L.R. v. Fort Lee Pub. Sch. Dist.

Superior Court of New Jersey, Law Division, Bergen County

September 19, 2014, Argued; September 23, 2014, Decided

DOCKET No. BER-L-5785-14

Reporter
2014 N.J. Super. Unpub. LEXIS 2331 *

L.R., individually and on behalf of J.R., a minor, Plaintiff, v. FORT LEE PUBLIC SCHOOL DISTRICT and DAVID RINDERKNECHT, Records Custodian and Interim Business Administrator/Board Secretary of the Fort Lee School District, Defendants.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS.

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Core Terms

records, documents, email, requests, government records, prevailing party, exempt, reasonable attorney's fees, defendants', prevailing, attorney's fees, inadvertent, requestor, initials, redacted, lawsuit

Counsel: [*1] Walter M. Luers, Esq. appearing on behalf of the plaintiff, L.R. (Law Office of Walter M. Luers, LLC).

Dennis McKeever, Esq. appearing on behalf of the defendants Fort Lee School District and David Rinderknecht (Lindabury, McCormick, Estabrook & Cooper, PC).

Judges: Honorable Peter E. ***Doyne***, A.J.S.C.

Opinion by: Peter E. ***Doyne***

Opinion

CIVIL ACTION

Introduction

On January 21, 2014, L.R. ("plaintiff" or "L.R."), individually and on behalf of J.R., a minor, ("J.R.") had a verified complaint and an order to show cause filed on his behalf. L.R. sought a judgment finding the defendants, the Fort Lee School District (the "District") and David Rinderknecht ("Rinderknecht" when referenced individually, "defendants" when referenced collectively), Records Custodian and Interim Business Administrator/Board Secretary of the Fort Lee School District, in violation of the Open Public Records Act, *N.J.S.A. 47:1A-1 to -13*, ("***OPRA***" or "the Act"), requiring the defendants to provide copies of the requested documents, awarding attorney's fees, and granting any other relief the court may deem just and equitable.

Facts/ Procedural History

L.R. is the parent and guardian of J.R., who is a minor. Jamie Epstein, Esq. ("Epstein") had been ***retained*** to represent **[*2]** L.R. and makes certain ***OPRA*** requests on behalf of J.R. and the plaintiff. The District is a municipal body organized pursuant to the laws of New Jersey with its principal place of business at 2175 Lemonine Avenue, Fort Lee, New Jersey.

This matter arises from a denial of an ***OPRA*** request. On April 25, 2014, Epstein submitted an ***OPRA*** request to the District. The request identified it was being submitted on behalf of J.R. by her attorney. Epstein's request sought documents from May 1, 2012 to present, stating in relevant part:

> 1. All requests made on behalf of students for independent educational evaluations and all responses to those requests.
> 2. All requests made on behalf of students for independent evaluations and all responses to those requests.
>
> (please provide all records with personal identifiers of students and their parents or guardian redacted leaving only initials)

Epstein specifically requested personal identifiers be redacted, only leaving initials.

On May 1, 2014, Rinderknecht responded to Epstein's ***OPRA*** request via email. Rinderknecth advised "pursuant to *34 C.F.R. 99.32*, the Family Educational Rights and Privacy Act (FERPA), a school district must maintain strict confidentiality of student **[*3]** records and personal information." (Luers Cert. Ex. 2). Therefore, Rinderknecht advised Epstein's request was denied as "identifiable student information shall not be disclosed through ***OPRA*** requests." (*Id.*).

On May 1, 2014, Epstein, on behalf of the family, authored a response to Rinderknecht's denial. Epstein asserted he did not request any identifiable student information because he requested "all records with personal identifiers of students and their parents or guardians to

be redacted leaving only initials." He asserted the New Jersey Administrative Code and case law permits records custodians to redact personal identifiers to comply with the Family Educational Rights and Privacy Act ("FERPA"). Epstein requested, in relevant part:

> Pls [sic] provide me with a privilege log for the requested records, including, but not limited to the following: assign and identify each record's date, identify the sender's and recipient(s) names (initials only if it's the student's parent) and identify the number of pages of each responsive record. The privilege log should be incorporated into a sworn statement attesting to: (1) the search undertaken to satisfy [plaintiff's] request; (2) the documents **[*4]** found that are responsive to that request; (3) the determination of whether the document or any part thereof is confidential and the source of the confidential information; [and] (4) a statement of the Board's document retention/destruction policy and the last date on which documents that may have been responsive to the request were destroyed.

Epstein alleges he never received any response, but received a "read receipt" on May 1, 2014, showing Rinderknecht read the above email.

Rinderknecht certifies he intended to respond to Mr. Epstein's May 1 email by providing the document found responsive to the request, however, when authoring the District's response, Rinderknecht inadvertently addressed and then sent the email containing the responsive document on May 16, 2014, to the District's attorney, Dennis McKeever, Esq. ("McKeever") and not Epstein. McKeever received said email from Rinderknecht, but certifies he believed it was only a carbon copy, with the original going to Epstein, and therefore did not follow up on the ORPA response.[1]

Without having received a response from defendants, a verified complaint **[*5]** was filed on the plaintiff's behalf on June 16, 2014, with an order to show cause and a letter brief in support of the relief requested. The plaintiff alleges the defendants violated ***OPRA*** by failing to provide copies of documents requested on April 25, 2014. The documents in question include: (1) all requests made on behalf of students for independent educational evaluations and all responses to those requests for the time period of May 1, 2012 to April 25, 2014; and (2) all requests made on behalf of students for independent evaluations and responses to those requests for the time period of May 1, 2012 to April 25, 2014. The plaintiff sought a judgment requiring the defendants to produce the requested documents and awarding reasonable attorney's fees.

Subsequently, on June 26, 2014, counsel for defendants emailed Epstein the responsive document to his April 25, 2014 ***OPRA*** request. Believing the document had previously

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[1] The body of the email contained the salutation "Jamie," which is Epstein's first name.

been sent by Rinderknecht to Epstein, counsel for defendants advised plaintiff's counsel, Walter M. Luers, Esq. ("Luers") the documents had previously been emailed to Epstein on May 16, 2014. (McKeever's Cert.). Luers informed defendants' counsel no such email was ever **[*6]** received by Epstein and defendant's counsel agreed to find proof Epstein had been sent the email. (*Ibid.*). After a search of Rinderknecht's emails, defendants' counsel informed Luers the email to Epstein did not exist, due to Rinderknecht's inadvertent mistake.

On July 11, 2014, counsel on behalf of defendants, the District and Rinderknecht, filed an answer and opposition. Under cover of letter dated July 16, 2014, after comprehensive review of all filed pleadings, and without prejudice or any suggestion as to how the court might rule, the court suggested counsel to discuss a proposed resolution as to the appropriate amount of legal fees to be paid to plaintiff's counsel. On September 12, 2014, plaintiff's counsel filed a reply.

Oral argument was entertained on September 19, 2014.

Legal Standards

A. *OPRA*

1. *Generally*

The Act, *N.J.S.A. 47:1A-1 to -13*, "plainly identifies its purpose at the outset: to ensure that government records, unless exempted, are readily accessible to citizens of New Jersey for the protection of the public interest. To accomplish that aim, ***OPRA*** sets forth a comprehensive framework for access to public records." *Mason v. City of Hoboken, 196 N.J. 51, 57, 951 A.2d 1017 (2008)* (internal citation omitted).

OPRA provides "government records shall be **[*7]** 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 [under the Act] shall be construed in favor of the public's right of access." *N.J.S.A. 47:1A-1*. A government record is defined as:

> any 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 by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in

> the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.
>
> [*Id.* § 1.1.]

Records are typically available during the public agency's regular business **[*8]** hours with an exception for smaller towns, agencies, and school districts. *Id.* § 5. The records may be redacted to protect personal information, and the records custodian may charge a fee for copying and related services. Ibid. Typically, any request for a record must be made using the agency's official request form. *Ibid.* The custodian must respond to all requests within seven business days, unless the applicant fails to provide necessary contact information. *Ibid.*

If access to a government record is denied, the person denied access, and only that person, may challenge the decision by filing a complaint in Superior Court or with the Government Records Counsel. *Id.* § 6. The application must be brought within forty-five days of the denial. *Mason, supra, 196 N.J. at 68* ("[A] 45-day statute of limitations should apply to ***OPRA*** actions, consistent with the limitations period in actions in lieu of prerogative writs.").

The proceeding will go forward in a summary or expedited manner. *N.J.S.A. 47:1A-6*; *see Courier News v. Hunterdon Cnty. Prosecutor's Office, 358 N.J. Super. 373, 378, 817 A.2d 1017 (App. Div. 2003)*. As such, "the action is commenced by order to show cause supported by a verified complaint." *Ibid.* In *Courier News*, the appellate division held the trial court had failed to follow proper procedure when it denied a newspaper its right to **[*9]** summary adjudication on an ***OPRA*** action. The trial judge had erroneously applied the standard for preliminary relief to the summary action and dismissed plaintiff's action without prejudice. *Id. at 377*. As a result, the appellate division, recognizing the Act's policy of expediency, invoked original jurisdiction over the matter. *Id. at 379*.

In ***OPRA*** actions, the public agency has the burden of proving the denial is authorized by law. *N.J.S.A. 47:1A-6*. As such, the agency "must produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality. Absent such a showing, a citizen's right of access is unfettered." *Courier News, supra, 358 N.J. Super. at 383*. In establishing legal support, "[a] decision of the [Government Records Council] shall not have value as a precedent for any case initiated in Superior Court," *N.J.S.A. 47:1A-7*, though such decisions are normally accorded deference unless "arbitrary, capricious or unreasonable" or violative of "legislative policies expressed or implied in the act governing the agency." *Serrano v. South Brunswick Tp., 358 N.J. Super. 352, 363, 817 A.2d 1004*

(App. Div. 2003) (*citing* *Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562, 189 A.2d 712 (1963))*. Lastly, "a court must be guided by the overarching public policy in favor of a citizen's right of access." *Courier News, supra, 358 N.J. Super. at 383*. If it is determined access was improperly denied, such access shall be granted, and a successful requestor **[*10]** shall be entitled to reasonable attorney's fees. *N.J.S.A. 47:1A-6*.

2. ***OPRA*** Fees

Pursuant to *N.J.S.A. § 47:1A-6*, "[i]f it is determined that access has been improperly denied, the court or agency head shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." The Supreme Court of New Jersey in *Mason v. City of Hoboken, 196 N.J. 51, 951 A.2d 1017 (2008)*, interpreting legislative revisions to the Act, held "***OPRA*** mandate[s], rather than permit[s], an award of fees to a prevailing party." *Id. at 75*.

As the mandatory fee-shifting provision of ***OPRA*** is triggered only when a requesting party prevails, there must be a determination what constitutes a "prevailing party." The Supreme Court in *Mason* held "'prevailing party' is a legal term of art that refers to a 'party in whose favor a judgment is rendered.'" (quoting *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 603, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001))*.

Additionally, "a two-pronged test has been established to determine when a party seeking fee shifting has been a prevailing party." *N. Bergen Rex Transp. v. Trailer Leasing Co., 158 N.J. 561, 570, 730 A.2d 843 (1999)*; *see* *Singer v. State, 95 N.J. 487, 494, 472 A.2d 138 (1984)*.

> The first prong requires that the litigant seeking fees establish that the lawsuit was causally related to securing the relief obtained; a fee award is justified if [the party's] efforts are a necessary and important factor in obtaining the relief. . . . That prong requires the party seeking fees to **[*11]** demonstrate a factual nexus between the pleading and the relief ultimately recovered. . . .
>
> The second prong involves a factual and legal determination, requiring the party seeking fees to prove that "the relief granted has some basis in law." The party seeking fees need not obtain all relief sought, but there must be a resolution of some dispute that affected the defendant's behavior towards the prevailing plaintiff.
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> [*Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444, 771 A.2d 1194 (2001)* (internal citations omitted)]

Analysis

The defendants do not dispute the District is considered a "public agency," the request was made to the proper "Records Custodian," and the responsive document is a public record not exempt from disclosure. Therefore, the only remaining issue is the question of reasonable attorney's fees. In order to justify attorney's fees, the requestors must be deemed a prevailing party. *See* *Mason, supra, 196 N.J. at 73*. Premised upon the "catalyst theory," requestors are deemed the prevailing party and are entitled to fees "if they can show [1] that their lawsuit was causally related to securing the relief obtained and [2] that the relief granted had some basis in law." *Id. at 57*.

While the defendants assert the bringing of this action did not change the custodian's conduct and therefore **[*12]** is not the catalyst for production, the same is inherently flawed premised upon the record presented. The documents were requested on April 25, 2014, and on May 1, 2014, but only after this current action was filed on June 16, 2014, did the defendants finally provide plaintiff with the responsive document. It is abundantly clear the only reason the document was provided and Rinderknecht's mistake was revealed, was the filing of the complaint and defendants' subsequent efforts to conclude this action by lawfully responding to Epstein's ***OPRA*** request. As such, the plaintiff is the "prevailing party." *See* *Mason, supra, 196 N.J. at 73-76*. The failure to provide government records in a timely matter is a further violation. *See* *N.J.S.A. 47:1A-5*.

In their opposition, counsel for the defendants stated the requested documents were provided on June 26, 2014. Rinderknecht certified the delay in producing the documents was due to his inadvertent mistake of addressing the May 16, 2014, email to McKeever, rather than Epstein. The defendants contend the actions by Rinderknecht were in good faith, there was no willful violation of the act, and therefore the defendants should not be required to pay fees and costs as mandated. There is no indication **[*13]** Rinderknecht's actions were done in bad faith, although defendants explicitly and wrongfully denied Epstein's original April 25, 2014, ***OPRA*** request. Accordingly, without a plenary hearing and for the purpose of this decision, it is accepted Rinderknecht's actions were in good faith. That said, nothing in the case law countenances or even suggests a "good faith denial" or "inadvertent failure" to respond prevents a prevailing plaintiff's counsel from obtaining legal fees.[2]

At oral argument, Defendants' counsel clarified their opposition, arguing the catalyst theory should be interpreted to require a showing the lawsuit altered the custodian's intent, not conduct. Asserting Rinderknecht and the District had always intended to produce the

[2] Although the court is appreciative of counsel's citation to the courts' earlier decision, this court's rulings are hardly precedential.

document and the lawsuit did not change that intent, instead, the lawsuit merely altered the execution of production. However, defendants' counsel conceded at oral argument this "intent theory" is not supported by a published opinion of a single New Jersey trial, appellate or Supreme Court decision. Rather, defendant cites **[*14]** a Government Records Council ("GRC") decision. While not binding on the court, the same shall be addressed.[3] *N.J.S.A. 47:1A-7(e)*; *O'Shea v. Township of West Milford, 410 N.J. Super. 371, 381-82, 982 A.2d 459 (App. Div. 2009)*.

The GRC denied a request for attorney's fees where the records custodian inadvertently attached the incorrect PDF to the responsive email, attaching an unrelated township resolution rather than the requested first fifty (50) ***OPRA*** requests the town had received that year. *Wolosky v. Township of Rockaway*, GRC Complaint No.1 2010-242 (Feb. 28, 2012). Upon learning of the mistake when the complainant filed with the GRC seventeen days later, the records custodian immediately turned over the responsive documents. *Ibid.* The complainant made no attempts to alert the custodian of the error or any communication at all prior to filing a complaint. *See id.* "Importantly, the Custodian never asserted that the requested records were exempt from disclosure under ***OPRA***; instead, the evidence indicated that the Custodian timely granted access to what she thought were the records responsive to the request. . . . There is no evidence in the record that the Custodian **[*15]** affirmatively attempted to deny access to the requested records at any time." Here, this is simply not the case.

The defendants in *Wolosky* never informed the complainant the documents were exempt, an important distinction noted by the GRC, which conspicuously is lacking from this action since Rinderknecht informed the plaintiff the records were exempt from disclosure. *Id.* Unlike the complainant in *Wolosky* who ceased communications with the township after making the initial ***OPRA*** request until filing a complaint, Epstein affirmatively cooperated with the defendants by informing them the records were not exempt on May 1, 2014, and gave the defendants an opportunity to remedy the denial. Thus, even if *Wolosky* were precedential, which it is not, it would be inapplicable to the circumstances at hand.

Conclusion

The ***OPRA*** statute is intended to be construed in favor of the public's right of access. "[T]he court must maintain a sharp focus on the purpose of ***OPRA*** and resist attempts to limit its scope, absent a clear showing that one of its exemptions or exceptions incorporated in the statute by reference is applicable to the requested disclosure." *Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329, 864 A.2d 446*

[3] It is not for this court to make new law, rather, that judicial function is appropriate for the Appellate Division or Supreme Court.

(Law Div. 2004). "The salutary goal, simply put, is to maximize public **[*16]** knowledge about public affairs in order to ensure an informed citizenry and minimize the evils inherent in a secluded process." *Id.* "Exposure of records to the light of public scrutiny may perhaps cause discomfort to some," however, ***OPRA*** is founded on belief that society as a whole will suffer far more if the government operates in secrecy. *Id.*

The failure to provide government records in a timely matter is a violation. It would be inappropriate, and contrary to the Act, to allow the defendants to frustrate the purposes of ***OPRA*** by avoiding the payment of attorney's fees and costs to a prevailing plaintiff due to its own mistakes, regardless of whether those mistakes were in good faith. Pursuant to the statute, the plaintiff commenced this action, which caused the production of the document. As such, the District has violated ***OPRA*** and the plaintiff is the prevailing party. The plaintiff seeks an award of attorney's fees and costs pursuant to *N.J.S.A. 47:1A-6*, which expressly provides "[a] requestor who prevails . . . *shall* be entitled to a reasonable attorney's fee." *N.J.S.A. 47:1A-6* (emphasis added). As the plaintiff has satisfactorily demonstrated an ***OPRA*** violation and this instant action was the catalyst for the **[*17]** production of the record, the plaintiff is entitled to reasonable attorney's fees and costs.

Counsel shall attempt to agree upon a reasonable quantum of fees. Failing to accomplish the same, counsel for plaintiff shall submit a certification of services within seven (7) days and defendants' counsel shall have seven (7) days thereafter to respond.

Plaintiff's counsel shall prepare an order in conformity with this decision to be submitted pursuant to the five day rule.

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