough is still in the process of refiling these records. Currently, there is archival storage in two rental facilities approximately two (2) miles away from Ryan's current office space. This requires her to travel in order to secure records from her present location in Brick Township. The records in this Brick location both predate and postdate the storm.

With respect to electronic records, Ryan testified she has over 10,500 e-mails maintained in the Borough's Microsoft Outlook Program with some e-mails still in the inbox and others in the sent box. In order to search for records she uses the search engine which will only search the sender's name and subject line. She explained that Outlook will not search the actual attachment itself. Ryan testified that there are currently twenty-one (21) Borough e-mail accounts. She has access to two (2) of those e-mail accounts but cannot search the other nineteen (19) e-mail accounts for other departments.

Prior to Sandy, Ryan stated that she was assisted in OPRA requests by a deputy municipal clerk whose time is now entirely dedicated to processing matters in the Borough's construction department which is extremely busy due to Sandy. She also stated that with respect to OPRA requests in the past, the Borough received an average of eighty-seven OPRA requests per year. However, in the post-Sandy era of 2013, it has increased to about two hundred twenty OPRA requests. According to Ryan prior to Sandy, OPRA requests were usually single topic and easy to fulfill within the seven (7) days of response time. However, she noted that the current OPRA requests are more involved due to issues related to Sandy, particularly with insurance claims.

Ryan testified that for the period of October 28, 2012 until the time of plaintiff's request for documents, the Borough grew from thirty-five (35) employees to sixty-five (65) employees in

order to address post-Sandy issues. She was unable to identify any one person who dealt with the issue of Borough road openings or closings. In terms of municipal officials, Ryan testified that there are seven elected officials within the Borough and approximately one hundred fifty other officials who serve as Board members, committee members, or commission members. Ryan reiterated that it is Borough procedure upon receipt of an OPRA request to forward to the department believed in possession of the requested information. However, she again pointed out that she is unable to directly access records from those other departments.

With respect to plaintiff's requested information under numbers 7 and 8, Ryan stressed that her search limits her to a review of the sender's name and subject line. In her view, this would require her to review every e-mail from the State or Ocean County to determine whether the subject dealt with a road opening or closing. With respect to hard copies of records, Ryan explained that she sends out a request to the departments, usually electronically, asking the departments to respond to the request. Ryan did acknowledge, however, that there is no formal or written records retention policy within the Borough of Mantoloking.

In defense of the position that requests #7 and #8 were vague and overly broad, Ryan testified as follows during the plenary hearing:

Q. With regard to Mr. Burke's OPRA request paragraph 7 and 8 –

A. Yes.

Q. -- and the subject matter that's inquired about, the language reads, "Regarding closing and opening of roads in the Borough of Mantoloking," I believe your earlier testimony was that those words or that clause could have several meanings.

A. Yes. That's correct.

Q. Explain that to me. Tell me what some of those various meanings could be.

MR. BURKE: Objection, Your Honor, because that wasn't the basis for the denial.

THE COURT: Well, I think she testified in response to your questions that the term opening and closing of roads, in her opinion, had several definitions.

I think that was your response.

MR. BURKE: I'll withdraw my objection.

THE COURT: And I assume that was the basis from which Ms. Ryan said that was vague. So, I think it's a proper question.

If you understand the question, you can answer it, Ms. Ryan. You indicated there were several definitions in your mind as to what opening and closing of roads meant.

THE WITNESS: Yes.

THE COURT: All right. And I'm not putting words in your mouth and I'm not trying this case, but I assume that was one of the bases on which you responded it's vague.

THE WITNESS: Correct.

THE COURT: So, could you - - what did you mean when you said there are several definitions that you view in terms of opening and closing of roads?

THE WITNESS: There - - are you asking me what those definitions are?

THE COURT: Why is that term - - why is that term vague to you, I guess is really the question. Why is a road opening and a road closing, why is that vague from your perspective as a custodian?

THE WITNESS: Okay. It's vague because Mr. Burke did not indicate whether he was asking me for the permits - - the permit applications for a road opening, which could be an engineer's permit to actually open a road to excavation.

The term closing of a road could also be an engineer's - - is also an engineering term for when the inspection of the excavation is completed and the road is now closed. The other - - assumption is that if there is an order to open and close a road. However, Mr. Burke did not indicate if a road was going to be open to traffic, to people, to emergency personnel only, I - - helicopters. What was the road being opened to or for.

And, lastly, was the naming of who wrote this communication as far as officials and employees, there was no indications of any particular persons. It was a category of persons.

MS. THIEMANN: Judge, I have nothing further.

THE COURT: All right. Anything on redirect, Mr. Burke?

MR. BURKE: Yes, Your Honor.

THE COURT: Go ahead, please.

REDIRECT EXAMINATION BY MR. BURKE:

Q. And, by the way, with regard to 7 and 8, you never asked the requester, the plaintiff, to clarify what was meant by opening and closing of the roadways, did you?

A. It is my understanding that I have to take what is on the face of the - - of the OPRA request. And it is the applicant's obligation to clearly provide the description of or identification of the document.

Q. Is it your understanding that the - - as custodian of record, you have no obligation at all to seek the clarification of something you feel is not clear?

A. It is my - - with my attorney's advice, I do not have to negotiate, in other words, what the meaning is or to further ask for more information.

Q. Well, in this case there were - - in your mind, there were the two possibilities; either opening or closing of the actual pavement or opening or closing of the roadway to traffic, correct?

A. Or something other than traffic.

Q. But those are - - those are two possible interpretations in your mind, right?

A. Right.

OPEN PUBLIC RECORDS ACT:

New Jersey's Open Public Records Act (OPRA) manifests the State's public policy favoring transparency in government and disclosure of government documents. See N.J.S.A. § 47:1A-1 (“[G]overnment 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 . . . shall be construed in favor of the public's right of access . . .”). Pursuant to N.J.S.A. § 47:1A-1.1, if a document is a government record, it must be disclosed unless it is excluded from disclosure by other statutory provisions or executive orders, N.J.S.A. § 47:1A-9(a), or exempt based on a privilege or confidentiality established or recognized by the State Constitution, statute, court rule, judicial decision, or OPRA itself.

OPRA defines a “government record” as:

[A]ny 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 . . . or that has been received in the course of his or its official business . . .

N.J.S.A. § 47:1A-1.1.

While the statute defines “government record” broadly, it excludes twenty-one (21) specific categories of information. N.J.S.A. § 47:1A-1.1. Thus, before determining whether the information should be disclosed, it must be determined: (1) whether it is a government record; and (2) whether it falls under any of the exemptions to disclosure found in the statute. With regard to these questions, the law provides for a presumption of disclosure: “The public agency shall have the burden of proving that the denial of access is authorized by law.” N.J.S.A. § 47:1A-6. Moreover, “N.J.S.A. § 47:1A-5(g) generally places the burden upon the custodian of

a public record to state the ‘specific basis’ for the denial of access” Gannett N. J. Partners v. Middlesex, 379 N.J. Super. 205, 215 (App. Div. 2005).

While OPRA is intended to provide broad access to government documents, it does not contemplate “wholesale requests for general information,” MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005). “OPRA is not intended as a research tool litigants may use to force the government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records ‘readily accessible for inspection, copying, or examination.’” Id. at 546 (emphasis added). As such, in making an OPRA request, the requestor must specifically describe the documents being sought. See Gannett, supra, 379 N.J. Super. at 212. A proper request under OPRA must identify with reasonable clarity those documents that are desired. See Bent v. Stafford Twp. Police Dept’s, 381 N.J. Super. 30, 37 (App. Div. 2005). The requirement of “reasonable clarity” must be assessed on a case-by-case basis. See MAG Entm’t, supra, 375 N.J. Super. at 546.

For example, in Bent, supra, 381 N.J. Super. 30, the plaintiff requested public records which consisted of five subparts and sought documents comprising the entire file of the criminal investigation of which he was the subject. Similarly, in Spectraserv, Inc. v. Middlesex County Utilities Authority, 416 N.J. Super. 565 (App. Div. 2010), sixteen of the plaintiff’s requests sought “any and all” documents from the defendants. Of those, several requests failed to specify a specific document by date, title, and author and instead sought records that “reflect,” “explain,” “detail,” or “demonstrate” the “rationale,” “decision,” or “purpose” of various chemical processes. Id. at 570. Moreover, in N.J. Builders Ass’n v. N.J. Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), the plaintiff submitted thirty-eight requests describing the documents and data sought as those “used” or “considered” by COAH or “supporting,”

“demonstrating,” “justifying,” or “verifying” various determinations relevant to COAH’s determinations about fair-share housing obligations.

In each of the above-cited cases, the Appellate Division affirmed the denial of requests because they were overly broad and improper under OPRA. Bent, *supra*, 381 N.J. Super. at 37; Spectraserv, *supra*, 416 N.J. Super. 565; N.J. Builders Ass’n, *supra*, 390 N.J. Super. 166. To the extent plaintiff cannot identify the records sought with reasonable specificity, an OPRA request is the inappropriate mechanism to obtain the information sought.

In contrast, in Burnett v. Gloucester, 415 N.J. Super. 506 (App. Div. 2010), an attorney brought an action under OPRA against the County to compel production of any and all settlements, releases or similar documents entered into, approved or accepted over an approximate two (2) year period preceding the request. The Appellate Division reversed the trial court’s grant of summary judgment for the County, and held that the attorney’s request for “settlement agreements” without specification of their subject matter constituted a specific document, rather than an improper request for information obtained through research. The Appellate Division explained that their retrieval required a search, not research, triggering the compliance requirements of OPRA. Similarly, the Government Records Council found that the Township of Union violated OPRA by failing to fulfill a request for “[a]ll motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005.” Donato v. Union, GRC 2005-182, interim order (January 31, 2007).¹

Pursuant to [MAG], the custodian is obligated to *search* her files to *find* the identifiable government records listed in the Complainant’s OPRA request. . . . However, the Custodian is not required to *research* her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. The word *search* is defined as “to go or look

¹ <http://www.state.nj.us/grc/decisions/pdf/Donato%20v.%20Union,%202005-182>.

through carefully in order to find something missing or lost.[“] The word *research*, on the other hand, means “a close and careful study to find new facts or information.”

Id.

More recently, the issue of the overbreadth of an OPRA request was addressed in Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012). That case involved a request under OPRA to the Office of the Governor, seeking government records regarding E-Z Pass Benefits afforded to retirees of the Port Authority, including all correspondence between the Office of the Governor and the Port Authority. The custodian of the records for the Governor’s Office denied the request as overbroad. The Superior Court, Law Division dismissed the requestor’s complaint and requestor appealed. The Appellate Division reversed the trial court and determined that the request was “confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information, namely E-Z Pass Benefits provided to Port Authority retirees.” Id. at 176.

OPRA requests can often present the vexing issue of whether the request requires a search or research. Here, the Borough’s custodian stated, “it would be impossible for me or any other municipal employee to provide responses without literally reading each and every correspondence transmitted by the Borough of Mantoloking to either the County of Ocean or the State of New Jersey, in order to determine if the content of that correspondence in any way relates to the opening or closing of roads within the municipality.” The Borough maintains that it would be entirely too burdensome to provide Burke with the documents requested as it would require reading all correspondence to ascertain the subject matter, author and recipient.

The court finds plaintiff’s requests numbered 7 and 8 more analogous to those requested in the Burnett and Brandes cases. The subject of road closings and openings within the Borough

is sufficiently specific. When the Borough's custodian of the records testified that when she forwarded plaintiff's request to the mayor, police chief and special counsel, there was no request for clarification from any of these parties. Moreover, they responded that they possessed no such records. As in Burnett, the request was limited to identifiable governmental records between one governmental entity and another rather than for general information. Although the custodian of the records testified she could only access two of the Borough's twenty-one e-mail accounts, the custodian could reasonably request those other nineteen e-mail accounts to search on the subject of "road closings and openings."

Ryan testified that the Borough's Outlook program does permit a search of the sender and subject line. It seems reasonable to this court that other departments such as Fire Department, Office of Emergency Management, Construction Department and Department of Public Works could conceivably have records regarding road closings and openings for the time period requested. According to Ryan, the Outlook program would permit her to search for e-mails on the basis of who they were from as well as the subject or category of the e-mail.

The court finds that the custodian's search for the requested records did not go far enough with the request limited to the mayor, police chief and special counsel. If not already in place, the task of the custodian of the records would be well served by electronically creating a "group contact" list for all of the Borough's twenty-one e-mail accounts. The chair or head of the various Borough's departments, committees and/or commissions should be on the "group contact" list. In this manner, the custodian can reach out to all of the departments, committees and commissions and inquire whether they possess the requested government record by generating one e-mail request. Moreover, the Borough would benefit from the adoption of a

written records retention policy particularly in light of the significant increase in OPRA request due to post-Sandy matters.

The court finds that plaintiff's requested items 7 and 8 are to be returned to the custodian of the records to further conduct a search for written and electronically maintained records by each head or chairperson for the Borough's several departments, committees and commissions. The custodian should further inquire of the seven elected Borough officials regarding items 7 and 8 as well. The search would be undertaken and concluded within seven days of the receipt by the custodian of the records of the within order.

Finally, due to Sandy, reasonable extensions, if needed, should be granted to the Borough in order to complete a search for hard or paper documents which were relocated to storage facilities in adjoining Brick Township. The application for attorney's fees and costs is reserved and will abide the outcome of the continued search. Mr. Burke is to prepare an order that comports the within ruling.