SUPERIOR COURT OF NEW JERSEY

TRAVIS L. FRANCIS
ASSIGNMENT JUDGE

MIDDLESEX COUNTY COURT HOUSE
P.O. BOX 964
NEW BRUNSWICK, NEW JERSEY 08903-0964

November 20, 2015

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Re: Collene Wronko v. New Jersey Society for the Prevention of Cruelty to Animals, Docket No. L-11721-14
Issue: Defendant's Motion for Reconsideration
Returnable: November 6, 2015

Dear Counsel:

Please find the Court's decision on Defendants' Motion for Reconsideration:

Statement of Facts

Plaintiff served an OPRA request on Defendant seeking various records regarding the Helmetta Regional Animal Shelter (email correspondence), the 2013 year end payroll record for all NJSPCA employees, any report or summary statistics of the number of complaints received from 2014 to present date, a list of all current

NJSPCA employees, and a copy of all complaints/citations/summonses written for animal cruelty from August 1, 2014 to present date. Defendant was unresponsive to the request and Plaintiff filed an Order to Show Cause to compel Defendant to respond. During the hearing Defendant conceded that they are subject to OPRA and additionally conceded that they had not developed an OPRA compliance policy. Defendant and Plaintiff agreed that Defendant would formulate an OPRA Compliance Policy for effectuating any requests under OPRA for government records.

This Court's written opinion held that no special service charges could be assessed by Defendant finding that "The requests from Plaintiff...simply are not too burdensome nor amount to an 'extraordinary' expense of time." On September 22, 2015, this Court issued an Order consistent with the aforementioned conclusions.

Arguments of Defendant

Defendant argues that the records sought by Plaintiff are not public records under the Open Public Records Act and that while the NJSPCA, answers to the State's Executive Branch, it operates without any tax dollars. Defendant contends that the New Jersey Department of the Treasury has developed regulations defining a "public record," which specifically references non-tax funded organizations, stating "[a] record is private when it is evidence of activities of an organization that does not receive any substantial contribution of tax dollars to conduct those

activities." N.J.S.A. 52:18A-1 et seq. Based on this language, Defendant argues that this regulation specifically contradicts this Court's decision, requiring the NJSPCA to disclose its records as public records..

Defendant in the alternative asserts that if required to comply with OPRA, Plaintiff's request was insufficiently specific under the Act based on Plaintiff's broad generic description of documents that would require the custodian to "search the agency's files and 'analyze, compile and collate' the requested information. Bart v. Passaic County Public Housing Agency, 406 N.J. Super. 445, 451 (App. Div. 2009). Defendant contends that the burden of providing a request of sufficient specificity is on the requestor, and the responding party has no obligation to make clear a vague request. Id. at 452.

This Court reviewed the nature of each itemized request and the amount of work involved in satisfying each request. However, Defendant claims that this Court made these determinations without deciding whether said requests were valid under OPRA. The level of analysis and effort required of these requests, Defendants posit, is "what the Appellate Division has found to be sufficiently vague to make a request invalid." Thus, they argue that any email correspondence between Rick Yocum and any other individual are not the proper subject of an OPRA request unless the emails are generated from an NJSPCA account or were provided to the NJSPCA.

This Court found that requests 5 and 7 "deal with Defendant's staff, of which there appears to be few people." Defendant asserts that the number of employees on Defendant's staff does not affect the simplicity nor validity of the request. Request 7 is alleged by Defendant to be outside the scope of an OPRA request because it does not seek an existing document. Relying on Bent v. Township of Stafford Police Dept., Custodian of Records, 381 N.J. Super., 30, 37 (App. Div. 2005), Defendant avers that the Appellate Division has found that OPRA requests must be for specific, existing documents, and "not requests for information." Defendant concludes that because no record or roster of all employees exists, the Defendant is under no obligation to generate a new document to fulfill an OPRA request.

Request 6 seeks a "report or summary statistics" on a quarterly basis for the number of complaints received in 2014. As no such quarterly reports or summaries allegedly exist, Defendant similarly asserts that it should not be required to generate a new report for a request that is "overbroad and would require research and collation of documents" outside the scope of OPRA. Because Request 6 is "an invalid OPRA request," Defendant has no legal obligation to fulfill it.

Request 8 Defendant asserts seeks voluminous documents and requires extensive review of documents. Defendant states that this request can and will be fulfilled under the Order of this Court, but will require additional time to insure that the request is fulfilled completely and proper redactions are applied.

Defendant argues that the Court must reconsider its previous Order and determine the validity of the OPRA requests.

Opposition of Plaintiff

First, Plaintiff argues that Defendant's motion for reconsideration must be denied because such motions are used to correct errors committed by the Court, not errors committed by a party. On a motion for reconsideration, "a litigant must initially demonstrate that the Court acted in an arbitrary, capricious, or unreasonable manner, before the Court should engage in the actual reconsideration process." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). While a Court can consider new evidence or information on a motion for reconsideration in the interests of justice, it must do so only where a litigant can establish that "it could not have provided on the first application." Id. at 401. See also Medina v. Pitta, 442 N.J. Super. 1 (App. Div. 2015) ("Filing a motion for reconsideration does not provide the litigant with an opportunity to raise new legal issues that were not presented to the court in the underlying motion.").

Plaintiff asserts that at the first hearing, Defendant conceded it was subject to OPRA and agreed to establish an OPRA compliance plan and sign a consent order. The parties were ultimately unable to comply because Defendant insisted that it should be permitted to charge Plaintiff (and all other requestors) a special service charge. At no point did Defendant challenge the requests as valid or suggest that

some records might not even exist. Moreover, Plaintiff contends that the new "regulation" Defendants rely upon was posted publicly on a website and available and therefore Plaintiff avers that it is Defendant's error in not producing the document to the Court and not the Court's error.

The sole issue has been whether the NJSPCA could charge Plaintiff a special service charge for her requests. Plaintiff posits that a motion for reconsideration is not the appropriate time to raise new arguments that could have been raised before, and the motion is intended to correct the Court's errors, not the errors of a litigant.

Plaintiff contends that the "Regulation" by the Department of Treasury promulgated by Defendant in support of its argument that the records Plaintiff seeks are exempt from OPRA is not a promulgated regulation, nor does it pertain to OPRA but instead a manual drafted by the Department of Treasury to provide guidance to State agencies on how to comply with state record retention laws, also known as Destruction of Public Records Law (DPRL). Plaintiff contends that our Supreme Court and the Appellate Division have rejected all efforts to read the definition of "public records" as being equivalent to "government records" under OPRA. Moreover, Plaintiff asserts that even if the manual did pertain to the definition of government records under OPRA, an administrative agency has no authority to exempt records from OPRA unless it does so by actually promulgating regulations pursuant to the Administrative Procedures Act.

Furthermore, Plaintiff argues that the Department of Treasury manual does not exempt NJSPCA's records from access under OPRA. As an initial matter, Plaintiff notes that the "regulatory document" to which Defendant cites is not related to OPRA but is the Treasury's guidance manual to public agencies on how to comply with the State's Destruction of Public Records Law. DPRL applies to "public records" and subjects them to records retention schedules, while OPRA applies to "government records" and subjects them to public access. Both our Supreme Court and the Appellate Division have expressly rejected any attempt to read the definition of "public record" in the DPRL *in pari materia* with the definition of "government record" in OPRA. See Nero v. Hyland, 76 N.J. 213, 220-21 (1978) (refusing to read DPRL *in para materia* with the Right to Know Law, which is OPRA's predecessor); North Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 441 N.J. Super. 70, 106 (App. Div. 2015) (holding that retention schedules set by DPRL do not satisfy OPRA's "required by law" standard).

Plaintiff contends that the NJSPCA does receive "public funds" and that pursuant to N.J.S.A. 4:22-55, our court system forwards fines, penalties and monies to the NJSPCA. These fines are public funds. See Mesgleski, 330 N.J. Super. 10, 19 (App. Div. 2000) (noting that an SPCA "is at least in part funded through State statutes."). In Fair Share House Ctr., Inc. v. New Jersey State League of Municipalities, 207 N.J. 489, 506 (2011), the court focused on the fact that the

League was created by statute, controlled by government officials and served as an "instrumentality" of other public agencies. The League, similar to the NJSCA, indirectly received "public funds."

Plaintiff notes that the arguments Defendant has raised in its brief should have been made raised in response to Plaintiff's OPRA request and in opposition to Plaintiff's Order to Show Cause. The Plaintiff highlights that notwithstanding the Court having ordered the records to be produced by October 3, 2015, Defendant has yet to produce any records, including the records Defendant concedes are accessible. Plaintiff urges that after nearly a year of litigation, Defendant should be in a position to certify whether or not responsive records exist and that N.J.S.A. 47:1A-6 places the burden upon a public agency to establish that its denial of access is lawful and a public agency cannot do that by failing to acknowledge what records exist. Plaintiff knows that such a record exists because it was provided to other OPRA requestors, as evidenced in Plaintiff's July 30, 2015 submission to Court.

Plaintiff contends that providing the requested emails would require that Defendant locate responsive emails and simply provide them –creating a new record would be unnecessary. Second, Plaintiff asserts that the Government Records Council ("GRC") set forth a three-part test to determine whether an OPRA request for emails contains the necessary specificity in Elcavage v. West Milford Township (Passaic), GRC Complaint No.: 2009-07 (April 13, 2010):

> In order to specifically identify an e-mail, OPRA requests must contain (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail was transmitted or the emails were transmitted, and (3) a valid e-mail request must identify the sender and/or the recipient thereof.

Id. at 5. In the present matter, Plaintiff submitted the following four (4) requests for emails:

1. All email correspondence between Rick Yocum and Michal Cielesz from August 1, 2014 to present date regarding the subject matter Helmetta Regional Animal Shelter.
2. All email correspondence between Rick Yocum and Richard Cielesz from August 1, 2014 to present date regarding the subject matter Helmetta Regional Animal Shelter.
3. All email correspondence between Rick Yocum and Nancy Martin from August 1, 2014 to present date regarding the subject matter Helmetta Regional Animal Shelter.
4. All email correspondence between Rick Yocum and Buddy Amato from August 1, 2014 to present date regarding the subject matter Helmetta Regional Animal Shelter.

Plaintiff provided sender *and* recipient of the emails to assist Defendant locate responsive emails in her initial OPRA request.

Third, in response to Defendant's argument that any email not transmitted or received from an NJSPCA computer, or actually provided to the NJSPCA were not subject to disclosure, Plaintiff asserts that our courts and GRC have both determined that the physical location of a government record is of no consequence—all

government records must be "readily accessible" regardless of location. Any record "made, maintained or kept on file," or "received" in the course of an employee's official business is subject to OPRA. N.J.S.A. 47:1A-1.1.

Plaintiff cites in support of their assertion to Meyers v. Borough of Fair Lawn, GRC Complaint No.: 2005-127 (May 18, 2006), where an OPRA request was submitted for emails sent and received from the Mayor's personal email account. The GRC held that the emails sent or received by the Mayor discussing official business, even if done on his personal email account, does not change the fact that these emails were government records. "The location of the records does not inhibit the Custodian from obtaining the records and providing access to the records pursuant to OPRA." Id. Similarly, in Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), an OPRA request was made for several settlement agreements executed on the county's behalf. The county did not produce certain agreements that they did not possess in their files, which were stored by a third-party in a different location. The Appellate Division held that the county was still obligated to make those records accessible even if they did not actually possess them noting, "were we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply delegate their creation to third parties or relinquish possession to such parties, thereby thwarting the policy of transparency that underlies OPRA." Id. at 517. Accordingly, Plaintiff contends that her requests

were specific and provided all necessary information needed by Defendant to locate the records requested.

Plaintiff contends that requests 6 and 7 are valid requests because responsive records do exist. Defendants possess report or summary statistics of the number of complaints received on a quarterly basis for the year 2014 to present date. N.J.S.A. 4:22-11.2(c) expressly requires that these quarterly reports be created and submitted to the Attorney General. N.J.S.A. 4:22-11.2(c) ("The New Jersey Society for the Prevention of Cruelty to Animals shall submit quarterly to the Attorney General statistical information concerning its law enforcement activity during that period, on a form developed in conjunction with the Attorney General.").

Plaintiff contends that Defendant does possess a list of employees because Defendant has produced this list in response to another OPRA request. On June 18, 2015, Patricia Gilleran submitted an OPRA request to the NJSPCA for "NJSPCA employee and agent list for 2015." In response, Defendant produced a two-page list of all employees and agent of the NJSPCA.

Defendant takes the position that Plaintiff's requests are invalid because no records exist which actually have the title of the records identified in the request. However, Plaintiff asserts that an OPRA request is valid so long as it requests an "identifiable government record" and providing an incorrect title of a record in a request is not fatal. MAG Entertainment, LLC v. Div. of Alcohol Beverage Control,

375 N.J. Super. 534, 549 (App. Div. 2005). There is no requirement that a request identify the actual *title* of the record being requested so long as the custodian is able to understand what record is being asked for.

Plaintiff asserts that Defendant's response was inadequate because even if no responsive records exist to Requests 6 and 7, a government agency is nevertheless obligated to inform a requestor whether or not the requested record actually exists, and defendant did not respond to Plaintiff's OPRA request, which resulted in the initiation of legal proceedings. Next, Defendant took the position that though they were a "public agency" as defined by OPRA, they should be permitted to charge a special service fee for the records. At no point has Defendant indicated that no responsive records exist with regard to these portions of Plaintiff's OPRA request.

Legal Standard

A motion for reconsideration is governed by Rule 4:49-2. Rule 4:49-2 states:

> Except as otherwise provided by R. 1:13-1 (clerical errors) a motion for rehearing or reconsideration seeking to alter or amend a judgment or order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred, and shall have annexed thereto a copy of the judgment or order sought to be reconsidered and a copy of the court's corresponding written opinion, if any.

Rule 4:49-2 permits a party to make "a statement of the matters or controlling decisions which [the party] believes the court has overlooked or as to which it has

erred" in entering an order or judgment. State v. Fitzsimmons, 286 N.J. Super. 141, 147 (App. Div. 1995). Reconsideration should be used for cases where 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence. Fusco v. Board of Educ. of the City of Newark, 349 N.J. Super. 455. 462 (App. Div. 2002).

Analysis

A motion for reconsideration is not an opportunity for a party to raise new arguments and legal issues that were available yet not previously presented to the Court. This motion is intended to correct any errors that the Court has committed—not errors committed by a party. Rule 4:49-2 requires that the moving party provide a "statement of the matters or controlling decisions which counsel believes *the court* has overlooked or as to which it has erred." As such, reconsideration should be used for cases where 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence. Fusco v. Board of Educ. of the City of Newark, 349 N.J. Super. 455. 462 (App. Div. 2002). In deciding to grant a motion for consideration, the court must be convinced that it had acted arbitrarily, capriciously or unreasonably. Alternatively, a motion for reconsideration is appropriate where there is new or additional information brought

to the court's attention which could not have been provided in the prior hearing. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Reconsideration is "a matter within the sound discretion of the court to be exercised in the interest of justice." Id. (citing Johnson v. Cyklops Strapping Corp., 220 N.J. Super. 250, 257 (App. Div. 1987)). "Simply put, the motion is not to be a *"second bite at the apple"* but rather to give the court the opportunity to correct perceived error." KLOCK, N.J. Practice, Vol. 2, Court Rules Annotated, 6th Ed. (WEST GROUP) at 232.

Defendant's motion is an attempt to get a "second bite at the apple".

As an initial matter, Defendant has conceded that it is a public agency and thus, subject to OPRA. This Court addressed the same in its letter decision dated August 28, 2015 stating:

> The parties subsequently stipulated on the record that Defendant *is* subject to OPRA and that Defendant would formulate an OPRA compliance policy. They agreed on all aspects of the compliance policy with the exception of a fee for producing the documents. . . . During oral arguments, [Defendant] conceded [it was] a public agency subject to OPRA compliance.

Defs. Br., Ex. C at p. 2. At oral argument on February 18, 2015, Mr. Harry Levin stated on the record that the NJSPCA is a public agency, whether it is defined under OPRA or whether it is defined under the animal cruelty statute. It is an "inescapable

conclusion that is reached." Defendant now for the first time is attempting to argue inconsistent with their original position that records requested are not "government records" under OPRA. Defendant argues that it does not receive "public funds" or "tax dollars," and as a result, is not required to comply with the provisions of OPRA.

In determining whether an entity is a public agency, "a court must look behind the technical form of an entity to consider its substantive attributes," which requires a "fact-sensitive inquiry." Paff v. New Jersey State Firemen's Ass'n, 431 N.J. Super. 278, 288 (App. Div. 2013). Further, it "may be sufficient that an entity was created and controlled by a political subdivision." Id. at 288.

The NJSPCA meets the definition of a public agency under OPRA because it is an "instrumentality . . . created by . . . political subdivisions." Although OPRA does not define "instrumentality," the Supreme Court has adopted the generally accepted definition of the term. "Instrumentality is variously defined as '[a] thing used to achieve an end or purpose' and, alternatively, as '[a] means or agency through which a function of another entity is accomplished, such as a branch of a governing body." Fair Share Hous. Ctr., Inc. v. New Jersey State League Of Municipalities, 207 N.J. 489, 503 (2011). The NJSPCA achieves an end and provide a function on behalf of the State; NJSPCA promotes the interests of, and protects and cares for, animals within the State, as well as appoints agents for enforcing laws

and ordinance enacted for the protection of animals and for the investigation of alleged acts of cruelty. Therefore, it is an "instrumentality."

In Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., the Supreme Court held that a private, nonprofit corporation, which was created to assist the City of Trenton and the Trenton Parking Authority to redevelop a 3.1 acre site, was created by a public subdivision therefore making it a "public agency" under OPRA. 183 N.J. 519 (2005). The court applied the creation test, not the governmental-function test. Moreover, the Supreme Court has held that focusing on the fact that organizations were technically incorporated by private citizens would "elevate form over substance to reach a result that subverts the broad reading of OPRA as intended by the legislature." Times of Trenton Pub. Corp. v. Lafayette Yard Comm. Dev. Corp., 183 N.J. 519, 535 (2005). The Supreme Court found it relevant that "the Mayor and City Council had absolute control over the membership of the Board of Lafayette Yard and that the Corporation could only have been "created" with their approval." Id. at 535.

The State Legislature created the NJSPCA in 1868. In 2005, the Legislature amended its statutes to revise the organization, administration, and powers of the NJSPCA. See N.J.S.A. 4:22-1 to -11. Furthermore, the Legislature determined how the NJSCPA's Board of Trustees would be composed, and the statute states that the Governor, with the advice and consent of the senate, selects three of the trustees. See

N.J.S.A. 4:22-11.2. Because the NJSPCA is an instrumentality created by statute, it is a "public agency" under OPRA; it satisfies the creation test promulgated by the Supreme Court.

Although, the NJSPCA does not receive public funding through taxes, assessment or levy, it is funded in part by State statute. Pursuant to N.J.S.A. 4:22-55, our court system forwards fines, penalties and monies to the NJSPCA.

N.J.S.A. 4:22-55 states:

> a. Except as provided pursuant to subsection b. of this section, all fines, penalties and moneys imposed and collected under the provisions of this article, shall be paid by the court or by the clerk or court officer receiving the fines, penalties or moneys, within thirty days and without demand, to [. . .] the New Jersey Society for the Prevention of Cruelty to Animals, to be used by the State society in aid of the benevolent objects for which it was incorporated.
> b. If an enforcement action for a violation of this article is brought primarily as a result of the discovery and investigation of the violation by a certified animal control officer, the fines, penalties or moneys collected shall be paid as follows: one half to the municipality in which the violation occurred; and one half to the county society or to the New Jersey Society for the Prevention of Cruelty to Animals, as applicable to the particular enforcement action.

As an entity created and controlled by the State, that receives public funds through the State's power to collect fines, and performs a traditional government function, the NJSPCA is a public entity subject to OPRA. The NJSPCA must make available government documents as required by OPRA as "any document kept on file or received in the course of the official business of an 'agency' of a political

subdivision is a government document." See Fair Share Hous. Ctr., Inc. v. New Jersey State League of Municipalities, 207 N.J. 489, 493 (2011).

The receipt of public funds or tax dollars is just one factor a court might consider in determining whether a non-profit organization is a "public agency," as defined by OPRA. See Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519 (2005) (finding that a private, nonprofit corporation established under State law and created with the approval and subject to the control of the Mayor and City Council was a "public agency" subject to OPRA).

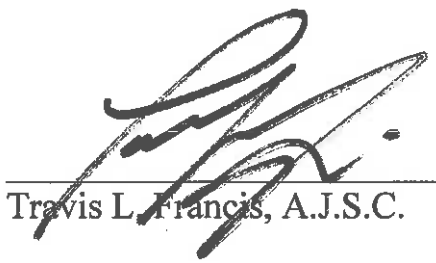
Additionally, Defendant has not demonstrated how this Court overlooked or erred as to any of the matters or controlling decisions pursuant to Rule 4:49-2. Instead, Defendant relies on a "new regulation," which is neither a regulation nor binding in this matter. The New Jersey Records Manual cited by Defendant as a "regulation" is simply a guidance document drafted by the Department of Treasury and is not binding on this Court. Further, it provides guidance to State agencies on how to comply with state's record retention laws, nor OPRA. N.J.S.A. 47:1A-9 states that OPRA does not abrogate exemptions made by statute prior to the enactment of OPRA, nor does it abrogate exemptions included in any other statute, Executive Orders of The Rules of Court, any federal law, federal regulation, or federal order. However, the guidance document submitted to this Court in support of the instant motion does not create an OPRA exemption pursuant to N.J.S.A.

47:1A-9 because it is neither a statute, Executive Order, Rule of Court, federal law, federal regulation, or federal order. Furthermore, it is not a regulation promulgated by a state agency pursuant to the Administrative Procedures Act. This guidance was issued in January 2013 and thus, not "new" information that could not have provided to this Court in the prior hearing. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990).

Defendant had two opportunities to present its argument that Plaintiff's OPRA requests were insufficient under the Act to require disclosure by the Defendant: 1. in response to the submission of Plaintiff's initial OPRA request; and 2. in opposition to Plaintiff's Order to Show Cause. This instant Motion for Reconsideration is not the appropriate vehicle for Defendant to now raise these issues.

Conclusion

Based on the foregoing, this Court **DENIES** Defendants' Motion for Reconsideration.



Travis L. Francis, A.J.S.C.