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500 W57 JV LLC,

Plaintiff,

v.

Township of Lakewood,

Defendant.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION

OCEAN COUNTY

DOCKET NO. OCN-L-1228-15

CIVIL ACTION

OPINION

Argued: June 9, 2015

Decided: June 9, 2015

Vincent J. Grasso, A.J.S.C.

Bruce H. Snyder, Esq. appearing on behalf of the plaintiff, 500 W57 JV LLC (Lasser Hochman, L.L.C.)

Steven Secare, Esq. appearing on behalf of the defendant, Township of Lakewood (Secare & Hensel, Attorneys at Law)

Summary

The matter before the court is an order to show cause and verified complaint brought by plaintiff, 500 W57 JV, LLC, pursuant to N.J.S.A. 47:1A-6, alleging that defendant, Township of Lakewood (Township), violated both the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, and the common law right of access by denying plaintiff's access to copies of documents and communications regarding any transaction related to any land contained, within, or directly adjoining the Crystal Lake Preserve since January 1, 2013. The issue before the court is whether plaintiff's request is overly broad and vague and/or requires research, which is beyond the scope

of OPRA. Alternatively, at issue is whether plaintiff is entitled to the documents pursuant to the common law right of access.

Background

The following facts are not in dispute. Plaintiff, 500 W57 JV, LLC, is a New York limited liability company whose members are residents, property owners, and taxpayers of the Township of Lakewood, County of Ocean, State of New Jersey. Plaintiff's members own properties that abut, or are within 200 feet of the portion of the Lakewood known as the Crystal Lake Preserve Zone, as defined and delineated in the Lakewood Township Development Ordinance and Zoning Map.

On or about March 27, 2015, plaintiff submitted a request to the Township for certain records pursuant to OPRA. The request sought the following documents:

Any and all records, from January 1, 2014, through the present, relating to any property in the Crystal Lake Preserve Zone, including but not limited to, correspondence, e-mails, applications, permits, wet land designations, or communications relating to potential transactions.

On March 30, 2015, the Township Clerk and records custodian, Kathryn Cirulli, asked for clarification of the term "potential transactions." Plaintiff responded with the requested clarification. On or about March 31, 2015, Cirulli responded that there were no pending applications with respect to the Crystal Lake Preserve responsive to plaintiff's OPRA request and that she was unable to respond further because the request did not specify the nature of the communications and the departments or parties potentially involved. Plaintiff agreed to reformulate the request.

On or about April 1, 2015, plaintiff submitted a revised OPRA request, which sought:

Any proposal, request, inquiry or application, formal or informal, from any entity or individual to acquire, swap, lease, exchange or engage in any other transaction related to any land contained within or directly adjoining, the Crystal Lake

Preserve, and any communications, including e-mails, correspondence, and memoranda of discussions, concerning same, since January 1, 2013.

On April 17, 2015, Cirulli responded that plaintiff's request "is not permitted under the Open Public Records Act" because the request "seeks information and research." She also stated, "However, rather than completely deny your request, I would encourage you to refine your request and be more specific as to what you are looking for rather than copies of all documents pertaining to Crystal Lake Preserve."

On April 29, 2015, plaintiff filed a verified complaint, order to show cause, and brief alleging two counts against the Township for its denial of access to the requested documents based on OPRA and the common law right of access respectively.

Findings

OPRA

OPRA manifests the State's public policy favoring transparency in government and disclosure of government documents. See N.J.S.A. 47:1A-1 ("[G]overnment 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 . . . shall be construed in favor of the public's right of access"). Pursuant to N.J.S.A. 47:1A-1.1, if a document is a government record, it must be disclosed unless it is excluded from disclosure by other statutory provisions or executive orders, N.J.S.A. 47:1A-9(a), or exempt based on a privilege or confidentiality established or recognized by the State Constitution, statute, court rule, judicial decision, or OPRA itself. OPRA defines a "government record" to mean:

[A]ny paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy

thereof, that has been made, maintained or kept on file in the course of his or its official business . . . or that has been received in the course of his or its official business.

[N.J.S.A. 47:1A-1.1.]

While the statute broadly defines “government record,” it specifies twenty-one categories of information that are excluded from the definition for purposes of the statute. N.J.S.A. 47:1A-1.1. Thus, before determining whether the information should be disclosed, it must be determined (1) whether it is a government record and (2) whether it falls under any of the exemptions to disclosure found in the body of the statute. Wilson v. Brown, 404 N.J. Super. 557, 571 (App. Div. 2009), cert. denied, 198 N.J. 473 (2009). With regard to these questions, the law provides for a presumption of disclosure: “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. Moreover, “N.J.S.A. 47:1A-5(g) generally 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. County of Middlesex, 379 N.J. Super. 205, 215 (App. Div. 2005).

On the other hand, “[t]he requestor must identify the records sought with specificity. The request may not be a broad, generic description of documents that requires the custodian to search the agency’s files and ‘analyze, compile and collate’ the requested information.” Bart v. Passaic County Public Hous. Agency, 406 N.J. Super. 445, 451 (App. Div. 2009) (citation omitted). If a request does not name specifically identifiable records or is overly broad, a custodian may deny access pursuant to the well-established case law. See MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Twp. of Stafford Police Dep’t., Custodian of Records, 381 N.J. Super. 30 (App. Div. 2005); N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166 (App. Div. 2007); Schuler v.

Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). “[W]hen a request . . . fails to specifically identify the documents sought, then that request is not ‘encompassed’ by OPRA.” N.J. Builders Ass’n, supra, 390 N.J. Super. at 179. “[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.” Bent, supra, 381 N.J. Super. at 37.

A custodian is *obligated to search* the files to find the identifiable government records listed in the OPRA request, but *not required to research* the files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. Burnett v. County of Gloucester, 415 N.J. Super. 506, 515 (App. Div. 2010). The Appellate Division explained,

The word *search* is defined as “to go or look through carefully in order to find something missing or lost.[”] The word *research*, on the other hand, means “a close and careful study to find new facts or information.”

[Burnett, supra, 415 N.J. Super. at 515 (quoting Donato v. Twp. of Union, GRC No. 2005-182, interim order (Jan. 31, 2007)).]

“While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records ‘readily accessible for inspection, copying, or examination.’” MAG, supra, 375 N.J. Super. at 546. Under OPRA, “agencies are required to disclose only ‘identifiable’ government records not otherwise exempt OPRA does not countenance open-ended searches of an agency’s files.” MAG, supra, 375 N.J. Super. at 549. In other words, an OPRA request is invalid if it requires information to be “analyzed, collated and compiled by the responding government entity.” Ibid. The purpose of OPRA is to “make identifiable government records ‘readily accessible for inspection, copying, or examination’”

rather than to require government officials to conduct research and create documents. MAG, supra, 375 N.J. Super. at 546.

In the Bent case, the plaintiff filed an OPRA request seeking the “entire file” of his criminal investigation and “the factual basis underlying documented action and advice to third parties to act against my interest.” Bent, supra, 381 N.J. Super. at 33–34. The Appellate Division held that this was an invalid OPRA request because it “neither identifies nor describes with any specificity or particularity the records sought.” Bent, supra, 381 N.J. Super. at 39. Instead, the plaintiff “sought general *information* to support his unsubstantiated claim of police misconduct.” Ibid. (emphasis added). This open-ended demand required analysis and evaluation which an agency is not obliged to provide under OPRA. Bent, supra, 381 N.J. Super. at 40.

In the MAG case, the plaintiff requested “all documents or records evidencing that the [Division of Alcoholic Beverage Control] ABC sought, obtained or ordered” (1) “revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person in which such person, after leaving the licensed premises, was involved in a fatal auto accident;” and (2) “suspension of a liquor license exceeding 45 days for charges of lewd or immoral activity.” MAG, supra, 375 N.J. Super. at 539–40. The Appellate Division held:

[Plaintiff] provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the [defendant’s] records custodian to manually search through all of the agency’s files, analyze, compile and collate the information contained therein, and identify for [the plaintiff] the cases [relevant] to its selective enforcement defense Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

[MAG, supra, 375 N.J. Super. at 549.]

In the N.J. Builders Ass’n case, the plaintiff, for instance, demanded “[a]ny and all documents and data which [were] relied upon, considered, reviewed, or otherwise utilized by any

employee or staff member . . . in calculating the second proposed third round affordable housing methodology and the regulations proposed on July 13, 2004.” N.J. Builders Ass’n, supra, 390 N.J. Super. at 172. The Appellate Division held that rather than specifically describing the documents sought, the plaintiff asked the agency to identify documents, which is the plaintiff’s obligation under OPRA rather than the agency’s.

Here, plaintiff in both its brief and its response to the Township’s opposition argues that the request seeks specific categories of documents, namely “proposal, request, inquiry or application, formal or informal, from any entity or individual to acquire, swap, lease, exchange or engage in any other transaction” together with related communications, concerning specially identified property, i.e. “any land contained within or directly adjoining, the Crystal Lake Preserve” within a specified time frame, from January 1, 2013 to now. Plaintiff argues that the request does not require research because the request is for the records themselves. The Township contends that the request is overly broad and impossible to define and requires investigation and research. Plaintiff’s responsive brief is unpersuasive and simply reiterates, in general terms, the Township’s obligation to produce these records.

First, the court finds that the documents sought through plaintiff’s revised OPRA request on April 1, 2015 are government records subject to OPRA. Fair Share Hous. Ctr., Inc. v. N.J. State League of Municipalities, 207 N.J. 489 (2011) (“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”). Because the Township claims no statutory exemption of any of these requests, the issue here is whether the request failed to identify with reasonable clarity any specific government record and was overly broad.

Plaintiff's OPRA request sought:

Any proposal, request, inquiry or application, formal or informal, from any entity or individual to acquire, swap, lease, exchange or engage in any other transaction related to any land contained within or directly adjoining, the Crystal Lake Preserve, and any communications, including e-mails, correspondence, and memoranda of discussions, concerning same, since January 1, 2013.

By applying the governing principles in the well-established case law, the court finds that the request failed to identify with the necessary specificity or particularity the government records sought. First, it provided neither names for "any entity or individual" nor any identifiers other than a broad scope of generic description of "any proposal, request, inquiry or application, formal or informal" regarding any transaction related to the Crystal Lake Preserve and "any communications" concerning the same. Such an open-ended demand was tantamount to an "any and all" request and required the custodian to search through all of the Township files and analyze the information contained therein in order to identify for plaintiff the records relevant to the request. OPRA does not countenance open-ended searches of an agency's files.

Plaintiff's open-ended request requires the custodian to identify and siphon documents and communications in all of the Township's files. For example, the custodian has to go through all the files to analyze whether any of them are "proposal, request, inquiry or application, formal or informal . . . to acquire, swap, lease, exchange or engage in any other transaction related to any land contained within, the Crystal Lake Preserve." Likewise, the custodian has to siphon all e-mails, memoranda, and letters to evaluate: whether they concerned the matter listed in the request. Additionally, in the custodian's response to plaintiff on April 17, 2015, the custodian stated that the Township did not completely deny plaintiff's request, but encouraged plaintiff to refine its request and be more specific as to what it is looking for. In short, requests for documents under OPRA, which are fashioned more like an interrogatory, are usually problematic

due to their lack of specificity, which is the case here. Therefore, the court finds that plaintiff's request is an invalid OPRA request because it failed to identify any specific government records, but required the custodian to analyze, evaluate, and identify the records for plaintiff, which the Township is not obliged to provide under OPRA. Bent, supra, 381 N.J. Super. at 39.

Common Law Right of Access

“[T]he common law definition of ‘public record’ is broader than the statutory definition of ‘government record’ contained in N.J.S.A. 47:1A-1.1.” Bergen County Imp. Auth. v. North Jersey Media Group, Inc., 370 N.J. Super. 504, 509–10 (App. Div. 2004), cert. denied, 182 N.J. 143 (2004). “Common-law records are any records made by public officers in the exercise of public functions.” Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35, 46 (1995) (quotation omitted). “These materials include almost every document recorded, generated, or produced by public officials whether or not required by law to be made, maintained or kept on file, as required under” OPRA. Ibid. “Nothing contained in [OPRA] shall be construed as limiting the common law right of access to a government record, including criminal investigatory records of a law enforcement agency.” N.J.S.A. 47:1A-8.

“The common law right of access involves a two-step inquiry. First, a litigant must establish an interest in the public record. . . . Once the first step has been satisfied, then, to gain access, a plaintiff's interest in disclosure of the relevant documents must outweigh the State's interest in non-disclosure.” Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 302–03 (2009) (citations omitted).

Plaintiff argues that it is entitled to common law right of access to the records because the records are “public records” and it has a valid interest in the records, which outweighs the Township's need for non-disclosure. In plaintiff's response to the Township's opposition,

plaintiff maintains that this alternative claim for relief should be granted because the Township has not addressed it in the Township's opposition brief. The court finds that the Township has no obligation to address it when the records requested are not readily identifiable.

For the reasons set forth herein, the court finds that the documents sought by plaintiff's request are not readily identifiable and, therefore, plaintiff's request was not a proper request under both OPRA and the common law right of access. The court dismisses the action with prejudice without the award of costs or attorney fees. Mr. Secare is to prepare the order that comports with the court's ruling.