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Yaakov Wenger,

Plaintiff,

v.

Lakewood Fire District No. 1 and Juan
Ortiz in his official capacity as
Commission Chairman and Records
Custodian,

Defendants.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION

OCEAN COUNTY

DOCKET NO. OCN-L-2466-13

CIVIL ACTION

OPINION

Argued: October 29, 2014

Decided: October 30, 2014

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

Walter M. Luers appearing on behalf of the plaintiff, Yaakov Wenger (Law Offices of Walter M. Luers, LLC)

Norman D. Smith, Esq. appearing on behalf of the defendants Lakewood Fire District No. 1 and Juan Ortiz in his official capacity as Commission Chairman and Records Custodian (Law Office of Norman Douglas Smith)

Summary

The matter before the court is a R. 4:46-2(c) motion for summary judgment filed by defendants Lakewood Fire District No. 1 and Juan Ortiz, the Commission Chairman and Records Custodian (collectively “Fire District”), seeking to dismiss plaintiff Yaakov Wenger’s complaint that the Fire District violated the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13 and the common law right of access for copies of executive session meeting minutes, certain email communications, and copies of other records.

Background

The following facts are not in dispute. On July 8, 2013, Walter M. Luers, the attorney for plaintiff, Yaakov Wenger, filed an OPRA request to defendants, Lakewood Fire District No. 1 and Juan Ortiz, the Commission Chairman and Records Custodian. In the request, plaintiff asked for:

- (1) Copies of the meeting minutes of all closed meetings of the governing body of the Lakewood Fire Department that were held in 2013;
- (2) Copies of written communication, including correspondence and emails, among or between the Fire Commissioners regarding Ms. Dowd since her retirement;
- (3) Copies of all documents that were provided in response to the OPRA request of Richard J. Shaklee in his March 8, 2013 OPRA request to Michael Dennis.

On July 17, 2013, the Fire District served Wenger's attorney, Walter M. Luers, the following records:

- (1) Copies of Lakewood Fire District 1 Commission Meeting Minutes both open and closed sessions that were held in 2013;
- (2) Copies of email correspondence between commissioners and OPRA requesters pertaining to Ms. Dowd retirement;
- (3) Copy of Agreement between The Commissioners of Fire District No. 1 in the Township of Lakewood, State of New Jersey and Megan C. Dowd, Business Manager for period January 1, 2010 through December 31, 2016;
- (4) Documents that were provided to OPRA request of Richard J. Shaklee were Minutes of Board Meetings from January 2013 through March 2013 and a copy of Ms. Dowd's contract.

In support of its motion for summary judgment, the Fire District provides the court a joint certification from Juan Ortiz and Ray Blaszczak. According to their joint certification, Juan Ortiz is the chairman of the Lakewood Fire District No. 1 Board of Fire Commissioners and Ray Blaszczak is the district administrator of the Lakewood Fire District No. 1. In their joint certification, Ortiz and Blaszczak “represent to the Court that *to the best of their knowledge*, every document requested by the Plaintiff that was in the possession of the Fire District was forwarded with the July 17, 2013 letter.”

Findings

Summary judgment obviates futile trials by allowing courts to pierce the pleadings to see whether a genuine dispute exists. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75–76 (1954) (citations omitted). However, it must not deprive deserving litigants of their right to a trial. Judson, supra, 17 N.J. at 77. Accordingly, the Court may grant summary judgment only if: (1) no genuine issue of material fact exists; and (2) the movant is entitled to judgment as a matter of law. R. 4:46-2(c). When determining whether a genuine issue of material fact exists, the court must view the evidence in the light most favorable to the non-movant. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523–24 (1995). If, using the same evidentiary standard that would apply at trial, the court finds the evidence one-sided, it may grant summary judgment if that party is entitled to judgment as a matter of law. Brill, supra, 142 N.J. at 536.

In the present motion, the Fire District claims that its response on July 17, 2013 constituted full compliance of plaintiff’s OPRA request. On the other hand, plaintiff contends that the Fire District’s joint certification is deficient because it fails to discuss the scope of the search undertaken and merely states “to the best of their knowledge, every document requested by the Plaintiff that was in the possession of the Fire District was forwarded with the July 17,

2013 letter.” Moreover, plaintiff, in his certification, describes certain documents that the Fire District has not produced to him:

7. For example, at one of the Fire District’s meetings, a document was passed around and shown to the Fire Commissioners of the District regarding a payout that Dowd had received. This document was not produced by the District.

8. In addition, on or about March 8, 2013 Attorney Richard J. Shaklee sent a letter to the Fire District, copying the District’s attorney at the time, Richard Braslow, Esq., and he enclosed an OPRA request for documents, including all emails regarding Dowd since her retirement. This OPRA request and all of the documents produced in response to it were not produced to us.

Custodian’s Responsibility

Under OPRA, “[a] *custodian* shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium.” N.J.S.A. 47:1A-5(d) (emphasis added). “Custodian of a government record” or “custodian” is the officer “officially designated by formal action of that agency’s director or governing body.” N.J.S.A. 47:1A-1.1. “If 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.” N.J.S.A. 47:1A-5(g). The Appellate Division explained:

[T]he custodian is obligated to *search* her [or his] files to *find* the identifiable government records listed in the Complainant’s OPRA request However, the Custodian is not required to research her [or his] 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 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.”

[Burnett v. County of Gloucester, 415 N.J. Super. 506, 515 (App. Div. 2010) (quoting Donato v. Twp. of Union, GRC No. 2005-182, interim order (Jan. 31, 2007)).]

Here, the Fire District provides a joint certification of Juan Ortiz and Ray Blaszak. The joint certification, however, fails to identify who is the custodian of records pursuant to N.J.S.A. 47:1A-1.1. Moreover, in their joint certification, Juan Ortiz and Ray Blaszak “represent to the Court that *to the best of their knowledge*, every document requested by the Plaintiff that was in the possession of the Fire District was forwarded with the July 17, 2013 letter.” The court finds that the certification of the best knowledge of Commissioners Ortiz and Blaszak does not constitute a custodian’s certification of the specific basis of his or her response pursuant to N.J.S.A. 47:1A-5(g) nor complies with the “search” definition in the Burnett case. At oral argument, the attorney for the Fire District represented there were some extenuating circumstances which likely explained the fact that there was no formally designated custodian of records for the Fire District. The attorney for the Fire District at the time of plaintiff’s request became ill and Commissioners Ortiz and Blaszak were relatively new members. Plaintiff has not taken issue with what the court viewed as a good faith effort by the Fire District to comply with the requests.

Purpose of OPRA

“The purpose of OPRA ‘is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.’” Times of Trenton Publ’g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005) (quoting Asbury Park Press v. Ocean County Prosecutor’s Office, 374 N.J. Super. 312, 329 (Law Div. 2004)); O’Shea v. Twp. of West Milford, 410 N.J. Super. 371, 379 (App. Div. 2009). Thus, 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 . . . shall be construed in favor of the public's right of access[.]

[N.J.S.A. 47:1A-1.]

To serve this policy and purpose, OPRA provides that “[t]he public agency shall have the burden of proving that the denial of access is authorized by law.” N.J.S.A. 47:1A-6. As such, the agency “must produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality. Absent such a showing, a citizen’s right of access is unfettered.” Courier News v. Hunterdon County Prosecutor’s Office, 358 N.J. Super. 373, 383 (App. Div. 2003).

Here, in plaintiff’s July 8, 2013 OPRA request, the request No. 2 is for “[c]opies of written communication, including correspondence and emails, among or between the Fire Commissioners regarding Ms. Dowd since her retirement.” This request fails to specify particular documents by date and author. Instead, it seeks all “written communication . . . among or between the Fire Commissioners regarding Ms. Dowd since her retirement.” Arguably, the documents requested are not readily identifiable. Nevertheless, the designated custodian of records will undertake this request anew in conformance with the purpose and requirements of OPRA. At oral argument, the parties stipulated that requests one and three were satisfied and not at issue.

Under the circumstances presented, the court denies the grant of summary judgment, without prejudice. The matter is remanded to the Fire District with the directive that it designate a custodian of records pursuant to N.J.S.A. 47:1A-1.1 at their next regularly scheduled meeting. The newly designated custodian of records shall undertake plaintiff’s request No. 2 as set forth by plaintiff’s letter of July 8, 2013 and provide a response in accordance with the requirements of OPRA. Mr. Luers will prepare an Order that comports with this ruling.