

New Jersey Law Journal

VOL. CXCIII - NO.10 - INDEX 759

SEPTEMBER 8, 2008

ESTABLISHED 1878

IN PRACTICE

CIVIL PROCEDURE

Government Records Production And Retention Not a 'Gotcha-Game'

Court strikes the right balance

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Judge Robert P. Contillo recently balanced the interests protected by New Jersey's Open Public Records Act, N.J.S.A. 47:1A-1 et seq. ("OPRA"), and held that OPRA requests are not a "gotcha-game" played by document requestors and custodians. *Martin O'Shea and John Paff v. Borough of Emerson*, No. 9008-07, slip op. at 11-12 (2008 WL 2328239) (N.J. Super. Law Div., June 3, 2008). Applying the "rule of reason," he rejected the plaintiffs' claim that the Borough of Norwood and its records custodian violated OPRA when they did not produce a copy of a document because that document was not in Norwood's files. He also found for the plaintiffs on their OPRA claims asserted against another municipality, after the plaintiffs settled with eight other municipalities that they sued.

In the fall of 2007, the plaintiffs faxed similar public records re-

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quests to all seventy Bergen County municipalities. As part of this effort, on October 25, 2007, at 5:14 p.m., O'Shea faxed to Norwood's records custodian, the borough clerk, a request seeking by return mail "paper copies of the 'Internal Affairs Summary Report Forms' filed by the Norwood Borough police Department for the years 2006, 2005 and 2004.

The next day, the police chief mailed to O'Shea the department's 2006 and 2005 summary report forms, with a cover letter explaining that he could not find the 2004 report and asking the plaintiffs if they have any questions. On November 1, 2007, O'Shea sent a letter to the clerk and paid for the copies. "Neither plaintiff at any time stated any objection to Norwood's response to the OPRA request, nor otherwise responded to the non-production of the 2004 Summary Report."

Instead, the plaintiffs filed an OPRA complaint against 10 Bergen County municipalities and their clerks, including Norwood. After Norwood's police chief learned of the suit, he obtained copies of Norwood's 2004 and 2003 reports from the Bergen County Prosecutor's office, where those reports are to be filed. "Those reports — showing no complaints — were then

provided to plaintiffs." Judge Contillo found that "the Borough's copy of [the 2004] report, if indeed a copy of it was ever made or retained, was lost, misplaced or innocently discarded."

OPRA declares that this state's public policy requires that "government records" be made "readily accessible." N.J.S.A. 47:1A-1. A "government record" is "any paper ... that has been made, maintained or kept on file in the course of ... official business ... or that has been received in the course of ... official business." N.J.S.A. 47:1A-1.1. OPRA establishes a presumption that all government documents be made public, but also contains exceptions that preclude public access when disclosure will defeat the public interest or privacy interests. See, N.J.S.A. 47:1A-1.1, -2.2, -3, -5(k), -9, and -10.

The Legislature created the Government Records Council ("GRC") to enforce OPRA. N.J.S.A. 47:1A-6 and -7. "A person who is denied access to a government record by the custodian of the record" may file a summary action in the Superior Court, or file a complaint with the GRC. N.J.S.A. 47:1A-6. A prevailing requestor may obtain an order compelling access to the government record and attorney fees. OPRA even authorizes civil penalties and disciplinary proceedings against a "public official, officer, employee, or custodian who knowingly and willfully violates" OPRA's requirements, "and is found to have unreasonably denied access under the totality of the circumstances [.]" N.J.S.A. 47:1A-11.

The GRC has consistently found that a public agency and its records custodian do not violate OPRA if they are unable to produce a government record because they do not have it in their possession. For example, in *Kaithern v. West Cape May Borough, Custodian of Record*, GRC No. 2003-135 (April 8, 2004), the requestor sought documents including copies of letters referenced in West Cape May Environmental Commission resolutions. The GRC dismissed the complaint, finding that “the Custodian and officials of the Environmental Commission have provided a reasonable explanation as to their inability to produce the [letters] ... (i.e., the documents do not exist).”

The Appellate Division accepts this definition of the document custodian’s duty. *Paff v. New Jersey Dept. of Labor*, 392 N.J. Super. 334, 341 (App. Div. 2007); *Bent v. Township of Stafford Police Dep’t*, 381 N.J. Super. 30, 39 (App. Div. 2005); see *Windish v. Mount Arlington Bd. of Ed.*, 2007 WL 4334858 (App. Div. 2007). The court also held that “OPRA only allows requests for records, not requests for information. [citation omitted].” *Bent v. Township of Stafford Police Dep’t*, supra, 381 N.J. Super. at 37. “OPRA does not require records custodians to conduct research among its records for a requester and correlate data from various government records in the custodian’s

possession. [citation omitted].” *MAG v. Division of ABC*, 375 N.J. Super. 534, 546-547 (App. Div. 2005). “Of course, even if the requested documents exist, the custodian [is] under no obligation to search for them beyond the [agency’s] files.” *Bent v. Township of Stafford Police Dep’t*, supra, 381 N.J. Super. at 39.

Judge Contillo wrote: “No reported New Jersey case has determined that a municipality has a duty under OPRA to produce a copy of a government record it does not have.” *Martin O’Shea and John Paff v. Borough of Emerson*. He found that “OPRA is not a document retention statute — it mandates access to records, not their preservation.”

He stated, however, that he was “prepared to accept” that “an OPRA violation may be triggered by a custodian’s failure to have available, or make available, for public inspection, a government record it is required by law to have on hand, available for public inspection.” He cited, as one example, a government record that was maliciously destroyed or concealed, and stated that OPRA might require a custodian to provide a requestor with a copy of a document that was required to be on file, if the “custodian has moved with reasonable haste and retrieved a copy.” He noted that OPRA requires a custodian to advise a requestor if a government record is “temporarily unavailable

because it is in use or in storage,” and to “make arrangements to promptly make available a copy of the record.” at n. 1, quoting N.J.S.A. 47:1A-5(g).

In a footnote to the holding, the judge suggested a hypothetical: “Suppose an individual asked for a copy of the employment contract between City X, and Clayton James. Suppose, also, that the custodian certified promptly, truthfully, and in good faith, that there is no employment contract on file between the City and any James Clayton. The first and last names were mistakenly transposed by the Clerk” He opined it could not “rationally be argued that the custodian had violated OPRA” because “it is entirely reasonable to expect the requestor to follow up, and entirely unreasonable [for the requestor] to resort instead to litigation[.]” After all, taxpayers will be required to pay for the attorney fees awarded to a requestor/litigant.

This decision also suggests that a public agency does not violate OPRA if it has not “maintained or kept on file” a document pursuant to the standards established by other laws, such as the Destruction of Public Records Law and the regulations and retention schedules adopted there under (N.J.S.A. 47:3-15 to -32, N.J.A.C. 15:3-2.1 to -2.6), because OPRA does not define what documents must be made maintained or kept on file. ■