

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4670-10T4

HOWARD BRANIN,

Plaintiff-Appellant,
v.

COLLINGSWOOD BOROUGH CUSTODIAN,

Defendant-Respondent.

Submitted March 27, 2012 - Decided August 9, 2012

Before Judges Baxter and Nugent.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-1047-11.

Jamie Epstein, attorney for appellant.

Brown & Connery, L.L.P., attorneys for respondent (Joseph M. Nardi, III, and Christopher A. Orlando, on the brief).

PER CURIAM

Plaintiff Howard Branin appeals from the April 15, 2011 Law Division order that denied his motion to have the court: declare that defendant Collingswood Borough Records Custodian violated the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, by denying plaintiff access to a settlement agreement that resolved a federal lawsuit filed against Collingswood; compel defendant to provide plaintiff with the settlement agreement;

and award plaintiff attorney's fees. The trial court determined that plaintiff's OPRA request for "the settlement" of a lawsuit was too vague to be interpreted as requesting any document other than a settlement agreement, which did not exist. We conclude that absent a request for clarification, the records custodian was required to conduct a search for a settlement agreement or a document containing the terms of the settlement. Because the trial court did not consider what documents were contained in the Borough's files, evaluate the custodian's search for "the settlement," or consider the timeliness of the custodian's response to plaintiff rather than the post-complaint communications between the parties' attorneys, we reverse and remand for further proceedings.

I.

The facts are undisputed. On February 2, 2011, plaintiff submitted an OPRA request to the Borough of Collingswood on the Borough's OPRA request form. The form included the following pre-printed language: "Please be as specific as possible in describing the records being requested." Plaintiff made the following request: "I am requesting a copy of the [s]ettlement from the [c]ase of Reedy vs Collingswood: Docket #04-CV-4079." There was no settlement agreement, and the terms of the settlement were not contained in any single document. Those

undisputed facts are central to the record custodian's response and to the current dispute. A brief review of the "Reedy" case will provide additional context.

The "Reedy" case was a federal lawsuit that had been filed against the Borough and dismissed with prejudice in November 2007. Reedy and other plaintiffs had filed an eight-count complaint challenging the Borough's inspection procedures for rental properties. After being served with the complaint, the Borough moved to dismiss the complaint in lieu of filing an answer, and the federal court judge dismissed seven of the complaint's eight counts. That decision was affirmed on appeal.¹ Thereafter, at the direction of a federal magistrate, the parties conferred about the remaining count of the complaint. As a result of those discussions, the Borough agreed to amend the form it used to notify property owners of violations of the Borough's Property Maintenance Code (the violation notice).

After the Borough agreed to revise its violation notice, the parties' attorneys conferred with the presiding federal magistrate and Reedy's attorney "advised the Court that they considered the matter to be resolved." The magistrate dismissed the matter without prejudice, with the understanding that it

¹ Reedy v. Borough of Collingswood, 204 Fed. Appx. 110 (3d Cir. 2006).

would be dismissed with prejudice after all plaintiffs in the case had reviewed the proposed revisions to the violation notice. Counsel for the Borough, who was not its solicitor, sent a stipulation of dismissal to Reedy's attorney, but the stipulation was never signed or returned. On November 19, 2007, the federal judge entered an order dismissing the case with prejudice.

The parties did not prepare or sign a settlement agreement. During the conferences that resulted in the resolution of the case, the Borough's attorney, Joseph M. Nardi III, prepared two letters and a "blacklined" draft of proposed revisions to the violations notice. In the first letter, dated August 27, 2007, Nardi wrote:

As a result of our earlier meeting in my office which was also attended by Gayle Reedy, I have again revised the Borough of Collingswood Hous[ing] Code Violations. I believe that it addresses your and Ms. Reedy's concerns and explains in greater detail the procedures under the applicable ordinance and state statute. I have also attempted to incorporate the points that you raised in your earlier proposed Notice of Violations.

I also enclose a copy of [the] Housing Code Inspection Guideline that Ms. Reedy requested during our meeting. She requested a "checklist" of the more common items covered in the inspection process.

Please contact me upon your review of this document and let me know if it meets with your approval.

The second letter, dated August 30, 2007, provided:

As a follow up to our conference call with [the federal magistrate] on Tuesday and in anticipation of final approval of the revised Notice of Violations form which I had forwarded to you, I am forwarding to you a Stipulation of Dismissal with Prejudice. I would appreciate if you would execute it and return it to me so that I may have it ready for filing with the Court. I understand from our conversations that you and Ms. Reedy agree with the Notice of Violations form and that you anticipate Ms. Burns to concur. I also understand that Ms. Flynn has indicated to you that she will not object to the form of the Notice based upon Ms. Reedy's and Ms. Burn's consent. Lastly, the remaining Plaintiffs are also expected to join in agreement of the form.

Based upon this understanding, I look forward to the final dismissal of this case. Therefore, I would appreciate if you would return the Stipulation of Dismissal with Prejudice promptly. I will hold it in escrow until I receive final confirmation from you. Hopefully that will occur within the next week.

Neither letter referred to a "settlement" or contained the word, "settlement." As previously indicated, the federal action was dismissed with prejudice in 2007.

When plaintiff made the OPRA request more than three years later, on February 2, 2011, K. Holly Mannel was the Borough's Municipal Clerk. Her tenure as clerk had begun on January 10,

2011. When she received plaintiff's OPRA request, she checked the Borough's records to see if a settlement agreement existed. Finding "no document titled 'Settlement Agreement' or anything similar to that description[,]" she contacted the Borough Solicitor, who provided her with copies of the District Court's decision and the decision of the Third Circuit Court of Appeals. She forwarded those documents to plaintiff, who responded in a February 21, 2011 letter that stated:

On 2/2/2011, I requested by OPRA a copy of the "**settlement**" in Reedy v. Collingswood.

On 2/18/2011, you failed to respond to my OPRA request; you gave me a copy of the "**decision**" in Reedy v. Collingswood.

I will give you until 2/24/2011 to provide me with the record I requested on 2/2/2011.

Upon receiving plaintiff's letter, Mannel asked the Borough Administrator if a settlement agreement existed and was advised that there was no settlement agreement. She wrote to plaintiff on February 22, 2011 and informed him:

The OPRA request dated 02/02/2011 does not exist. There was no settlement. I supplied you with the court[']s opinion which was obtained [from] our Municipal Attorney.

Dissatisfied with the clerk's response, plaintiff filed a verified complaint on February 28, 2011, alleging, among other things, that "[t]he Custodian's denial of access to the

requested settlement agreement violated [OPRA]." (Emphasis added).

Upon receiving the complaint, Mannel forwarded it to Nardi, who, as previously noted, had represented the Borough in the federal litigation. Nardi wrote to plaintiff's attorney, Jamie Epstein, asserting that plaintiff "did not specifically request a government record," and further asserting that the Borough clerk had correctly informed plaintiff that no settlement agreement existed. Nardi explained how the federal case was resolved and offered to provide the "earlier" violations notice and the "revised form," which was "the result of the agreement that was reached by the Parties but is not a settlement agreement." Lastly, Nardi asked if plaintiff would dismiss the case.

Epstein accepted Nardi's offer to send the forms but refused to dismiss the suit.² Plaintiff subsequently filed a motion seeking to have the court: (1) declare that defendant violated OPRA by improperly denying plaintiff access to a

² Plaintiff's reason for refusing to dismiss the action is explained in an email that Epstein wrote to Nardi. Plaintiff asserts that the email was not part of the record before the trial court, and defendant does not dispute that assertion. Defendant did not move for leave to supplement the record with the email. Consequently, we will not consider it. Our decision should not be construed as a bar to the admission of the email during subsequent proceedings if it is relevant to the issues in those proceedings.

settlement agreement that resolved Reedy v. Collingswood; compel defendant to "immediately provide Plaintiff with the settlement agreement that resolved Reedy v. Collingswood"; and permit plaintiff to submit a bill for costs and attorney's fees.

The trial court denied plaintiff's motion. Noting that plaintiff's OPRA request asked for neither a settlement agreement nor documents evidencing the settlement, the court determined that the modified violation notice and correspondence describing it "are not the settlement." Explaining to plaintiff's counsel that "[t]here is nothing that you can hand to me . . . that is a settlement of this matter," the court concluded that defendant had "provided [plaintiff] with the documents . . . the municipality had available to it pursuant to Title 47."³

The trial court entered an order confirming its decision. Plaintiff filed a timely appeal from that order.

II.

Plaintiff argues that his request for a "copy of the settlement" of the federal action was broad enough to encompass Nardi's letters and the blacklined violation notice. Defendant counters that OPRA requires custodians to respond to requests

³ Whether the court was referring to the federal decisions or Nardi's correspondence is unclear.

for records, not information, and plaintiff requested information, not records. Defendant further maintains that plaintiff made a vague OPRA request for non-existent documents, and that defendant properly responded that such documents did not exist.

Our review of a trial court's interpretation of OPRA is de novo. See O'Boyle v. Borough of Longport, 426 N.J. Super. 1, 8 (App. Div. 2012). "Findings of fact, however, are reviewed deferentially." Ibid.

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.'" Mason v. City of Hoboken, 196 N.J. 51, 64 (2008) (quoting Asbury Park Press v. Ocean Cnty. Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). The Legislature has explicitly declared 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 . . . shall be construed in favor of the public's right of access." N.J.S.A. 47:1A-1.

Subject to certain exceptions⁴ OPRA defines "government record" as

any paper, written or printed book, 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 her or its official business by any officer, commission, agency or authority of the State or any political subdivision thereof . . . or that has been received in the course of his or her or its official business by any such officer[.]

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

A requestor must submit the record request to the custodian,⁵ in writing, on a form adopted by the custodian of the public agency. N.J.S.A. 47:1A-5(f) and (g). "The requestor must identify the records sought with specificity." Bart v. Passaic Cnty. Pub. Housing Agency, 406 N.J. Super. 445, 451 (App. Div. 2009). In other words, "the request must reasonably identify a record and not generally data, information or statistics." Bent v. Twp of Stafford, 381 N.J. Super. 30, 37

⁴ Exceptions are contained in N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-3, and N.J.S.A. 47:1A-10. The parties do not contend that any exception applies to the facts of this case.

⁵ OPRA provides that "'Custodian of a government record' or 'custodian' means in the case of a municipality, the municipal clerk and in the case of any other public agency, the officer officially designated by formal action of that agency's director or governing body, as the case may be. N.J.S.A. 47:1A-1.1.

(App. Div. 2005). A custodian may deny a request that is "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, supra, 406 N.J. Super. at 451 (quoting MAG Entm't, LLC v. Div. of Alcohol Beverage Control, 357 N.J. Super. 534, 549 (App. Div. 2005)).

OPRA requires the "custodian of a government record" to comply promptly with properly conveyed, written requests for government records, N.J.S.A. 47:1A-5(g), and, with certain exceptions, no later than seven business days after receiving the request. N.J.S.A. 47:1A-5(i). "If the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and properly return it to the requestor." N.J.S.A. 47:1A-5(g). If a request is vague or unspecific, the custodian may request a clarification. The Government Records Council, the administrative body charged with adjudicating OPRA disputes, N.J.S.A. 47:1A-7, has explained that when a request for records is unclear, the requestor has the burden to clarify the request because agencies are required to disclose only identifiable government records. Kelley v. Rockaway Twp. Custodian of Records, GRC No. 2006-176, (Mar. 28, 2007).

A custodian who neither denies an OPRA request nor requests a clarification must search, but not research, the public entity's files to locate the requested records. In Burnett v. County of Gloucester, we explained:

[T]he custodian is obligated to search her [or his] files to find the identifiable government records listed in the Complainant's OPRA request However, the Custodian is not required to research her [or his] files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. 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."

[415 N.J. Super. 506, 515 (App. Div. 2010) (quoting Donato v. Twp. of Union, GRC No. 2005-182, interim order (Jan. 31, 2007)).]

We begin our analysis of the case before us by recognizing that the federal litigation was finally resolved when the parties settled the sole count of the complaint that was not dismissed by the court. Indisputably, the Borough took action requested by the plaintiffs in the federal suit. Specifically, the Borough agreed to amend its violation notice. In exchange, the plaintiffs agreed, either tacitly or explicitly, to a dismissal of the litigation. There was clearly a "bargained-for exchange of promises or performance [consisting] of an act, a forbearance, or the creation, modification or destruction of a

legal relation." Shebar v. Sanyo Business Systems Corp., 111 N.J. 276, 289 (1988). Consequently, there was an enforceable settlement agreement.

Plaintiff's OPRA request for "the settlement" could have been more precise, but we have no difficulty interpreting it as a request for either a settlement agreement or a document that referred to the settlement and incorporated its terms. Parties typically prepare and sign settlement agreements or releases when they settle cases. Undoubtedly there are exceptions, as this case demonstrates, but here the parties themselves interpreted plaintiff's OPRA request as a request for a settlement agreement; plaintiff's complaint alleged, among other things, that defendant had violated OPRA by denying access to the "settlement agreement," and defendant searched for a settlement agreement after receiving the OPRA request. For those reasons, and because defendant did not seek a clarification of the OPRA request, defendant was required to conduct a search for a settlement agreement or a document that referred to the settlement and contained its terms. She was not, however, required "to conduct research among [the entity's] records for [the] requestor and correlate data from various government records" Burnett, supra, 415 N.J. Super. at

515. (quoting MAG Entertainment, supra, 375 N.J. Super. at 546-47.

Generally, a custodian is "under no obligation to search for [records] beyond the [entity's] files." Bent, supra, 381 N.J. Super. at 38. Because of the significant public interest in settlements of lawsuits against public entities, however, those entities may not assert a position "that would provide grounds for impeding access to such documents." Burnett, supra, 415 N.J. Super. at 517. And legal files are the property of the client. See Frenkel v. Frenkel, 252 N.J. Super. 214, 218-19 (App. Div. 1991). So a custodian responding to an OPRA request for a settlement agreement of a specific lawsuit, when unable to locate the settlement agreement in the entity's files, must, at minimum, make an inquiry of the attorney who represented the entity, or, if unknown, the governmental entity's solicitor, as the custodian did in this case. The inquiry should result in the custodian receiving a settlement agreement, a release, a document confirming the terms of the settlement, or an explanation as to why such document does not exist. Absent an OPPRA exception, such information will usually enable the custodian to respond to the OPRA request. If a litigation file is not immediately accessible, the custodian "shall so advise

the requestor and shall make arrangements to promptly make available a copy of the record." N.J.S.A. 47:1A-5(g).

Here, the custodian's search of the Borough's files disclosed no settlement agreement, but the record is not clear as to whether the Borough's files contained any documents about the Reedy litigation, or, if so, whether those documents identified Nardi as the Borough's litigation attorney. The record is also unclear as to why the Borough solicitor provided the custodian with the federal court decisions, but not Nardi's letters and the revised violations notice; and whether, as a consequence, the custodian was led to believe that no settlement agreement existed. The record does not disclose whether the solicitor knew at the time of the custodian's inquiry that the settlement was based on the Borough agreeing to amend its violation notice.⁶ And the record is also unclear as to whether the custodian would have understood from Nardi's two letters and the blacklined violation notice, without any explanation of the

⁶ After the plaintiff filed his motion in the trial court, but before the motion's return date, plaintiff served the Borough's solicitor with a subpoena. The subpoena has not been included in the record, and we do not know if it requested "the settlement" or was broader in scope. The Borough's solicitor apparently produced Nardi's letters in response to the subpoena. We do not know if the solicitor contacted Nardi to obtain the documents, or whether the solicitor had the documents in his file.

significance of those documents or the background of the litigation, that they constituted the terms of the settlement.

In short, the trial court did not consider the adequacy of the custodian's search; the effect, if any, of the information provided by the solicitor on the custodian's failure to produce the blacklined violation notice; or the effect of the need, if any, for an explanation from Nardi in order for the custodian to understand what documents contained the terms of the settlement. Accordingly, we remand this matter for consideration of those issues and, if necessary, consideration of plaintiff's application for attorney's fees.

Reversed and remanded.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION