

Superior Court of New Jersey



CHAMBERS OF
JUDGE VINCENT J. GRASSO
ASSIGNMENT JUDGE

OCEAN COUNTY COURT HOUSE
P.O. BOX 2191
TOMS RIVER, NJ 08754-2191

(732)-929-2176

May 6, 2015

Steven Secare, Esq.
16 Madison Avenue
Suite 1A
Toms River, NJ 08753

VIA FAX: (732) 349-9293

Donald M. Doherty, Jr., Esq.
125 North Route 73
West Berlin, NJ 08091

VIA FAX: (609) 784-7815

**Re: Paff v. Township of Lakewood and Kathryn Cirulli
Docket No. OCN-L-612-15**

Dear Counsel:

The following shall set forth the court's decision.

Summary

The matter before the court is an order to show cause and complaint in lieu of prerogative writs brought by plaintiff, John Paff, alleging that defendants, Township of Lakewood and Kathryn Cirulli, Township Clerk (collectively Township), violated New Jersey's Open Public Records Act, N.J.S.A. 47:1A-1 to -13 (OPRA) and the common law right of access. Specifically, Paff challenges the Township's denial of access to all writings related to a police officer, Matthew Moore's, alleged drug use conduct that resulted in his resignation. At issue is whether the Township properly denied Paff's request for the documents as inaccessible under OPRA.

Background

Plaintiff, John Paff, is an open government activist that operates multiple internet blogs commenting on New Jersey government issues. He learned that Township of Lakewood had allowed police officer, Matthew Moore, to resign, on the condition that he would not seek further employment in the law enforcement field and the Township would report Moore to the New Jersey Central Drug Registry. Defendant, Township of Lakewood, is a government entity in the State of New Jersey and subject to the OPRA. Defendant, Kathryn Cirulli, functions as the Records Custodian for the Township.

On or about January 30, 2015, plaintiff filed an OPRA request with the Township. He requested “[a]ll writings including but not limited incident reports, investigation reports, supplementary reports, etc. related to Matthew Moore’s ‘drug use’ conduct that resulted in his resignation.” On the same day, in response, the Township informed plaintiff that this matter had been forwarded to the Ocean County Prosecutor’s Office. On February 2, 2015, the Township’s counsel responded that plaintiff’s request was “generic inquiries or questions that require research or investigation.” On February 5, 2015, the Township denied plaintiff’s request and explained that “the information requested is confidential information under the NJ Attorney General’s Guidelines on Internal Affairs [the Attorney General’s Guidelines] and cannot be released.”

On March 2, 2015, plaintiff filed an order to show cause in an action in lieu of prerogative writs alleging that (1) the Township violated OPRA by denying his access to the requested documents and failing to provide a Vaughn index; and (2) the Township violated plaintiff’s common law right of access by refusing to release the requested documents. Plaintiff sought a court order to direct the immediate release of the records requested and an award of

counsel fees and costs. On March 12, 2015, the court, in pertinent part of the order to show cause, requested defendants supply internal affairs reports for *in camera* review. Defendants submitted the documents accordingly.

Findings

OPRA

OPRA manifests this State's public policy of government transparency. "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 secluded process.'" Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005) (quoting Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)); O'Shea v. Twp. of West Milford, 410 N.J. Super. 371, 379 (App. Div. 2009). In OPRA, "[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, 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;

all government records shall be subject to public access unless exempt from such access by: P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, federal regulation, or federal order;

a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy; and nothing contained in P.L.1963, c.73 (C.47:1A-1 et seq.), as amended and supplemented, shall be construed as affecting in any way the common law right of access to any record, including but not limited to criminal investigatory records of a law enforcement agency.

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

To approach an OPRA request, “[t]he first inquiry is whether the requested documents meet the statutory definition of *government record*, and, if so, whether any exemption established in or recognized by any other law bars disclosure of the requested documents.”

Wilson v. Brown, 404 N.J. Super. 557, 571 (App. Div. 2009), cert. denied, 198 N.J. 473 (2009) (emphasis added); O’Shea, supra, 410 N.J. Super. at 380.

OPRA defines “government record” or “record” broadly under N.J.S.A. 47:1A-1.1:

[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.]

Vaughn Index

A Vaughn index is “a detailed affidavit correlating the withheld documents with the claimed exemptions.” Cozen O’Connor v. United States Dep’t of Treasury, 570 F. Supp. 2d 749, 765 (E.D. Pa. 2008) (citing Vaughn v. Rosen, 484 F.2d 820, 827 (D.C. Cir. 1973)). “To pass muster, a Vaughn index must consist of one comprehensive document, adequately describe each withheld document or redaction, state the exemption claimed, and explain why each exemption applies.” Afshar v. Dep’t of State, 702 F.2d 1125, 1144–45 (D.C. Cir. 1983) (quoting Founding Church of Scientology, Inc. v. Bell, 603 F.2d 945, 949 (D.C. Cir. 1979)). Recently, New Jersey courts have adopted this procedure in the context of OPRA requests. Hausmann v. N. Valley Reg’l Bd. of Educ., No. BER-L-7151-13 (Law Div. Nov. 7, 2013).

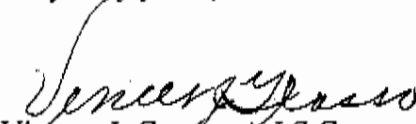
The Appellate Division in Fisher v. Division of Law, 400 N.J. Super. 61 (App. Div. 2008) found that:

The purpose of a *Vaughn* index is not only to facilitate the decision-maker's review of governmental records to determine whether they contain privileged material but also to provide the party seeking disclosure with as much information as possible to use in presenting his case. Halpern v. FBI, 181 F.3d 279, 291 (2d Cir.1999). A decision-maker's *in camera* review of the withheld documents is not ordinarily an adequate substitute for production of a proper *Vaughn* index because it does not afford the party seeking disclosure the opportunity to effectively advocate its position. Wiener v. FBI, 943 F.2d 972, 979 (9th Cir.1991). However, "when the facts in [the requestor's] possession are sufficient to allow an effective presentation of its case, an itemized and indexed justification of the specificity contemplated by *Vaughn* may be unnecessary." Brown v. FBI, 658 F.2d 71, 74 (2d Cir.1981).

[Fisher, supra, 400 N.J. Super. at 76.]

Here, after *in camera* review of the documents submitted by the Township, the court finds that a Vaughn index is necessary for plaintiff to present his case. The Township provided no information about the documents that it withheld from disclosure, but merely arguing the confidentiality requirements under the Attorney General's Guidelines. The court's *in camera* review of the withheld documents is not an adequate substitute for production of a proper Vaughn index. Consequently, plaintiff has no information nor opportunity to effectively advocate his position. Therefore, the court orders the Township to furnish a Vaughn index that itemizes each document requested by plaintiff and articulates the specific basis for its denial of each item. The court will carry the return date currently scheduled for May 7, 2015 at 2:00 pm to permit the Township to provide the Vaughn index within thirty (30) days. If the counsel need to set up a telephone conference in regard to this opinion, please kindly contact the chambers.

Very truly yours,


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

VJG:mag