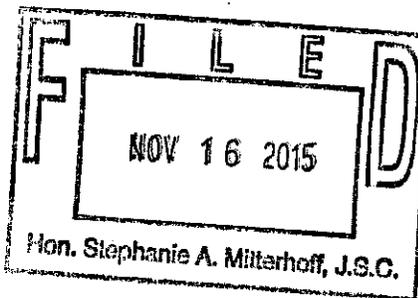


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**Patricia Gilleran**



PATRICIA GILLERAN,

Plaintiff,

v.

THE CITY OF EAST ORANGE and CYNTHIA BROWN, in her official capacity as City Clerk and Records Custodian for the City of East Orange,

Defendants.

SUPERIOR COURT OF NEW JERSEY  
 LAW DIVISION: ESSEX COUNTY

DOCKET NO.: ESX-L-5212-15

Civil Action

**ORDER**

THIS MATTER being brought before the Court by Pashman Stein, a Professional Corporation, attorneys for Plaintiff Pat Gilleran (CJ Griffin, Esq. appearing), by way of an application for an Order to Show Cause pursuant to the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1, et seq., to obtain access to records maintained by Defendants City of East Orange and Cynthia Brown, and for other relief, and the Court having considered the parties' respective papers and the Court having heard oral argument on October 21, 2015, and for good cause shown;

IT IS on this 16<sup>th</sup> day of November, 2015,

**ORDERED** that Defendants are found to be in violation of the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1, et seq., and it is further

**ORDERED** that Defendant East Orange's OPRA Request Form failed to adequately inform Plaintiff that requests submitted by e-mail were prohibited; and it is further

**ORDERED** that Defendant East Orange's policy of banning all forms of electronically

*prospectively*

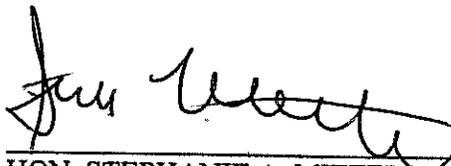
submitted OPRA request creates an unreasonable obstacle to access and is unlawful; and it is further

**ORDERED** that Defendant East Orange shall permit at least one form of electronically submitted OPRA requests within 60 days from the date of this Order.

**ORDERED** that Defendant shall accept Plaintiff's emailed OPRA requests and respond to them within 7 days from the date of this Order;

**ORDERED** that Plaintiff is found to be a prevailing party entitled to reasonable fees. Plaintiff may submit a certification of services in support of her fee application. All opposition briefs and reply briefs will be scheduled according to the ordinary motion day calendar.

**ORDERED** that a copy of this Order shall be served upon all parties within 7 days of this service of this Order.



HON. STEPHANIE A. MITTERHOFF, J.S.C.

Opposed

Unopposed



stated, "East Orange does not accept OPRA requests via fax/email. We do not have machines dedicated for this purpose. Our policy is that these requests must be mailed in or hand delivered."

On July 16, 2015, Plaintiff submitted an additional OPRA request, via e-mail, to gain access to East Orange's utility bills for May 2015, the animal shelter's 2015 budget, and information about the shooting of a man by police in East Orange earlier in July, which included a copy of the 911 call, all N.J.S.A. 47:1A-3b information and the Use of Force report. Defendants responded on July 20, 2015 and again informed Plaintiff that emailed OPRA requests are not accepted because they do not have a fax machine or email designated for such purposes. The response had a blank OPRA form attached to it for Plaintiff to fill out and return to the Clerk's office, along with instructions on how to properly request public records pursuant to N.J.S.A. 47:1A-1 et seq.

Plaintiff filed a one-count complaint, alleging that Defendants have violated OPRA by failing to permit electronic submission of OPRA requests and failing to disclose the requested records. Plaintiff claims that East Orange's policy of not accepting OPRA requests electronically places an unreasonable obstacle in the way of obtaining "immediate" access to certain records and that its OPRA form does not specify that OPRA requests can only be submitted via mail or hand delivery, in violation of N.J.S.A. 47:1A-5(f).

## DISCUSSION

### **I. The OPRA Standard**

The OPRA statute states that its purpose is to "insure that government records, unless exempted, are readily accessible to citizens of New Jersey for the protection of the public interest." N.J.S.A. 47:1A-1. Thus, public records must be covered by a specific exclusion to

prevent disclosure once an OPRA request has been made. OPRA provides that a summary proceeding is available for actions challenging a decision to withhold access to government records. N.J.S.A. 47A:1A-6. If a public agency denies a requester access, OPRA places the burden on the agency to prove the denial was authorized by law. N.J.S.A. 47:1A-6. Thus, an agency seeking to restrict the public's right of access to government records "must produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality." Courier News v. Hunterdon Cnty. Prosecutor's Office, 358 N.J. Super. 373, 382-83 (App. Div. 2003).

## **II. Statutes and Case Law Relating to the Issue at Hand**

N.J.S.A. 47:1A-5(g) states in pertinent part: "A request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian." N.J.S.A. 47:1A-5(f) states in pertinent part: "the custodian of a public agency shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency . . . the form shall also include the following: (1) specific directions and procedures for requesting a record . . ." Plaintiff herein asserts that East Orange's policy of only allowing OPRA requests via hand delivery or mail, and not expressly stating that it does not accept facsimile or email requests in its form, are violations of these statutes. Plaintiff's argument is couched in the assertion that East Orange's policy is an unreasonable obstacle on access to public records.

Plaintiff cites Paff v. City of East Orange, 407 N.J. Super. 221 (App. Div. 2009) in support of her position. In Paff, a citizen requested records from the City of East Orange by facsimile, and was informed of the city's hand-delivery or mail only policy thereafter. The citizen filed a complaint with the Government Records Council ("GRC"), claiming that East

Orange was obligated under N.J.S.A. 47:1A-5(g) to accept a request for records via fax. Plaintiff appealed the GRC's rejection of his complaint to the Appellate Division, which identified the issue as whether a public agency is required to accept a request for records transmitted by any of the methods mentioned under N.J.S.A. 47:1A-5(g). The Appellate Court concluded that N.J.S.A. 47:1A-5(f) authorizes a custodian to direct that a request for a government record must be transmitted only by methods specified in the form, which need not include every method of transmission mentioned in N.J.S.A. 47:1A-5(g). Paff, supra, 407 N.J. Super. at 224. The Paff court analyzed the subject statute, noting that while it expressly requires the request to be in writing and conveyed to the appropriate custodian, it does not require a public agency to accept the transmission of an OPRA request by any one of the methods mentioned in the statute. Id. at 226. Accordingly, the court held that East Orange had not violated OPRA by not accepting fax requests. The court cautioned, however, that the procedures adopted by a government custodian must not be unreasonable, noting that "requiring any OPRA request to be hand-delivered" would be unreasonable. The court concluded by stating, "there is no basis for concluding that East Orange's form, which only prohibits submission of OPRA request by fax, but allows submission by mail or 'electronically,' imposes any undue burden upon parties who seek the disclosure of government records under OPRA." Id. at 229.

Plaintiff herein cites Paff in support of her contention that East Orange's policy of not accepting fax *or* email requests is unreasonable and unlawful, largely due to the court's dicta cautioning against unreasonable procedures at the end of its opinion. The Paff court did not hold that a policy that does not allow for e-mail requests is unreasonable. Rather, the court only identifies, in dicta, one policy that would be deemed unreasonable: where the custodian requires requests to be by hand-delivery only. East Orange's policy, as discussed, permits hand-delivery

and regular mail submission requests. Therefore, the court did not squarely address whether East Orange's request policy (mail or hand-delivery only) is unreasonable or unlawful.

In her reply, Plaintiff cited to a decision by the Government Records Council ("GRC") that was decided on September 29, 2015, after Plaintiff filed her complaint in this matter. The decision, Russo v. City of East Orange (Essex), GRC Complaint No. 2014-430, held that East Orange's policy of only accepting OPRA requests via hand-delivery or mail and not allowing for any electronic means of request is unreasonable. The GRC was unpersuaded by the contention from East Orange that requiring it to accept requests via email would create operational deficiencies and that there would be no way to ensure receipt of every OPRA request. It reasoned that, in this day and age, access to public records via electronic means is not burdensome for the agency. Furthermore, the GRC found that East Orange had not adequately made the public aware of its ban on electronic submission requests via its OPRA form, as the form does not include a definitive statement addressing the electronic limitation. For all these reasons, the GRC held that East Orange's OPRA request policy, to the extent it does not allow for electronic submission requests, is an unreasonable obstacle to access in violation of OPRA. Plaintiff herein concedes that GRC decisions are not binding upon any court, however, she asserts that the GRC is afforded deference from courts in its interpretation of OPRA statutes.

East Orange opposes Plaintiff's complaint by stating that its policy complies with N.J.S.A. 47:1A-5(g), that it has accommodated Plaintiff by providing her with a blank OPRA form, and that requiring it to implement a policy allowing for fax and email requests will disrupt agency operations. It asserts that it does not have machines dedicated to receiving OPRA requests via fax or e-mail and that it would be overly burdensome to discriminate OPRA requests from other official business conduct through these media. Defendant asserts that its policy is not

burdensome to Plaintiff or other OPRA requesters, as sending a request by first class mail, which costs 49 cents, is in no way burdensome.

### III. Analysis

Although the court is not bound by the GRC's decision made in Russo, it recognizes that the GRC's interpretation of OPRA is afforded substantial deference by the courts, provided the interpretation is not plainly unreasonable. Paff, supra, 407 N.J. Super. at 228. In that regard, the GRC's conclusion that East Orange's ban on all electronic submissions is an unreasonable obstacle to access of public records is not plainly unreasonable. Although the Paff court made clear that East Orange's policy of not accepting OPRA requests via facsimile was not unreasonable, it did not reach the issue of whether not accepting any electronic submissions would be unreasonable. The GRC, in its Russo decision, did reach that issue, and was faced with the same arguments and legal precedents presently before this court. The court will defer to the GRC's conclusion made therein and agrees with its reasoning that, in this day and age, it is not unreasonable or overly burdensome for a public entity to accept OPRA requests via email. Although it contends as much, East Orange has not persuasively shown that the process of creating a separate email account to receive OPRA requests and responding to said requests via email is overly burdensome or that it will disrupt agency operations. Accordingly, henceforth the court holds that East Orange must make arrangements to accept OPRA requests via email.

Furthermore, the court adopts the GRC's conclusion that East Orange has not adequately made the public aware of its ban on electronic submission requests via its OPRA form, as the form does not include a definitive statement addressing the electronic submission limitation, in violation of N.J.S.A. 47:1A-5(f). Unlike the question whether East Orange was bound to accept email requests, which was as discussed an unsettled question until now, the requirement that an

OPRA form specify the methods by which OPRA requests will be accepted is firmly established. For these reasons, the court concludes that East Orange's failure to so specify in its OPRA request form is a violation of OPRA.

### CONCLUSION

The court finds that East Orange's action in not responding to Plaintiff's OPRA email requests was not a clear violation of N.J.S.A. 47:1A-1, as the Russo decision was rendered after the filing of this complaint. Moreover, East Orange reasonably relied on Paff as supporting its position that it was not unreasonable to require OPRA requests to be made via hand delivery or regular mail. Accordingly, the court will not award fees on what is essentially a declaratory judgment that East Orange must accept requests via email, a previously undecided issue. However, because East Orange's request form violates N.J.S.A. 47:1A-5(f), as not specifying the methods by which OPRA requests are to be submitted, Plaintiff is a prevailing party and will be awarded counsel fees and costs pursuant to N.J.S.A. 47:1A-6.