COURT INITIATED

HARRY SCHEELER

PLAINTIFF(S)

VS

CITY OF CAPE MAY, et al.

DEFENDANT(S)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY
DOCKET NO. CPM-L-444-15

ORDER

THIS MATTER having been opened to the Court by Pashman Stein, A Professional Corporation, attorneys for Plaintiff, CJ Griffin, Esquire appearing; and Anthony P. Monzo, Esquire, of the law firm of Monzo, Catanese Hillegass, appearing on behalf of the Defendant; and the Court having entered an Order to Show Cause on September 30, 2015, setting down a hearing date of November 18, 2015; and said hearing having been adjourned at the request of Plaintiff to January 12, 2016; and the Court having heard oral argument on January 12, 2016, at which time it was presented with an unpublished decision of the Honorable Ronald E. Bookbinder, A.J.S.C. dated October 8, 2015; and, notwithstanding the provisions of Rule 1:36-3, the Court having granted counsel the opportunity to comment on said decision; and the Court having reviewed the submissions and considered the arguments of counsel; and for the reasons stated in the Court's Memorandum of Decision of even date herewith; and for good cause shown;

IT IS ON THIS 19th day of FEBRUARY, 2016, ORDERED, that Plaintiff's petition is DENIED. Plaintiff's Complaint is dismissed with prejudice.

IS FURTHER ORDERED that a copy of this Order shall be served upon all parties within seven (7) days of its receipt.

NELSON C. JOHNSON, J.S.C.

SUPERIOR COURT OF NEW JERSEY

NELSON C. JOHNSON, J.S.C.

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MEMORANDUM OF DECISION

TO: CJ Griffin, Esquire
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RE: Scheeler vs. City of Cape May, et al **DOCKET NO.** CPM-L-444-15

HAVING CAREFULLY REVIEWED THE MOVING PAPERS AND ANY RESPONSE FILED, I HAVE RULED ON THE ABOVE CAPTIONED MOTION(S) AS FOLLOWS:

PRELIMINARY OBSERVATIONS

Plaintiff, Harry Scheeler ("Scheeler") is a self-proclaimed "open government activist" who is "presently a resident of North Carolina." As certified by Plaintiff, he "file[s] approximately 100 OPRA requests or more" each year. It's clear from Mr. Scheeler's Certification that a non-taxpaying, non-citizen, with an over-sized interest in New Jersey local politics, wishes to assert equal claim to exercise statutory rights of New Jersey citizens to engage in the political processes of our state, without coming to our state, nor assuming any of the responsibilities, or incurring obligations of a citizen of New Jersey. *Query,* at the time the OPRA was adopted, did the members of the New Jersey Legislature contemplate that they were authorizing an out-of-state gadfly to repeatedly bombard local governments with demands to produce public records? That is the question before the Court.

POSTURE OF CASE

This matter comes before the Court on Plaintiff's petition seeking access to the records of the City of Cape May ("the City") pertaining to several government practices, primarily with regard to government spending on legal services by the City. The Defendant has provided responses, but has yet to comply with said request(s) to Plaintiff's satisfaction. As illustrated by "Exhibit A" to defense counsel's pleadings of November 4, 2015, Plaintiff is an inquiring person. The Plaintiff, Scheeler is a former resident of Woodbine, New Jersey, presently living in North Carolina. The City is obligated to comply with the requirements of the Open Public Records Act, viz., *N.J.S.A.* 47:1A-1 et seq. ("OPRA").

This Court entered an Order to Show Cause on September 30, 2015, setting down a hearing date of November 18, 2015. At the request of Plaintiff, the matter was adjourned to January 12, 2016. This matter was ready to proceed, essentially as cross-motions for Summary Judgment, each party asserting their position to be correct under OPRA. At the oral argument on January 12, 2016, Plaintiff's counsel presented the Court with a copy of an unpublished "tentative" decision issued by the Honorable Ronald E. Bookbinder, A.J.S.C. dated October 8, 2015, wherein Judge Bookbinder interpreted OPRA to grant a right of access to public records by a non-citizen of New Jersey. Notwithstanding the provisions of *Rule* 1:36-3, the Court granted both counsel an opportunity to provide written comments on the aforesaid decision in *Scheeler v. Atlantic Co. Mun. JIF*, Docket No.: BUR-L-990-15. The record is complete for the Court to rule.

PARTIES' CONTENTIONS

Defendant: In support of its Motion to Dismiss, Defendant avers as follows:

First, Defendant contends that Plaintiff lacks standing to claim a violation of OPRA because the Act only states that government records be accessible to "citizens" of New Jersey. According to Plaintiff, he identifies himself as a citizen of North Carolina. Moreover, Defendant contends that the Attorney General's Position in 2009, that OPRA requestors do not need to be citizens of the State, is now invalid under the U.S. Supreme Court's decision in *McBurney v. Young*, 133 S.Ct. 1709 (2013).

Second, Defendant asserts that Plaintiff lacks standing to claim a violation of the common law right of access. According to Defendant, standing under the common law right of

access was premised on one being a citizen and having an established "interest in the subject matter of the material he or she is seeking." *South Jersey Pub. Co. v. N.J. Expressway Auth.*, 124 *N.J.* 478, 487 (1991). Because Plaintiff is not a citizen of New Jersey, he does not have standing under the common law right to access. Defendant rejects Judge Bookbinder's decision as an inaccurate interpretation of OPRA. (NOTE: for purposes of this ruling, the Court has not addressed either party's position on redactions to the legal bills sought by Plaintiff.)

Plaintiff: In opposition to Defendant's motion, Plaintiff avers as follows:

First, Plaintiff argues that Judge Bookbinder got it right. Citing the decision in *Scheeler v. Atlantic Co. Mun. JIF* counsel argues that this Court is obligated to take a "liberal approach" in construing OPRA and must grant standing to an out-of-state requestor of public records. In essence, Plaintiff argues that "where the Legislature changes statutory language from 'any citizen' to 'any person' that it intended to broaden the scope of the law's provisions to include non-citizens."

Second, Plaintiff maintains that Defendant has failed to state a specific lawful basis for redacting responsive legal bills. Plaintiff notes that OPRA "places the burden upon the custodian of a public record to state the 'specific basis' for the denial of access." *Gannett N.J. Partners, LP v. City of Middlesex*, 379 *N.J. Super.* 205, 215 (App. Div. 2005). In this case, Plaintiff avers that Defendants have attempted to justify hundreds of redactions with extremely generalized and conclusory allegations of exemption. Plaintiff believes that Defendant's assertions of privilege are overbroad, as are the redactions. Additionally, Plaintiff argues that Defendant should be ordered to prepare a *Vaughn Index* and the Court should review the records *in camera.*

STANDARD OF REVIEW AND STATUTORY INTERPRETATION

OPRA actions are intended to be summary proceedings governed by *N.J.S.A.* 47:1A-6. "Any such proceeding shall proceed in a summary or expedited manner. 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. Additionally, "any limitations on the right of access accorded by [OPRA] shall be construed in favor of the public's right of access[.]" *N.J.SA.* 47:1A-1. OPRA actions are normally considered as cross motions for Summary Judgment. *See, e.g., Burnett v. County of Gloucester*, 415 *N.J. Super.* 506, 511 (App. Div. 2010). As the burden rests on the Defendant, Defendant must

demonstrate that it is entitled to Summary Judgment as a matter of law. *Brill v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520, 535 (1995).

When interpreting a statute, the Court's primary responsibility is to determine the Legislature's intent. *American Fire and Cas. Co. v. New Jersey Div. of Taxation*, 189 *N.J.* 65, 79 (2006). The starting point is to examine the plain language of the statute and ascribe to the words their ordinary meaning. *DiProspero v. Penn*, 183 *N.J.* 477, 492 (2005); *Mun. Council v. James*, 183 *N.J.* 361, 370-71 (2005). The Court's analysis of the parties' positions is guided by well-established principles of statutory construction, the most important being the intent of the Legislature. *In re T.S.*, 364 *N.J. Super.* 1, 7 (App. Div. 2003). To determine that intent, the plain language of the statute is examined and in doing so it should be given "its ordinary meaning, absent a legislative intent to the contrary." *Burns v. Belafsky*, 166 *N.J.* 466, 473 (2001) (superseded on other grounds). The words of a statute must be given their common-sense meaning in the context of the entire statute, which should be afforded a "harmonizing construction . . . and read . . . so as to give effect to all of its provisions and to the legislative will." *T.S., supra*, 364 *N.J. Super.* at 6. In determining legislative intent, "[s]pecific meaning supersedes a general one[.]" *City Council of Orange Twp. v. Brown*, 249 *N.J. Super.* 185, 191 (App. Div. 1991) (overruled on other grounds). *See also Lewis v. Bd. of Trs., Pub. Employees' Retirement Sys.*, 366 *N.J. Super.* 411, 416 (App. Div.) ("[T]he inclusion of specific words and phrases controls or limits more general words and phrases."), certif. denied, 180 *N.J.* 357 (2004).

Finally, as stated by the Court in *Foxworth v. Morris*, 134 *N.J.* 284, 288 (1993), our task is to have the law make sense: "it is a venerable principle that a law will not be interpreted to produce absurd results." *K Mart Corp. v. Cartier, Inc.*, 486 *U.S.* 281, 324 n. 2, 108 *S.Ct.* 1811, 1816 n. 2, 100 *L.Ed.*2d 313, 345 n. 2 (1988) (Scalia, J., concurring in part and dissenting in part). We "'effectuate the legislative intent [of the law] in light of the language used and the objects sought to be achieved.'" *Merin v. Maglaki*, 126 *N.J.* 430, 435, 599 *A.2d* 1256 (1992) (quoting *State v. Maguire*, 84 *N.J.* 508, 514, 423 *A.2d* 294 (1980).

DISCUSSION OF LAW AND RULING

As discussed hereinafter, the history preceding the repeal of the former Right to Know Law (the "RTKL") and the adoption of OPRA comprises a substantial Legislative record. What's clear from that record, and prior Court rulings, is that the OPRA was adopted primarily

to grant citizens a more unfettered right of access to public records. From this Court's perspective, the most fundamental difference between the statutes was a shifting of the burden of proof for entitlement to records from the citizen to government. Under the RTKL, citizens had to prove they had an interest in and/or need for the record, and that the record sought was a public record. Under OPRA, statutory public records have been defined and the burden of proof has been placed squarely upon government to present a rationale explaining why the citizen's right of access must be denied.

Burden shifting, coupled with counsel fee shifting in the event the governmental agency fails to meet its burden, have put teeth into the OPRA which the RTKL did not have. In making these fundamental changes to the statutory right to access public records, the Court must be mindful of all the circumstances entailed and whether or not the right to access should be upheld over the objections of a municipal government. Teeth can be sharp. Finding the right of access, particularly as here, where the Plaintiff is a non-citizen, must be granted with due caution and judicious restraint.

As noted above, OPRA is the progeny of the former RTKL, the purpose of which was to illuminate and avoid secrecy in government affairs. As such, the benefits of the RTKL and OPRA are properly given to those who not only "foot the bill" for such benefits but who also are directly affected by the very political processes the aforementioned legislation was enacted to protect and serve. Presently before the Court is a non-citizen Plaintiff who, by his own admission, files 100(+) OPRA requests per year. Sitting in the comfort of his home, hundreds of miles away in North Carolina, Plaintiff types a note at his keyboard, and with the click of his mouse submits an email making demands upon the City Clerk. *Query*, when dealing with such a professional requestor, is it reasonable for the municipality to have the burden of proof and run the risk of paying legal fees in each and every instance Mr. Scheeler decides he's interested in a particular issue involving local government in New Jersey?

Informative to this Court's analysis is the excellent argument of counsel to the City regarding the U.S. Supreme Court's decision in *McBurney v. Young*, 133 *S.Ct.* 1709 (2013). *McBurney* involved a challenge to Virginia's Freedom of Information Act ("Virginia's FOIA") which is similar to New Jersey's OPRA.

The Petitioners in *McBurney*, like the Plaintiff here, were citizens of states other than the commonwealth of Virginia – the state in which the request for records was made. *Id.* 133 *S. Ct.*

1709 at 1714. Upon receipt of their requests, two different agencies of state government denied the requests (of both Plaintiffs) on the grounds that he was not a Virginia citizen. Petitioners then filed suit under 42 *U.S.C.* § 1983 and sought declaratory and injunctive relief for violations of the *Privileges and Immunities Clause* of the *U.S. Constitution* ("PIC") and the dormant *Commerce Clause* to the *United States Constitution. Ibid.*

In holding that Petitioners' rights under the PIC were not violated, the Court opined,

> This does not mean, we have cautioned, that state citizenship or residence may never be used by a State to distinguish among persons. Nor must a State always apply all its laws or all its services equally to anyone, resident or nonresident, who may request it so to do. Rather, we have long held that the Privileges and Immunities Clause protects only those privileges and immunities that are fundamental. [*Ibid.*] [internal quotations and citations omitted].

According to the City, a holding that OPRA applies only to New Jersey citizens fits squarely within the PIC jurisprudence, interpreting *Art.* IV § 2 *cl.* 1 of the U.S. Constitution. Though this Court respects the ruling in *McBurney* and the thorough and persuasive arguments made by the City's attorney, the facts here are so very different than those in *McBurney* that the Court is obligated to look to our own state's jurisprudence for guidance. Additionally, the Court must examine the Legislative history in the transition from RTKL to OPRA.

The Plaintiff claims that the Legislature amended the RTKL so that any person (including non-citizens) can request government records. In *South Jersey Pub. Co. v. N.J. Expressway Auth.*, 124 *N.J.* 478, 489 (1991), a decision this Court knows well, the Supreme Court applied the RTKL and stated in relevant part:

> In 1963, the Legislature supplemented the public's right of access to public records by enacting the Right to Know Law, *N.J.S.A.* 47:1A-1 to -4, declaring the public policy of the State to be 'that public records shall be readily accessible for examination *by the citizens of this State*, with certain exceptions, for the protection of the public interest.' *N.J.S.A.* 47:1A-1. Although the Legislature did not curtail or affect the common-law right to inspect and examine public records, *Irval Realty, supra*, 61 *N.J.* at 373, 294, A.2d 425, it did eliminate the standing requirement for access; under the Right to Know Law, *one need only be a citizen of the State to obtain access to public records. Id.* at 489. [Emphasis added.]

If the intent of the Legislature was to abrogate the RTKL's standing requirement as set forth above, then the Legislative findings and declarations portion of OPRA, along with the transcript of the public hearing to discuss the enactment of OPRA, would have clearly stated that was the change in policy. If the Legislature had amended the RTKL so as to make records accessible both to citizens of this State as well as any person, including non-citizens, then the first sentence of OPRA might well have stated that: *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 all citizens of this State, and any person, including non-citizens.* That language is not the law. *N.J.S.A.* 47:1A-1 reads, in limited/relevant part:

> 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... [Emphasis added.]

Accordingly, from this Court's perspective, Plaintiff's argument that "any person" broadens the scope of access under OPRA to non-citizens does not conform to the clear Legislative intent. Contrary to Plaintiff's interpretation of OPRA, OPRA was enacted to expand the scope of accessible government records, not to expand the scope of those who had access to these records.

Query, why should Plaintiff, a non-New Jersey resident, who does not pay taxes within the State of New Jersey or the City of Cape May reap the benefits of a similarly situated citizen? What is more, why should Plaintiff, who is not affected by New Jersey or Cape May's political process, be entitled to the records at issue? And finally, is it likely that the Legislature intended that the City should be compelled to continue its exchange(s), and have the burden to continually explain its position and be required to satisfy multiple inquiries of a non-resident gadfly? Is this someone the Legislature had in mind when OPRA was adopted? As discussed more fully hereinafter, the PIC, United States and New Jersey Supreme Court jurisprudence, and the Legislative history lead this Court to conclude that Mr. Scheeler is not someone the Legislature had in mind when it adopted OPRA.

Notwithstanding a municipality's authority to assess a reasonable special service charge for the expenditure of time and effort it takes to respond to OPRA requests, no amount of reimbursement makes up for the fact that when a public employee responds to an OPRA request, he/she is unable to devote their energies to their primary mission of serving the local constituency. The exhibits accompanying the pleadings reveal a time-consuming exchange between City officials and a practiced, disruptive gadfly, bent on intimidating public officials.

The Certification of City Clerk, Louise Cummiskey, dated November 4, 2015, (with attached emails) illustrates the disruption caused by the "barrage of requests" [¶7] made by Plaintiff. In her Certification, Ms. Cummsikey characterizes Plaintiff's communications as "inciteful, harassing and derogatory" [¶4]. An objective reading of Plaintiff's emails might characterize them as *rude*, *bellicose* and *obnoxious*. The Exhibit to Ms. Cummiskey's Certification containing the exchange of emails between her and Plaintiff is replete with one belligerent demand after another. Plaintiff's truculence is palpable; his penchant for rebuke is totally inappropriate. Any further discussion of his bullying comments would lend them a dignity they do not deserve. It is inconceivable that the drafters of OPRA would find Plaintiff's badgering tactics to be reasonable requests for public records.

Plaintiff's counsel would have this Court ignore the Legislative history of OPRA which noted that the Legislative changes required to make the transition from the RTKL to OPRA were limited to: (1) the definition of what constitutes a "government record"; (2) the definition of a "custodian of a government record"; (3) the ability for a public entity to assess a Special Service Charge; (4) the ability that a custodian of records may require a deposit against costs; and (5) clarification that a custodian of records will either grant access to government records or deny a request no later than seven (7) business days after receiving a request. *NJ Assembly Government Committee Statement on Assembly, No. 1309,* p. 2 (March 6, 2000). *See also Judiciary Committee Statement to Assembly, No. 1309*, p. 1 (December 6, 2001) ("the bill expands the public's right to access to all public records to include all government records and facilitates the way in which that access is provided by the custodian of a government record").

A reading of the New Jersey Senate bills preceding the adoption of OPRA demonstrates that the Legislature intended to make OPRA applicable only to citizens of this State. It is this Court's understanding of the Legislative enactments, particularly as to statutes which amend existing statutes, that when the Legislature includes limiting (or expansive) language in an earlier

version of proposed legislation, but deletes it prior to enactment of the statute, it is presumed that the limitation (or expansion) was not intended by the Legislature. In this case, Senate Bill, No. 351, introduced on January 11, 2000, by Senators Kenny and Kyrillos stated in their proposed *Legislative findings and declarations*, in part: "[T]he Legislature finds and declares it to be the public policy of this State that public records shall be readily accessible for examination by members of the public," striking the phrase "citizens of this State." This change, as initially proposed and as stated in the accompanying Statement, was intentionally made to "broaden[s] the scope of the public policy regarding availability of public information to incorporate any member of the public and not just citizens. Currently, the right to information access exists for citizens alone." [NOTE: Senate Bill, No. 351 was *not* adopted by the Legislature.]

It was Senate Bill No. 866, subsequently introduced by Senator Martin on January 31, 2000, which ultimately became OPRA. It was drafted to state, at *N.J.S.A.* 47:1A-1, that "[t]he 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 ... for the protection of the public interest." Senator Martin stated during the Senate Judiciary Committee Public Hearing regarding the adoption of OPRA that, "I fundamentally believe that the public is entitled to the records of its government, and the legislation that we've introduced today will be the subject of this hearing basically takes that approach." Mr. Scheeler cannot call the New Jersey government "[his] its government."

Similarly, the Assembly Floor Amendments are likewise devoid of any suggestion that OPRA "changed course" from RTKL and expanded who may freely access government records to include non-New Jersey citizens. *Statement to Assembly No. 1309,* Assemblymen Geist (March 27, 2000), Collins (June 26, 2000), Martin (May 3, 2001), Geist and Collins (January 3, 2002). Indeed, even the transcript of the *Public Hearing before the Senate Judiciary Committee* (the "Committee") (*Senate Bill Nos.* 161, 351, 573 and 866) (the "Hearing") is also devoid of Plaintiff's suggestion that OPRA "changed course" from the RTKL and deleted or otherwise amended its citizenship requirement.

Additionally, Scheeler's argument that just because OPRA's provisions contain the phrase "*any person*" New Jersey's government records must be made accessible to "*any*" person, a New Jerseyan or not, is not persuasive. The Legislative "citizens of this State" limitation is similar to other New Jersey residency restrictions that also use Plaintiff's frequently cited, "*any*

person" verbiage from the Act. For example, *N.J.S.A.* 19:31-1 ("Registration required to vote") provides that, "no '*person*' shall be permitted to vote at any election unless such '*person*' shall have been registered[.]"; *N.J.S.A.* 39:3-10 ("Licensing of drivers; classification") provides that, "no person" under 18 years of age shall be issued a basic license to drive motor vehicles[.]"

Under the Legislative construction of the phrase "*any person*" as proposed by Plaintiff, *a fortiori* a North Carolina resident could vote in New Jersey's elections and obtain a New Jersey driver's license all while never obtaining New Jersey residency. Stated differently, voting in New Jersey's elections and domicile requirements for obtaining a New Jersey license to operate a vehicle all require that the recipient (i.e., the New Jersey citizen) of the benefit (i.e., the ability to vote for public officials and the privileges of having a New Jersey license) to also bear the burden of said benefit's cost via tax dollars. The Act does not contemplate that a non-resident, non-tax paying, out-of-state gadfly is entitled to the benefits of OPRA.

This Court also relies upon our Supreme Court's ruling in *Burnett v. County of Bergen,* et al, 198 *N.J.* 408, (2009) wherein the Court found that the initial precatory language at *N.J.S.A.* 47:1A-1 is not a non-operational "preamble" but rather is part of the substantive body of the law. At *N.J.S.A.* 47:1A-1 – "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. . ." The Court in *Burnett*, 423, ruled that *N.J.S.A.* 47:1A-1 "...is neither a preface nor a preamble. It has not telltale "whereas" clauses that often appear in a preamble. It appears after OPRA's enactment clause, making the provision part of the body of the law."

Prior to discussing the common law, this Court addresses the reliance (in part) of the Court in *Scheeler v. Atlantic Co. Mun. JIF* upon *N.J.S.A.* 47:1A-5F. This Court has always had difficulty understanding the enforceability of an "anonymous request." For the reasons stated by the Court in *A.A. v. Gramiccioni*, 442 *N.J. Super.* 276 (App. Div. 2015), Plaintiff's reliance upon *N.J.S.A.* 47:1A-5F is of no moment to this Court's analysis. Both the Trial Judge and the Appellate Court's opinion in *Gramiccioni* articulate well the law on anonymous legal proceedings.

Finally, with regard to the common law right of access, existent per *N.J.S.A.* 47:1A-8, the Court also concludes that Plaintiff is not entitled to the records sought. In the cases decided under the former RTKL, New Jersey citizenship was required to gain access to public records