

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3335-14T3

JOHN PAFF,

: Civil Action

:
Plaintiff-Respondent,

v.

NEW JERSEY MOTOR VEHICLE
COMMISSION and JOSEPH F. BRUNO,

: On Appeal from a Final Order
of the Superior Court of New
Jersey, Mercer County, Law
Division
: Docket No. MER-L-1672-14

Defendants-Appellants.

: Sat below: Honorable Mary C.
Jacobson, A.J.S.C.
:

BRIEF AND APPENDIX ON BEHALF OF APPELLANTS,
NEW JERSEY MOTOR VEHICLE COMMISSION AND JOSEPH F. BRUNO

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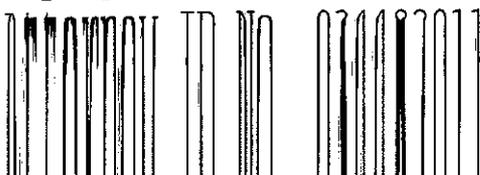


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CASES CITED

Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008) 6, 7

Bart v. Passaic Cnty. Pub. Hous. Agency, 406 N.J. Super. 445 (App. Div. 2009) 5, 13

Bent v. Twp. of Stafford, 381 N.J. Super. 30 (App. Div. 2005) .6, 14

CWA v. McCormac, 417 N.J. Super. 417 (App. Div. 2008) 17

Gannett N.J. Partners L.P. v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005) passim

Lippman v. Ethicon, Inc., 432 N.J. Super. 378 (App. Div. 2013) 12

MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) 5

Massarano v. N.J. Transit, 400 N.J. Super. 474 (App. Div. 2008) 12

Myers v. Ocean City Zoning Bd. of Adjustment, 439 N.J. Super. 96 (App. Div. 2015) 10, 12, 13

N.J. Builders Ass'n v. N.J. Council on Affordable Housing, 390 N.J. Super. 166, 176-77 (App. Div. 2007) 6, 14

Spectraserv, Inc. v. Middlesex Cnty. Utils. Auth., 416 N.J. Super. 565, 576 (App. Div. 2010) 5, 6, 13

State v. Rose, 206 N.J. 141, 183 (2011) 9, 10

Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519 (2005) 7

STATUTES CITED

N.J.S.A. 47:1A-1 through -13 2

N.J.S.A. 47:1A-1.1 3, 15

OTHER AUTHORITIES

5 Am. Jur. 2d Appellate Review § 564 (2007) 8

PRELIMINARY STATEMENT

This court has previously held that the Open Public Records Act ("OPRA") does not permit a requestor to seek OPRA requests, and the responses thereto, submitted to governmental agencies by other requestors. The same result should apply here with respect to the blanket OPRA request submitted by the respondent John Paff seeking all OPRA requests submitted to the New Jersey Motor Vehicle Commission (the "MVC") during a one-week period in May 2014. For the reasons this court explained in its prior published decision, this court should reverse the trial court's decision that these other third-party OPRA requests must be provided to the respondent. Specifically, this court held that such a request improperly seeks access into the nature and scope of a third-party's inquiry to a government agency. This type of request for OPRA requests made by private individuals does nothing to advance the purpose of OPRA in maximizing public knowledge about public affairs. Such blanket requests seeking OPRA requests submitted by others fails to identify public records with specificity.

A contrary result would allow media organizations and other commercial actors to unfairly trade on the ideas of their competitors, in violation of OPRA's exemption for information that would unfairly advantage competitors. Put simply, OPRA does not permit one person -- be he a reporter, commercial actor, or simply

curious -- to piggyback off of someone else's inquiry to the government.

The trial court acknowledged the Appellate Division's on-point holding but considered it to be dicta. Under New Jersey Supreme Court precedent defining dicta, however, it was not. And, in any event, the Appellate Division's carefully considered analysis in its earlier decision should have been binding on the trial court even if labeled dicta. The trial court's order directing the release of documents should be reversed.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS¹

This matter arises out of a request for records submitted to the New Jersey Motor Vehicle Commission (the "MVC") under the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 through -13. On June 2, 2014, the respondent, John Paff filed an OPRA request with the MVC seeking the disclosure of all OPRA requests received by the MVC over an approximately 1 week time period. (Ja15-16). On June 11, 2014, the MVC denied the respondent's OPRA request, on the basis that the Appellate Division's opinion in Gannett N.J. Partners L.P. v. County of Middlesex, 379 N.J. Super. 205 (App.

¹ Because the procedural and factual histories are closely related, they are presented together for the convenience of the court.

"Ja" refers to the attached joint appendix filed with this brief.

"T" refers to the transcript dated October 28, 2014.

Div. 2005), states that such requests are invalid, and recognizes that OPRA requests are confidential, and moreover that disclosure would give an advantage to competitors citing N.J.S.A. 47:1A-1.1 and Gannett, supra. (Ibid.)

On July 29, 2014, the respondent filed an one count Verified Complaint and Order to Show Cause against the MVC and its custodian of records, Joseph F. Bruno. (Ja01-20). The respondent alleges that copies of OPRA requests submitted to the MVC are government records that must be disclosed. (Ja02). On August 1, 2014, the court entered an Order to Show Cause, returnable October 8, 2014. (Ja14-20). The trial court conducted case management conferences on September 2, 2014 and September 27, 2014.² (Ja23-26). On October 10, 2014, the appellants filed a motion for a stay pending the resolution of the appeal in the matter of Scheeler v. Office of the Governor, et al., MER-L-992-14; A-1236-14T3 (the "Scheeler matter") on the basis that this matter presented the same legal issue as the Scheeler matter. (Ja29-34). At that time, the

² Counsel to Mr. Paff, Walter M. Luers, Esq., also represents Heather Greico in the matter of Greico v. New Jersey Department of Education, MER-L-1674-14; A-3170-14T4. As both the Paff and Greico matters presented nearly-identical legal issues, counsel for the defendants in both matters requested the court consolidate the matters. (Ja21-22). Because the matters involved different plaintiffs and different agencies, the trial court rejected the request for consolidation, but conducted joint case management conferences, heard oral argument on both matters together, and issued a single oral decision on both matters. (Ja23-26; Ja46; T: 1).

appellants also opposed the respondent's order to show cause.
(Ibid.)

The trial court heard oral argument on October 28, 2014, and issued an oral opinion denying the motion for a stay filed by the appellants and concluded, in line with its the decision in the Scheeler matter, that the discussion of the confidentiality of OPRA requests in Gannett opinion was dicta and lacked precedential authority. (Ja46; T: 22-23 to 23-4). The trial court issued an order on October 28, 2014 memorializing its oral decision. (Ja35-36). The respondent consented to stay the release of the records pending the resolution of any appeal in this matter. (Ja37). The trial court entered a stipulation and final order on February 4, 2015. (Ja38-39). This timely appeal followed. (Ja40-45).

LEGAL ARGUMENT

POINT I

APPELLANTS CORRECTLY DENIED RESPONDENT'S REQUEST FOR DOCUMENTS BECAUSE THE REQUEST IMPROPERLY SOUGHT ACCESS INTO THE NATURE AND SCOPE OF A THIRD PARTY'S INQUIRY TO A GOVERNMENT AGENCY.

OPRA "is not intended as a research tool litigants may use to force government officials to identify and siphon useful information." MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). For that reason, a "requestor must identify the records sought with specificity." Bart v. Passaic Cnty. Pub. Hous. Agency, 406 N.J.

Super. 445, 451 (App. Div. 2009). New Jersey courts have consistently cited and applied this "specificity" requirement, in a variety of contexts. See, e.g., Spectraserv, Inc. v. Middlesex Cnty. Utils. Auth., 416 N.J. Super. 565, 576 (App. Div. 2010); Bart, supra, 406 N.J. Super. at 452; N.J. Builders Ass'n v. N.J. Council on Affordable Housing, 390 N.J. Super. 166, 176-77 (App. Div. 2007); Bent v. Twp. of Stafford, 381 N.J. Super. 30, 37 (App. Div. 2005). As one court explained, "'a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents.'" Spectraserv, supra, 416 N.J. Super. at 576 (quoting Bent, supra, 381 N.J. Super. at 36-37) (emphasis in original).

"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 a secluded process.'" Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609, 616 (App. Div. 2008) (quoting Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005)). In Bart, the court held that the OPRA requestor could not have been denied access to a document that he already possessed, explaining that "[r]equiring the Authority to duplicate another copy and send it to Bart does not, in our judgment, advance the purpose of OPRA, which is to ensure an informed citizenry." Id. at 618 (citing Times of Trenton,

supra, 183 N.J. at 535). Likewise, the respondent's OPRA request seeking access to other OPRA requests does not seek access to government records that would inform the public of the actions of the public entity.

The OPRA request in Gannett, supra, sought release of federal subpoenas issued to Middlesex County and "all information supplied to the U.S. Attorney or other federal authorities in response to the subpoenas." 379 N.J. Super. at 210. The defendant disclosed many of the responsive documents, but withheld the subpoenas and certain other records. On appeal, the respondent sought release of these withheld documents. The court began its analysis by setting forth OPRA's specificity requirement and holding that the request for all information supplied to another entity was not permitted because it did not comport with that requirement. Id. at 212. Specifically, the court stated:

OPRA requires a party requesting access to a public record to specifically describe the document sought. OPRA does not authorize a party to make a blanket request for every document a public agency has provided another party in response to an OPRA request, or, in this case, a federal grand jury subpoena.

[Ibid. (citation omitted).]

The court explained that "[s]uch a request seeks access not merely to public records but also into the nature and scope of a third party's inquiry to a government agency." Ibid. Gannett sets forth an unambiguous holding: OPRA's specificity requirement "does not

authorize a party to make a blanket request for every document a public agency has provided another party in response to an OPRA request." Ibid. "Such a request seeks access not merely to public records but also into the nature and scope of a third party's inquiry to a government agency." Ibid. Because this is exactly what the respondent requested in this case, the trial court should have held that the OPRA custodian here properly denied respondent's request, and this court should reverse the trial court's contrary holding.

POINT II

THE TRIAL COURT WRONGLY LABELED GANNETT'S HOLDING DICTA AND SO ERRED IN FAILING TO FOLLOW BINDING APPELLATE DIVISION PRECEDENT.

The trial court acknowledged the Gannett court's concern regarding the confidentiality of the records at issue. (T: 22-6 to 22-14). The court concluded, however, that the Appellate Division's concerns regarding confidentiality did not extend to protecting OPRA requests. (T: 22-1 to 22:3). The court held that this aspect of Gannett constituted dicta that lacked precedential authority. (T: 22-22 to 23-4). That conclusion was wrong as a matter of law. As set forth by the New Jersey Supreme Court, "'matters in the opinion of a higher court which are not decisive of the primary issue presented but which are germane to that issue . . . are not dicta, but binding decisions of the court.'" State v. Rose, 206 N.J. 141, 183 (2011) (quoting 5 Am. Jur. 2d Appellate Review § 564

(2007)) (alterations in original); see also Myers v. Ocean City Zoning Bd. of Adjustment, 439 N.J. Super. 96, 102 n.2 (App. Div. 2015) ("We disagree it was dictum, as it was germane to the primary issue in the case whether the municipality's zoning ordinance was substantially consistent with the master plan." (citing Rose, supra, 206 N.J. at 183)).

In Gannett, the court held that the defendant waived its specificity argument and so proceeded to consider whether other grounds existed for exempting the requested documents from disclosure. See Gannett, supra, 379 N.J. Super. at 212-14. But that additional analysis does not render Gannett's holding dictum. Gannett's pronouncement that "OPRA does not authorize a party to make a blanket request for every document a public agency has provided another party in response to an OPRA request" because "[s]uch a request seeks access not merely to public records but also into the nature and scope of a third party's inquiry to a government agency," id. at 212, is clearly "germane" to the "primary issue presented": whether OPRA required the public release of the requested documents. Under Rose, that is not dicta.³

The plaintiff in Gannett requested the public release of certain documents under to OPRA. The court held that those requests

³ It is true that Gannett involved a federal subpoena. But the Appellate Division in Gannett made plain that its conclusion regarding the invalidity under OPRA of requests for other parties' inquiries applied to both OPRA requests and subpoenas -- in that order.

did not satisfy OPRA's specificity requirements because such requests improperly seek access into the nature and scope of a third party inquiry. Plainly, that holding both "addresses" and is "germane" to the issue presented in that case, i.e., whether documents should be released under OPRA. The trial court thus erred in labeling Gannett dictum and refusing to follow binding Appellate Division precedent.

POINT III

GANNETT'S CAREFULLY CONSIDERED HOLDING IS BINDING ON THE TRIAL COURT EVEN IF LABELED DICTA.

Even if Gannett's specificity holding could somehow be construed as dicta, the trial court was still incorrect in finding that it did not constitute considered analysis applicable to this matter. Gannett's holding constitutes a carefully considered analysis of the principal issue presented: whether OPRA permitted the respondent's blanket request for every document a public agency provided to a third-party. In New Jersey, such an analysis is binding on a trial court, regardless of the designated label.

New Jersey law provides that "[j]ust as we [i.e., appellate courts] are bound by carefully considered dictum from the Supreme Court, a trial court should be bound by similar pronouncements by our [i.e., the Appellate Division] court." Myers, supra, 439 N.J. Super. at 102 n.2 (internal citation and quotation marks omitted). Thus, for example, the Appellate Division in

Lippman v. Ethicon, Inc., 432 N.J. Super. 378 (App. Div. 2013), rejected the plaintiff's argument "that the motion judge was free to disregard the language in Massarano [v. N.J. Transit, 400 N.J. Super. 474 (App. Div. 2008)] as mere dictum," because "lower courts should consider themselves bound by a higher court's dicta." Id. at 407 n.11.

The Appellate Division defines "carefully considered dictum" as a statement "intended to provide guidance to courts that may address an issue in the future." Myers, supra, 439 N.J. Super. at 102 n.2. Gannett's specificity holding satisfies this definition for all of the reasons stated in the previous sections of this brief. The Gannett court thoroughly analyzed the requests posited by the plaintiff and held that such requests were insufficiently specific under OPRA because they inappropriately sought access into the nature and scope of a third party's inquiry to a government agency. The resulting pronouncement went out of its way to address a permutation of the precise fact pattern presented, holding that OPRA prohibits not only blanket requests for documents provided in response to federal grand jury subpoenas, but also blanket requests for documents provided in response to OPRA requests. This specific declaration of law must, at the very least, be intended to provide guidance to courts addressing this issue in the future.

And predictably, that is exactly what happened. The principle underlying the decision in Gannett that the trial court

characterized as "dicta" -- the requirement that OPRA requests satisfy a minimal level of specificity -- has become a bedrock legal canon in this State. Numerous appellate courts have followed, cited, and applied Gannett's specificity requirement. See, e.g., Spectraserv, supra, 416 N.J. Super. at 576; Bart, supra, 406 N.J. Super. at 452; N.J. Builders, supra, 390 N.J. Super. at 176-77; Bent, supra, 381 N.J. Super. at 37. Gannett's specificity holding thus does not just manifest intent to provide guidance to future courts; it has, in practice, served as the foundational opinion underlying all New Jersey courts' subsequent analyses determining whether an OPRA request is sufficiently specific.

The trial court acknowledged that dicta may have precedential weight "where the dicta was based upon some considered analysis even if the determination of that decision was not necessary to that particular case." (T: 23-5 to 23-11). The court held, however, that the discussion of OPRA requests in Gannett was a "ruminantion" and not binding precedent. (T: 24-7). The trial court therefore erred by refusing to follow Gannett's unequivocal declaration that "OPRA does not authorize a party to make a blanket request for every document a public agency has provided another party in response to an OPRA request" because "[s]uch a request seeks access not merely to public records but also into the nature and scope of a third party's inquiry to a government agency." Gannett, supra, 379 N.J. Super. at 212. Indeed, there are only two

plausible explanations for this language. It either constitutes a "germane" analysis to the "primary issue presented," and so binding precedent under Rose, supra, or, at bare minimum, it qualifies as a statement "intended to provide guidance to courts that may address an issue in the future" and thus binding "carefully considered dictum" under Myers, supra. Either way, the trial court erred by declining to follow Gannett.

POINT IV

ALLOWING ONE REQUESTOR TO OBTAIN ANOTHER'S OPRA REQUESTS MAY CONFER AN UNDUE COMPETITIVE ADVANTAGE

As discussed above, the Gannett court ruled that a demand for all documents provided to another requestor in response to either an OPRA request or a subpoena is invalid because it improperly seeks access to the nature and scope of a third party's inquiry to an agency. One of the strongest reasons the Gannett court cited for its conclusion is that "a party who requests access to public records also may have an interest in maintaining the confidentiality of its inquiry." Gannett, supra, 379 N.J. Super. at 212. While the court stated that the need for such confidentiality is "particularly strong" when the party that requested the documents is a law enforcement agency, it also said that "the interest of third parties in protecting the confidentiality of their requests for access to public documents is not limited to law

enforcement agencies," and specifically cited an example that is highly germane to the respondent's request in this case:

Suppose Gannett suspected that another news organization was conducting an investigation into a public agency's financial practices and had sought production of documents under OPRA in connection with that investigation. Could Gannett make a blanket request to the public agency for the production of all records provided to the other news organization?

[Ibid.]

Through that rhetorical question, the Gannett court essentially declared that use of OPRA to check up on what other requestors are seeking -- exactly what the respondent has attempted -- is improper.

Journalists have a confidentiality interest in shielding their OPRA requests from the public eye because these inquiries essentially constitute work product, i.e., their preliminary investigations and thought processes regarding potential articles. As noted in the appellants' response to the respondent's OPRA request, the Appellate Division's recognition of the confidentiality of OPRA requests may also be understood as applying OPRA's exemption for the disclosure of information that would give an advantage to competitors. See N.J.S.A. 47:1A-1.1 ("[I]nformation which, if disclosed, would give an advantage to competitors or bidders."). The Gannett court's example demonstrated its conclusion that news organizations would suffer competitive harm if rival

reporters could access their OPRA requests and thereby discern the stories they were working on. Similarly, a reporter's investigation into an official's malfeasance could be harmed if the publicizing of an OPRA request alerted that person to the reporter's efforts.

Responding to such requests would improperly deprive other requestors of the competitive advantage they validly derived from their earlier diligence. And allowing such requests threatens a deluge of them: What would prevent multiple media organizations from submitting regular OPRA requests for the OPRA requests submitted by their competitors? What would prevent any other kind of commercial actor from seeking information about what information its competitors sought from the government? This court has held such "free rides" on the backs of competitors to be improper under OPRA's commercial advantage exception. See, e.g., CWA v. McCormac, 417 N.J. Super. 417, 442 (App. Div. 2008). And because OPRA custodians would have no way to know whether a requestor is seeking information for the purpose of disadvantaging a competitor, or even who a requestor is, Gannett wisely held that requests for another persons' OPRA submissions are always improper. The trial court's order directing the release of documents therefore should be reversed.

CONCLUSION

For the foregoing reasons, the trial court's order directing the release of records responsive to the respondent's OPRA request should be reversed.

Respectfully submitted,

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