

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
CAMILLE M. KENNY
JUDGE



COURTHOUSE
ELIZABETH, NEW JERSEY
07207-6001

LETTER OPINION

October 1, 2015

UNION COUNTY COUNSEL
RECEIVED

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ADMINISTRATION BUILDING
ELIZABETH, NJ

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Brian P. Trelease, Esq.
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Elizabethtown Plaza
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Re: Renna v. County of Union and Marlena Russo
Docket No.: UNN-L-3253-14

Dear Counsel:

This matter comes before the Court on the application of Plaintiff Tina Renna, President of the Union County Watchdog Association, who maintains a website and blog relating to political and government matters in Union County and its municipalities, for a access to the County's Emergency Operations Plan under the Open Public Records Act and Common Law Right of Access. Denied access, Plaintiff sued the County and an employee, records custodian Marlena Russo.

The County filed an Answer, and in opposition to the Order to Show Cause, filed a brief Affidavit from Christopher Scaturro, Director of the Division of Emergency Services for the County's Department of Public Works. Mr. Scaturro asserted that the Plan, consisting of 16 separate "Annexes" is not "designed to inform the citizens of the county on what is expected of them during an emergency situation," (Scaturro, ¶ 7) but is rather an "internal guide" to instruct law enforcement and emergency responders in an

“emergency situation.” (*id.*, ¶ 8). Mr. Scaturro asserted that disclosure would “create[s] safety and security issues.” (¶ 9).

The County cited to and relied upon Executive Order 21, which exempts from OPRA the disclosure of any government record “that would substantially interfere with the States’s ability to protect and defend that State and its citizens against acts of sabotage or terrorism,” as well as N.J.S.A. 47:1a-1.1, which exempts from OPRA the disclosure of security measures and surveillance techniques that would create a safety risk.

Plaintiff objected to Mr. Scaturro’s assertions as “merely conclusory”, and argued that the County had not met its burden under OPRA. Moreover, Plaintiff argued that she is a bona fide member of the media and a government watchdog, and that her interest in the Plan was “to try to assure that Union County does not experience a disaster similar to” that suffered by New Jersey Transit during Hurricane Sandy, when flooding damaged many rail cars and locomotives left in low-lying areas. Thus, Plaintiff argued she has a strong interest in disclosure under the Common Law Right to Access.

After argument, I found that the matter could not be resolved without an *in camera* review. Several weeks later, the County delivered to chambers a large Redwell containing what appeared to be in excess of a thousand pages of documents, divided into “annexes” with separate headings, but little other description, along with compact discs containing additional material totaling several hundred pages. Upon perusal, it appeared that many of the documents undeniably were public, *i.e.*, Resolutions of the Freeholders, mutual aid agreements between or among the County and other entities, and even brochures designed for public dissemination.

I then afforded the County an additional opportunity to explain specifically the sensitivity of the documents, and to advise whether it agreed that at least some parts of the Plan could be released without threatening public safety. Shortly thereafter, at the request of Plaintiff’s counsel, I ordered the County to prepare a Vaughn index. The index eventually provided spanned thirty-eight legal size pages.

Thereafter, counsel and the Court painstakingly reviewed, on the record, each document. The County agreed to the release of many documents. Some, in fact, already

were available on websites, which Plaintiff agreed to access herself. It also became clear that several parts of the materials originally produced for *in camera* review were not part of the County's Emergency Plan, and thus not relevant to Plaintiff's request.

On April 17, 2015, I issued an Order directing the County to provide to Plaintiff all documents to which it did not, or was no longer, claiming an exemption, all mutual aid agreements, and cover sheets, which had been provided *in camera* and which listed the documents within each Annex.

I further ordered the County to file and serve an updated Vaughn index which reflected only those documents still in dispute, and to provide *in camera* those parts of the Plan for which the County still claimed exemption. Compliance with the last directive reduced the number of documents in dispute sufficiently so they could fit in one large binder. We continued our review of the index, with my decision as to each individual piece. In those instances where the description in the Vaughn index and counsel's explication did not convince me that the County had met its burden, I determined to give the County a further opportunity to explain its position through that testimony.

Thereafter, on June 22, 2015, the County produced William Kane, Deputy Director of Emergency Management for the County's Department of Public Safety, and Deputy Chief, Union County Hazmat. Mr. Kane was reluctant to explain in open court even the reasoning behind the claimed exemptions for the remaining documents. Just eleven days before his scheduled testimony, an Appellate Division opinion was approved for publication in which the Court held it was error not to allow such testimony *ex parte* and *in camera*.¹ Accordingly, the Court permitted the County to submit the Kane Certification in that manner. Approximately one month later, the County submitted Mr. Kane's detailed, 195 paragraph, thirty-four page certification, with exhibits. Among the exhibits (Exhibit B), were several Daily Overviews from the New Jersey Regional Operations Intelligence Center released on various dates in 2015, which provide "a synopsis of significant threat reporting that may affect New Jersey's current threat

¹ North Jersey Media Group, Inc., v. Township of Lyndhurst, et al., 441 N.J. Super. 70 (App. Div. 2015).

posture.” Kane Certif., Exhibit B. Several “suspicious activity reports (“SARS”) were highlighted to illustrate Mr. Kane’s concerns.

Mr. Kane addressed the following Annexes: Alert Warning and Communication, Damage Assessment, Emergency Medical, Emergency Operations Center, Emergency Public Information, Evacuation, Fire and Rescue, Hazardous Material, Law Enforcement, Public Health, Public Works, Radiological Protection, Resource Management, Shelter/Reception and Care, Social Services, and Terrorism Incident. He did not address any items listed in the last ten pages of the Vaughn index.²

As to the Annexes he addressed, Mr. Kane’s certification carefully explained how each Annex itself is significant, and why seemingly innocuous individual pages or parts of Annexes could pose a threat or enable a terrorist or malcontent if released. He emphasized the County’s view of the Plan as an integrated document, rather than individual pages or pieces, and the importance of considering the Plan as a whole, rather than as individual components.

ANALYSIS

Standard of Review

The New Jersey Open Public Records Act is codified in N.J.S.A. 47:1A-1.1, et seq. The Act mandates 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 [under OPRA] as amended and supplemented, shall be construed in favor of the public’s right of access.” Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136, 139 (App. Div. 2006). “The purpose of OPRA ‘is to minimize the evils inherent in a secluded process.’” Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., 183 N.J. 519, 535 (2005) (quoting Asbury Park Press v. Ocean County Prosecutor’s

² The County in its revised Vaughn index still maintained that many pages of documents not included in the Annexes but produced in camera were confidential, such as Performance Evaluations, Procedures for Temporary Detention of Prisoners and several other categories listed in the last ten pages of the index. The County eventually agreed that these were not part of the Plan, and thus irrelevant. Additionally, many of these sections are available elsewhere.

Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). The New Jersey Supreme Court has recognized that “[t]hose who enacted OPRA understood that knowledge is power in a democracy, and that without access to information contained in records maintained by public agencies citizens cannot monitor the operation of our government or hold public officials accountable for their actions.” Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities, 207 N.J. 489, 502 (2011). The public entity denying access has the burden of proving that its denial was justified by an OPRA exemption or exclusion. N.J.S.A. 47:1A-6; Asbury Park Press v. Monmouth County, 406 N.J. Super. 1, 7 (App. Div. 2009).

Plaintiff also seeks disclosure under the common law right of access, as that right was not limited or superseded by the enactment of OPRA. N.J.S.A. 47:1A-8; see Irval Realty Inc. v. Board of Public Utility Com., 61 N.J. 366, 375 (1972). Under the common law test, the Court balances the individual’s right to the requested information against the public’s interest in the confidentiality of the records. Loigman v. Kimmelman, 102 N.J. 98, 101 (1986). The interest of the individual seeking the government records need not be purely personal, but rather, may be out of concern for a public problem or issue. See Irval, 61 N.J. at 374. In balancing these interests, the Court focuses on the character of the materials sought to be disclosed. See State v. Doliner, 96 N.J. 236, 248 (1984).

Disclosure of the Emergency Plan

N.J.S.A. 47:1A-1.1 exempts from the definition of a public record: “[E]mergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize the security of the building or facility or persons therein” and “security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software.” Additionally, N.J.S.A. 47:1A-9 provides that OPRA shall not abrogate any exemption of a public record made pursuant to an Executive Order of the Governor. Executive Order No. 21 (2002) exempts from the definition of public records:

“any government record where the inspection, examination or copying of that record would substantially interfere with the State’s ability to protect and defend the State and its citizens against acts of sabotage or terrorism, or

which, if disclosed, would materially increase the risk or consequences of potential acts of sabotage or terrorism.”

Executive Order No. 21 (2002).

Mr. Kane thoroughly outlined the County’s concerns with release of the remaining Annexes and the manner in which release could jeopardize the safety of people and property, whether during an emergency or if the information were made available to terrorists or malcontents. He is unequivocal in his belief that release of the Plan could cause a serious security risk. I found his concerns and his explanations compelling.

Regarding the broader Common Law Right to Access, I have balanced the County’s concerns with Plaintiff’s rights as a member of the media. Having reviewed the Annexes, I am satisfied that the contents are of minimal interest to the general public, but could be much more interesting to malfeasants and pose a danger if released.

Accordingly, I am satisfied, after careful review of Mr. Kane’s certification, in conjunction with the documents in these Annexes, that the County has met its burden as to these Annexes, both under OPRA and the Common Law Right of Access.

Very truly yours,

A handwritten signature in cursive script, reading "Camille M. Kenny". The signature is written in black ink and is positioned above the typed name.

Camille M. Kenny, J.S.C.

CMK:jb
Encl.

FILED

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**GAMILE M. KENNY
J.S.O.**

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, UNION COUNTY
DOCKET NO.: UNN-L- 3253-14**

PREPARED BY THE COURT

TINA RENNA

Plaintiff(s),

v.

**UNION COUNTY and MARLENA
RUSSO**

Defendant(s).

CIVIL ACTION

ORDER

THIS MATTER having been brought before the Court pursuant to R. 4:67-2(a) by Walter M. Luers, Esq. of the Law Offices of Walter M. Luers, LLC by Verified Complaint and Order to Show Cause requiring Defendants Union County and Marlana M. Russo in her official capacity as the Information Assistant and Records Custodian of Union County to provide Plaintiff with a copy of "The Countywide Emergency Plan" for Union County, on notice to Brian P. Trelease, Esq. of the Union County Counsel's Office on behalf of Defendants Union County and Marlana M. Russo, and the Court having considered the papers submitted by the parties, and having conferenced this case on several occasions, and having conducted and *in camera* review of the documents, and having held hearings to evaluate the County's objections, and having considered the Certification of William Kane, with exhibits, and for the reasons set forth in the Letter Opinion attached,

IT IS on this 1st day of **October, 2015, ORDERED** that

1. Plaintiff's Complaint for release of the County's Emergency Operations Plan is denied, except as to those portions previously ordered to be released by this Court's Order of April 17, 2015;

2. The documents addressed in the Kane Certification are exempt from disclosure under the Open Public Records Act because they relate to security measures which would create a risk to safety of persons and property if released;
3. Release of the documents in the 17 Annexes submitted as per the revised Vaughn index would pose a substantial security risk which outweighs the Plaintiff's interest in disclosure;
4. Standard Operating Procedures of the Union County Police Department produced in camera are not relevant to Plaintiff's request.

So Ordered.


CAMILLE M. KENNY, J.S.C.

cc: Civil Assignment