PREPARED BY THE COURT:

Tucker Kelley,	**SUPERIOR COURT OF NEW JERSEY**
	LAW DIVISION
	MORRIS COUNTY
Plaintiff,	
v.	**DOCKET NO. MRS-L-524-14**
Borough of Riverdale and Carol Talerico in her official capacity As Municipal Clerk and Records Custodian of the Borough of Riverdale	**CIVIL ACTION**
Defendants.	**ORDER**

FILED

APR 11 2014

THOMAS L. WEISENBECK, A.J.S.C.
JUDGE'S CHAMBERS
MORRIS COUNTY COURTHOUSE

THIS MATTER having been opened to the Court by way of Verified Complaint and Order to Show Cause filed by Walter M. Luers, Esq., counsel for plaintiff Tucker Kelley, with opposition filed by Robert H. Oostdyk, Jr., Esq., counsel for defendants Borough of Riverdale and Carol Talerico, and the Court having read and considered the pleadings filed and conducted oral argument, and for the reasons set forth in the attached Statement of Reasons and for good cause shown;

IT IS ON THIS 11 DAY OF APRIL 2014, ORDERED as follows:

1. Plaintiff's request for legal fees due to defendant's failure to accurately respond to his OPRA request is granted in part; and
2. Plaintiff's counsel shall submit his certification of services within thirty (30) days hereof, together with an appropriate form of Order.

THOMAS L. WEISENBECK, A.J.S.C.

Dated: April 11, 2014

Kelley v. Borough of Riverdale

Docket No. MRS-L-524-14

STATEMENT OF REASONS

I. BACKGROUND AND PROCEDURAL HISTORY

Plaintiff Tucker Kelley ("Kelley") is a resident of Rockaway, New Jersey and receives mail at P.O. Box 291, Hibernia, New Jersey.

Defendant Borough of Riverdale ("Riverdale") is a governmental agency with a business address at 91 Newark-Pompton Turnpike, Riverdale, New Jersey. Defendant Carol J. Talerico ("Talerico") is Riverdale's Municipal Clerk and Records Custodian. As a public agency, Riverdale is subject to the provisions of the Open Public Records Act, N.J.S.A. 47:1A-1 et. seq. ("OPRA").

On June 20, 2013, Kelley filed a municipal court complaint against non-party Philip Tobaygo for Mr. Tobaygo's alleged maintenance of unregistered and abandoned vehicles on his property in Rockaway. Verified Complaint ¶7. The Court Administrator found that there was probable cause, and the matter was transferred to Riverdale Municipal Court. Ibid. The matter was dismissed. Ibid. Plaintiff submitted the matter of the dismissal to the Prosecutor's Office for investigation and began submitting OPRA requests with the intention of finding out how and why the matter was dismissed. Ibid.

On January 9, 2014, Mr. Kelley emailed Ms. Talerico and Linda Forbes requesting "the complete audio recording for the matter State v. Philip Tobaygo on September 17, 2013." Certification of Carol J. Talerico, Exh. B. Ms. Talerico and Ms. Forbes brought a copy of the email to Riverdale's Municipal Court Administrator, Ms. Kathleen Latta, because such a recording is a municipal court record, which the Municipal Court Administrator, and not the Municipal Clerk and Records Custodian, controls. Id. at ¶10. By email dated January 9, 2014, Ms. Latta informed Mr. Kelley that "the above referenced case was a transfer from Rockaway Township. Upon disposition, all records were returned to Rockaway. Please contact Rockaway Township Court Office." Id. at Exh. A. By email dated January 10, 2014, Mr. Kelley responded to Ms. Latta's email, on which he copied both Ms. Talerico and Ms. Forbes, stating that he did not feel comfortable communicating with Ms. Latta, because of his alleged mistrust towards her stemming from her statement to detectives involved in the matter, and asked that Ms. Talerico

and Ms. Forbes serve as the conduits through which all future communication between Mr. Kelley and Ms. Latta travel. Ibid.

Ms. Talerico certified that

> I was concerned about how to respond to his second request because the response, together with the e-mail he sent to Ms. Latta the same day which he copied to me, seemed to evidence some hostility involving the Court. I requested the advice of the Borough Attorney who drafted a written response to me and gave me permission to forward his response to the requestor in the hope that it would help him understand why I could not assist him.

Id. at ¶12. On January 13, 2014, Ms. Talerico forwarded to Mr. Kelley the Borough Attorney's email explaining that Ms. Talerico is not the records custodian for records maintained by the municipal court and that those records are not subject to OPRA. Id. at Exh. D.

On January 14, 2014, Kelley emailed three (3) OPRA requests in which he asked for copies of (1) emails between Talerico and Riverdale Court Administrator Kathy Latta referencing Philip Tobaygo and Kelley from January 9, 2014 to January 14, 2014; (2) emails exchanged by Riverdale Deputy Clerk Forbes and Kathy Latta referencing Mr. Tobaygo and Kelley from January 9, 2014 to January 14, 2014; and (3) emails between Talerico and Ms. Forbes referencing Mr. Tobaygo and Kelley from January 9, 2014 to January 14, 2014. Id. at ¶8.[1]

By email dated January 15, 2014, Ms. Talerico informed Mr. Kelley that he requested "court records that I cannot and do not have authorization to send to you." Certification of Carol J. Talerico, at Exh. E.

Kelley claims he requested reconsideration of that determination on January 28, 2014, which defendants deny receiving. Verified Complaint ¶10.

On March 4, 2014, plaintiff filed a Verified Complaint and Order to Show Cause alleging violations of the Open Public Records Act, N.J.S.A. 47:1A1, *et seq.* ("OPRA") seeking an Order (1) requiring defendants to provide copies of emails between: (a) Talerico and Ms. Latta referencing Mr. Toabygo and Kelley from January 9, 2014 to January 14, 2014; (b) emails between Riverdale Deputy Clerk Forbes and Kathy Latta referencing Mr. Tobaygo and Kelley from January 9, 2014 to January 14, 2014; and, (c) emails between Talerico and Ms. Forbes referencing Mr. Tobaygo and Kelley from January 9, 2014 to January 14, 2014 (2) awarding

[1] In their Answer dated March 14, 2014, defendants deny the allegations in plaintff's Complaint at ¶8, arguing instead that there were four total emails and that they were sent on January 15, 2014.

plaintiff cost and reasonable attorneys' fees; and (3) such other relief as the Court deems appropriate and just.

On March 18, 2014, defendants filed opposition. Defendants reply by arguing that the records requested do not, in fact, exist. Defendants' Brief at pg. 1. Defendants assert that, "as there are no documents to be 'disclosed,' this matter should be dismissed." Id. Moreover, defendants submit that the Court's review of defendants' denial of plaintiff's OPRA request requires context, to wit, that the emails exchanged between Ms. Talerico and Mr. Kelley on January 9, 2014 and January 13, 2014 made Ms. Talerico wary to involve herself in Mr. Kelley's alleged dispute with Ms. Latta. Defendants explain that Talerico viewed Kelley's emails as "yet another attempt by Mr. Kelley to have her [Talerico] get involved in the Municipal Court matter. She was very focused on avoiding involvement in something in which she clearly now understood was not within her jurisdiction. " Df. Br. at pg. 2. Defendants submit that Talerico was so focused on not over-stepping her bounds that she neglected to even search for the requested emails, which do not exist. Id.; Talerico Cert. ¶¶ 3, 5, 6, 14. Defendants claim that "[h]ad she focused on this aspect of the requests, she would have told him that no such e-mails exist." Df. Br. 2. Ultimately, defendants submit that "[t]here are no emails concerning his [Kelley's] matter between the Clerk, her deputy, and the Court Administrator between January 9 and January 14, 2014, [and thus] the Order to Show Cause in this matter should be denied and the accompanying complaint dismissed." Id. at pg. 2.

By letter dated March 21, 2013, plaintiff filed a reply brief.

The Court heard oral argument on April 2, 2014.

II. STANDARD OF REVIEW

N.J.S.A. 47:1A-1, "Legislative findings, declarations," reads:

> The Legislature finds and declares it to be the public policy of this State 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, and any limitations on the right of access accorded by P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, shall be construed in favor of the public's right of access;
>
> all government records shall be subject to public access unless exempt from such access by: P.L.1963, c.73 (C.47:1A-1 et seq.) as

> amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, federal regulation, or federal order;
>
> a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy; and nothing contained in P.L.1963, c.73 (C.47:1A-1 et seq.), as amended and supplemented, shall be construed as affecting in any way the common law right of access to any record, including but not limited to criminal investigatory records of a law enforcement agency.

N.J.S.A. 47:1A-5 reads: "[t]he custodian of a government record shall permit the record to be inspected examined, and copied by any person during regular business hours." N.J.S.A. 47:1A-5(a). Subsection (b) addresses the fees prescribed for copying government records. Subsection (f) states

> [t]he custodian of a public agency shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency. The form shall provide space for the name, address, and phone number of the requestor and a brief description of the government record sought. The form shall include space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged.

In pertinent part, subsection (g) reads: "[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof."

OPRA directs 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, and any limitations on the right of access accorded by [OPRA] as amended and supplemented, shall be construed in favor of the public's right of access." N.J.S.A. 47:1A-1. "The purpose behind the Legislature's enactment of OPRA was 'to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in

a secluded process.'" Kovalcik v. Somerset County Prosecutor's Office, 206 N.J. 581, 588 (2011)(quoting Mason v. City of Hoboken, 196 N.J. 51, 64 (2008)).

In a proceeding to challenge the denial of an OPRA request, the applicant may appeal the decision by filing an action with the Superior Court or filing a complaint with the Government Records Council ("GRC"). N.J.S.A. 47:1A-6. The custodian of the records has the burden of proof to show that denial was "authorized by law." Id. A decision of the [GRC] shall not have value as a precedent for any case initiated in Superior Court pursuant to [N.J.S.A. 47:1A-6]. N.J.S.A. 47:1A-7. Should the applicant prevail in the Superior Court proceeding they shall be entitled to a reasonable attorney's fee. Id.

OPRA defines a "government record" 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.]

In other words, in order for a document to qualify as a government record, the applicant must demonstrate, on a threshold basis, that the public employee or entity made, maintained, kept, or received the requested document in the course of his or its official business. If not, the Court will affirm the denial of the request.

Furthermore, while "government records" under OPRA are broadly defined and made publicly accessible, Kovalcik, supra, 206 N.J. at 588, the "public's right of access [is] not absolute." Educ. Law Ctr. V. N.J. Dep't. of Educ., 198 N.J. 274, 284 (2009). To that extent, OPRA exempts from disclosure several categories of documents and information. See, e.g., N.J.S.A. 47:1A-1.1 (excluding certain categories of documents and information from disclosure; N.J.S.A. 47:1A-1.2 (limiting access to biotechnology trade secrets); N.J.S.A. 47:1A-3(a) (limiting access to records of ongoing investigations); N.J.S.A. 47:1A-10 (limiting access to personnel records).

III. DISCUSSION

Plaintiff claims that the emails he requested are subject to OPRA because "emails sent or received by municipal officials regarding public business are public records." Plaintiff's Brief at pgs. 3-4. Plaintiff argues that his OPRA requests were valid because he mentioned a sender, recipient, date range, and subject matter. Id.

When arguing that the documents should be disclosed pursuant to the common law right of access, plaintiff argues that defendants failed to articulate any interest in non-disclosure, whereas plaintiff's "interest in disclosure is better understanding what happened to his municipal court complaint when it was dismissed on what was supposed to be a first appearance in Riverdale Municipal Court." Pl. Br. 6.

Finally, plaintiff argues that, should the Court order defendants' production of the documents, plaintiff is entitled to reasonable attorneys' fees and costs pursuant to N.J.S.A. 47:1A-6 and Mason v. Hoboken, 196 N.J. 51, 79 (2008). Pl. Br. at 6.

In reply, plaintiff reargues that emails between government employees are government records, as contemplated by OPRA. Plaintiff's Reply Brief at pgs. 1-2. While plaintiff does not dispute that the emails do not exist, he submits that defendants negligently failed to read plaintiff's OPRA requests carefully, and, "when given an opportunity to reconsider their decision, they ignored Plaintiff." Id. at pg. 2. Plaintiff asserts that defendants' response to plaintiff's OPRA request was not authorized by OPRA and that, had Talerico responded properly by stating that no such records exist, this "matter would not be before the Court." Ibid.

Finally, plaintiff argues that "with respect to fee-shifting, the Court should find that the Plaintiff has prevailed because we have achieved a change in defendants' position." Id. at pg. 4. Furthermore, plaintiff submits that "the burden of paying for fees should be on the Defendants, because their initial response was not proper ... and a proper initial response would have obviated the need for this lawsuit." Ibid.

IV. ANALYSIS

The parties agree that the records requested do not exist. Accordingly, the Court need not determine whether their disclosure must be compelled.

While plaintiff fails to cite any authority to support its argument that OPRA requires an award of fees and costs in favor of a plaintiff where it is discovered that, after a negligently misstated response that the custodian lacked access to such records, the requested documents

were determined never to exist, the Court concludes that plaintiff is entitled to some recovery, because he is a prevailing party given that his litigation was "the catalyst" for the relief ultimately achieved, to wit, an accurate response from the records custodian. See Mason v. City of Hoboken, 196 N.J. 51, 76 (2008).

Here, plaintiff achieved prevailing party status when the Borough ultimately responded in a substantive manner that the municipal records did not exist. First, plaintiff filed an OPRA request for records not exempt from disclosure. Second, defendants technically violated OPRA by providing, albeit negligently, an incorrect response, thereby requiring plaintiff to file his complaint. Had defendants initially advised Mr. Kelley that no such responsive emails exist, then presumably Mr. Kelley would not have initiated suit. Instead, defendants negligently stated that the requested records were not in the custodian's possession or control. In determining the amount of reasonable attorney's fees to which plaintiff is entitled, the Court is required to 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." NJDPM, supra, 185 N.J. at 155. Plaintiff ultimately received an accurate response to the OPRA request that was the subject matter of the litigation. While defendants were negligent in their pre-litigation OPRA response, it is noteworthy that the Township's Answer and responding certifications immediately apprised plaintiff of the error and disclosed that no such records exist. At oral argument, plaintiff's counsel conceded that he did not engage in any fee settlement negotiations prior to filing his reply papers or otherwise pursue his claim for fees.

Accordingly, the Court declines to award attorney's fees associated with plaintiff's efforts after receipt of defendant's pleadings, as it concludes that the purpose of OPRA—to provide New Jersey citizens with ready access to government records—is not vindicated by that aspect of the litigation.[2] Furthermore, the Court is satisfied that its partial award of fees and costs does not defeat the underlying purpose for fee-shifting statutes such as OPRA, which is "to ensure 'that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in cases involving statutory rights . . . and to ensure justice for all citizens.'" NJDPM, supra, 185 N.J. at 153 (citing Coleman v. Fiore Bros., 113 N.J. 594, 598 (1989)). To this extent, the Court finds that it would be inequitable to grant fees beyond those

[2] See, e.g., Burnett v. County of Bergen, 198 N.J. 408, 421-30 (2009).

awarded, as such fees would effectively penalize the Borough for its forthrightness in immediately revealing its error. Accordingly, plaintiff is entitled to attorney's fees and costs up through his counsel's review of defendants' answering pleadings, as well as attorney's fees and costs associated with the preparation of plaintiff's fee certification. Plaintiff's counsel shall submit his certification of services within thirty (30) days hereof, together with an appropriate form of Order.

V. CONCLUSION

For the aforementioned reasons, the Court grants in part plaintiff's request for an award of fees and costs.