

ORDER PREPARED BY THE COURT

JENNIFER COOMBS, GAVIN ROZZI and
JEFF EPSTEIN,

Plaintiff(s),

SUPERIOR COURT OF NEW JERSEY
MONMOUTH COUNTY
LAW DIVISION, CIVIL PART
DOCKET NO.: MON-L-3195-18

v.

Civil Action

COUNTY OF MONMOUTH and MARION
MASNICK in her official capacity as Clerk of
the Board and Records Custodian of the
County of Monmouth, OFFICE OF THE
MONMOUTH COUNTY PROSECUTOR and
the RECORDS CUSTODIAN of the Office of
the Monmouth County Prosecutor,

Defendant(s).

ORDER

THIS MATTER having been brought before the court by plaintiffs' complaint seeking disclosure under the Open Public Records Act, N.J.S.A. 47:1A-1 to -13, and the common law right of access, and the court having considered the arguments of counsel and all papers submitted, for the reasons stated in the attached opinion,

IT IS on this 24th day of May, 2019:

ORDERED that defendants shall grant plaintiffs access to the requested records through their OPRAmachine email accounts subject to the appropriate redactions; and

IT IS FURTHER ORDERED that counsel for plaintiffs and defendants are to confer and attempt to resolve the reasonable attorney's fees to which plaintiffs are entitled. If counsel cannot agree, plaintiffs' counsel shall prepare and submit, under the five-day rule, R. 4:42-1, an order that comports with this court's ruling, and if necessary, the Certification of Services delineating the amount of attorney's fees requested.

/s/ Lisa P. Thornton
LISA P. THORNTON A.J.S.C.

Opposed Unopposed

NOT FOR PUBLICATION WITHOUT APPROVAL
FROM THE COMMITTEE ON OPINIONS

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and JEFF EPSTEIN,

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capacity as Clerk of the Board and
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MONMOUTH COUNTY PROSECUTOR
and the RECORDS CUSTODIAN of the
Office of the Monmouth County
Prosecutor,

Defendant(s).

Decided: May 24, 2019

Walter M. Leurs, attorney for the plaintiffs (Law Offices of Walter M. Leurs, LLC.)

Sean T. Kean, attorney for defendants (Clearly, Giacobbe, Alfieri, Jacobs, LLC.)

THORNTON, A.J.S.C.

I.

This matter comes before the court on plaintiffs' claim for access pursuant to the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 to -13, and the common law. Because defendants' denial was not authorized by law, judgment is entered for plaintiffs.

II.

The relevant facts are undisputed. On various dates, plaintiffs individually requested records from defendants Monmouth County ("County") and the Monmouth County Prosecutor's Office ("MCPO") through OPRAMachine, a website used to facilitate public records requests. All

requests and responses processed by OPRAmachine are automatically uploaded and made available to the public.

A.

i.

On May 21, 2018, Jennifer Coombs requested “[c]opies of all attorney invoices for Monmouth County from January 1, 2016 through May 21, 2018 [, and] [c]opies of all litigation settlement agreements from January 1, 2010 through December 31, 2017.” Defendant Marion Masnick, the Custodian of Records, acknowledged receipt of the request the same day. Ms. Coombs withdrew her request for attorney invoices on May 25, 2018 and the County responded that it was “still compiling the documents requested in Item 2.” On May 29, 2018, the County requested an extension until June 8, 2018 due to the volume of OPRA requests received. On June 8, 2019, the County requested a second extension until June 12, 2018 because “not all of the agreements for the ten-year period requested [had] been compiled.” On June 12, 2018, the County requested a third extension until June 29, 2018 due to the “significant amount of responsive records and the required review and redactions to the same.” On June 29, 2018, Catherine Kim, Special County Counsel, requested a fourth extension until the County could implement a new OPRA policy that was expected “[i]n the next coming days.”

On July 13, 2018, Ms. Kim sent Ms. Coombs the new policy that provides in relevant part:

[w]e respectfully request that all OPRA requestors provide an address or e-mail address that permits the County to correspond directly with the requestor and securely provide access to the records. The County will deny any requests for records if the responses, including attachments, are automatically posted on any websites. This does not restrict the requestor from retaining, disseminating, distributing, or copying the records after receipt. However, the requestor may be liable for any unlawful disclosure of confidential and/or privileged information. The county does not waive any privilege or confidentiality within its message of the released records.

In addition, Ms. Kim advised Ms. Coombs that the County would proceed with processing her request when she returned “the filled-out statement” that required her email address.

Ms. Coombs immediately objected to the requirement that she provide additional information and cited Renna v. County of Union, 407 N.J. Super. 230 (2009) to support her position. On July 17, 2018 Ms. Kim advised,

The County reserves its discretion to partake on websites like OPRA Machine. The County is required to take specific steps to protect individual privacy whenever it uses third-party websites and applications to engage with the public. Upon examination of OPRA Machine’s privacy policy, the County has determined that the third party website is not appropriate for the County’s use. If you wish to move forward with the request, the County will require a secondary e-mail address.

After Ms. Coombs refused to provide a “secondary e-mail address,” Ms. Kim “denied” the OPRA request on July 19, 2018.

ii.

Ms. Coombs submitted two requests on June 6, 2018. The first request asked for “[a]pplications and RFP’s for all grants for 2017 and 2018 received by Monmouth County as well as the resolutions for each grant.” On June 7, Ms. Masnick replied “Got it.” On July 5, 2018, twenty (20) business days after the request was received, Ms. Coombs inquired about the “status of [her] request.” On July 13, 2018, Ms. Kim provided Ms. Coombs with the new policy and informed her that the request would be processed when she provided a secondary email address. Ms. Coombs objected immediately, and on July 17, 2018, Ms. Kim attempted to explain the County’s policy. On July 19, 2018, Ms. Kim advised that the “OPRA request [was] denied” because Ms. Coombs refused to provide a personal email address.

The second request asked for “[a]pplications and RFP’s for all contracts for 2017 and 2018 received by the County as well as the resolutions for each contract.” On June 07, 2018, Ms. Masnick, replied, “Got it.” On June 19, 2018, Ms. Kim replied:

[p]lease be advised this office represents the County of Monmouth (“County”) in regards to your OPRA request submitted on June 6, 2018, received on June 7, 2018. Currently, the County is searching for the responsive records. Due to the volume of the records and various departments involved in this request, including the required redactions, we respectfully request a thirty (30) business day extension.

On July 13, 2018, Ms. Kim advised Ms. Coombs that her request would be processed when she provided a secondary email address pursuant to the new policy. Ms. Coombs objected, and on July 19, 2018 her request was denied.

iii.

On June 11, 2018, Ms. Coombs requested “[a]ll e-mails to and from [Guy G. McCormick,] [Lori Linskey,] [Christopher Gramiccioni,] [John G. McCabe,] [and] [Teresa Wilbert] between April 28, 2018 and June 12, 2018 containing the words ‘Jennifer Coombs’, ‘Jen Coombs’, ‘OPRA Request(s)’, and/or ‘Citizens Videotaping in Public Buildings’” from the MCPO. On June 20, 2018, Ms. Kim replied,

[p]lease be advised this office represents the County of Monmouth (“County”) in regards to your OPRA request submitted and received June 11, 2018. Due to the volume of records involved in this request and the required redactions, we respectfully request a fifteen (15) business day extension.

On July 11, 2019, Ms. Kim requested a second extension until the new OPRA policy was implemented. On July 13, 2018, Ms. Kim requested a secondary email address to process the request. Ms. Coombs objected, and on July 19, 2018, Ms. Kim advised that the request was “denied.”

iv.

On June 25, 2018, Ms. Coombs requested “[a]ny and all private security contracts for any Monmouth County Office Building(s), and County Office Buildings(s) (COB)[,] [and] [a]ny current contracts associated to any Monmouth County Office Building(s), and County Office Building(s) (COB).” On June 26, 2018, Ms. Masnick replied “Received.” On July 6, 2018, Ms. Kim requested an extension to implement the County’s new policy. On July 13, 2018, Ms. Kim requested a secondary email address to process the requests. Ms. Coombs objected, and on July 18, 2018, Ms. Kim advised that the County would not process the request through “OPRA Machine.” On July 19, 2018, Ms. Kim advised that the request was “denied.”

B.

On July 13, 2018, plaintiffs Rozzi and Epstein submitted separate requests to the County. Plaintiff Rozzi requested “[c]opies of all OPRA requests received by the County of Monmouth for the period of July 1st, 2018 to July 13th, 2018.” Plaintiff Epstein requested “[a]ll legal bills for Cleary, Giacobbe, Alfieri & Jacobs [d]uring the month of June, 2018.” On July 18, 2018, Ms. Kim responded to both plaintiffs and attached the new policy that “modifie[d] the processing mechanism for certain OPRA requests.” She asked them to provide personal email addresses, before their requests would be processed. No subsequent communication occurred between the parties.

C.

A notice and takedown policy is published on OPRAmachine’s website that states:

If you see any personal information about you on the site which you’d like us to remove or hide, the please let us know. Specify exactly what information you believe to be problematic and why, and where it appears on the site.

If it is sensitive personal information that has been accidentally posted, then we will usually remove it. Normally we will only consider requests to remove personal information which come from the individual concerned, but for sensitive information we would appreciate anyone pointing out anything they see.

We consider that there is a strong public interest in retaining the names of officers or servants of public authorities. We will only remove such names in exceptional circumstances, such as where the disclosure of a name and position of employment would substantially risk the individual's safety. If you are such an official and you wish to have your name removed for such an urgent reason, you must supply us with a request to do so from your line manager. This request must demonstrate that a risk has been perceived which outweighs the public interest, and must demonstrate that efforts have been made to conceal the name on the organization's own website.

For all other requests we apply a public interest test to decide whether information should be removed.

[OPRAmachine, Your privacy # (January 29, 2019, 1:39 PM), <https://opramachine.com/help/privacy> (emphasis in original).]

This policy was utilized by OPRAmachine when defendants mistakenly provided confidential information in response to a request made by Ms. Coombs

III.

Plaintiffs contend defendants' policy of requiring a personal email address imposes an unnecessary "bureaucratic hurdle" on citizens. They reason that defendants can avoid the unauthorized disclosure of records by performing an adequate and appropriate review before a response is provided. They also ask the court to consider that OPRAmachine's notice and takedown policy protects the privacy rights of citizens in the event that public agencies make an improper disclosure. Finally, they stress that defendants' policy does nothing to protect the privacy rights of citizens because requests processed with a personal email address can still be uploaded immediately to the internet.

In opposition, defendants contend the complaint is barred by the statute of limitations. They also request dismissal because plaintiffs “failed to state an interest in the material under common law in both the e-mail correspondences and in [p]laintiffs’ letter brief.” Finally, they rely on OPRA’s privacy exemption, the Federal Privacy Act of 1974, and an Office of Management and Budget memorandum to support the new policy. They fail to explain why any of these documents should be private or confidential.

IV.

Access to public records is available in three distinct ways. MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 543 (App. Div. 2005) (citing Bergen County Improvement Auth. v. North Jersey Media Grp., 370 N.J. Super. 504, 515 (App. Div. 2004)). Government records may be obtained through a citizen’s common law right of access, by the discovery procedures applicable to civil disputes, or by asserting one’s rights pursuant to OPRA. Id.

OPRA was enacted “to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.” Mason v. City of Hoboken, 196 N.J. 51, 64-65 (2008) (quoting Asbury Park Press v. Ocean County Prosecutor’s Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). The statute embodies New Jersey’s strong tradition of favoring the public’s right to be informed of government actions.

While OPRA greatly expanded public access to government records, the statute excludes twenty-one categories of information, and requires public agencies to safeguard personal information from public access where disclosure would violate a citizen’s reasonable expectation of privacy. Burnett v. County of Bergen, 198 N.J. 408, 414, 422 (2009) (citing N.J.S.A. 47:1A-1).

When confronted with privacy concerns the court must balance the citizen's interest in privacy with the public's interest in government transparency by considering:

(1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.

[Burnett, 198 N.J. at 427 (citing Doe v. Poritz, 142 N.J. 1, 88 (1995)).]

OPRA also provides procedures for requests and responses. All requests must be in writing and may be "hand delivered, mailed, transmitted electronically or otherwise conveyed to the appropriate custodian." N.J.S.A. 47:1A-5(g). While the statute requires a public agency to "adopt a form for the use of any person who requests access to a government record," no custodian shall withhold records if the request is not presented on the official form, as long as the custodian has "sufficient information to make the threshold determination as to the nature of the request and whether it falls within the scope of OPRA." Renna v. County of Union, 407 N.J. Super. 230, 245 (App. Div. 2009); N.J.S.A. 47:1A:5(f).¹ While information such as a requester's address and phone number are to be included on the public agency's form, this requirement is "one of accommodation rather than restrictive" and should not be read to "create a circumstance that runs counter to" the language and policy of OPRA, that is designed to maximize access to government records. Id. at 238. See also American Civil Liberties Union of New Jersey v. New Jersey Div.

¹ The statute indicates that the form should provide a space for the requestor's name, address, phone number and "brief description of the government record sought." N.J.S.A. 47:1A-5(f). A review of the requests reveals that Ms. Coombs did not provide her address or phone number, however, defendants did not base their denial on these omissions.

of Criminal Justice, 435 N.J. Super. 533, 536 (App. Div. 2014) (holding that additional obstacles “untethered to any provision of OPRA” are to be discouraged).

OPRA also requires a custodian to grant or deny a request for access within seven (7) days. N.J.S.A. 47:1A-5. Failure to respond shall be “deemed a denial of the request.” N.J.S.A. 47:1A-5(i). When a public agency denies a request for records, it “shall have the burden of proving that the denial of access is authorized by law.” N.J.S.A. 47:1A-6. See also Courier News v. Hunterdon County Prosecutor’s Office, 358 N.J. Super. 373, 379 (App. Div. 2003). A court’s analysis should consider “the overarching public policy in favor of a citizen’s right of access.” Id. at 383. If it is determined that access has been improperly denied, the court shall enter an order requiring the public agency to comply, and the prevailing party “shall be entitled to a reasonable attorney’s fee.” N.J.S.A. 47:1A-6; Mason, 196 N.J. at 71. Requesters who choose to “challenge the decision of an OPRA custodian must do so within 45 days.” Mason, 196 N.J. at 69-70 (reasoning that “[j]ust as OPRA calls for the rapid response of an agency to any record request, a requester should also be required to make a prompt decision whether to file suit”).

R. 1:3-1 governs computation of time “fixed by rule or court order” and states in relevant part:

In computing any period of time fixed by rule ... the day of the act or event from which the designated period begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor legal holiday.

[R. 1:3-1.]

“A requestor who prevails in any proceeding shall be entitled to a reasonable attorney’s fee.” Mason, 196 N.J. at 71 (quoting N.J.S.A. 47:1A-6). Requestors shall receive attorney’s fees under OPRA “when they can demonstrate: (1) ‘a factual causal nexus between plaintiff’s

litigation and the relief ultimately achieved’; and (2) ‘that the relief ultimately secured by plaintiffs had a basis in law.’” Mason, 196 N.J. at 76 (quoting Singer v. State, 95 N.J. 487, 494 (1984)). See also Stop & Shop Supermarkets Co., LLC v. Cty. of Bergen, 450 N.J. Super. 286, 292 (2017) (citing Mason, 196 N.J. at 79, and holding that “under the common law right of access, litigants must make the same showing” as a prevailing party under OPRA to recover attorney’s fees.)

V.

Plaintiffs’ claims are not time barred. Ms. Kim denied the requests for Ms. Coombs on July 19, 2018 because she refused to provide a secondary email address. Consequently, the statute of limitations began to run on July 20, 2018. Day forty-five (45) fell on Sunday, September 2, 2018 and according to R. 1:3-1, the complaint was filed timely on September 4, 2018. Likewise, the requests by plaintiffs Rozzi and Epstein were denied on July 18, 2018, and the complaint was timely filed on Tuesday, September 4, 2018 for their claims.

Defendants’ denial based on plaintiffs’ refusal to provide a personal email address was not authorized by law. Plaintiffs were well within their rights under OPRA to file a request “electronically.” Furthermore, as the court in Renna concluded, the requests provided “sufficient information to make the threshold determination as to the nature of the request and whether it falls within the scope of OPRA.” 407 N.J. Super. at 245. At no time did defendants deny the requests for any reason other than plaintiffs’ refusal to provide a personal email address. While the statute requires the agency’s form to include a place for an address and phone number, our courts have held that a requester’s failure to provide this information is not a basis to deny a request. Renna, 407 N.J. Super. at 245.

Defendants’ denial based on “privacy” concerns is also without merit. Defendants never asserted OPRA’s privacy exemption in their denial, and it is not apparent why any of the

documents should be confidential. Any inadvertent disclosure of confidential records can be prevented if defendants perform an adequate review and make appropriate redactions. The County's new policy inappropriately shifts the responsibility to protect a citizen's privacy to the requestor, and does nothing to prevent the inadvertent disclosure of confidential records. Defendants fail to acknowledge that documents processed with a personal email address can be immediately uploaded to the internet.

VI.

For the foregoing reasons judgment is entered for plaintiffs. The parties shall confer to attempt to resolve the reasonable attorney's fees to which plaintiffs are entitled, or submit an affidavit of services within 14 days.