

access to public records. Instead of granting or denying the request, the Township filed a lawsuit against Scheeler, asking the court to relieve the Township of any obligation to respond to the request and to enjoin Scheeler from making similar requests in the future.

Scheeler asserts that the Township has no authority to seek relief from the records request in court; that only the requestor has such a right. Consequently, before reaching the merits of the request, the threshold issue that the court addresses in this opinion is whether a government agency, such as plaintiff, may file a lawsuit against a person requesting public records, or whether the right to institute a lawsuit determining the validity of the request belongs solely to the requestor. The court concludes that the right to bring the issue to court belongs exclusively to the requestor, not the government agency.

To properly address this issue a review of the procedural history of the case is helpful. On March 26, 2015, Scheeler, a resident of North Carolina at the time, submitted a request to the Township for public records pursuant to OPRA and the common law. In part, the request stated: "Please provide video footage for all building CCTV cameras both [for the] town hall and [the] police department for the past 30 days. Once these records are

turned over they will be publicly archived on YouTube. I will repeat this request every thirty days."

In response to Scheeler's request, on April 8, 2015, the Township filed an order to show cause and verified complaint. The complaint was characterized as a declaratory judgement action. In sum, the complaint seeks to relieve the Township of any obligation to respond to Scheeler's request and seeks to enjoin him from making future requests for CCTV video recordings.

Scheeler subsequently narrowed his request: "I seek, pursuant to OPRA and the common law all video footage from March 25, 2015 from 12pm until 5pm from the police department's sally port camera."

The Township amended its complaint. In the first count, the complaint seeks judgment (1) relieving the Township of any obligation to respond to Scheeler's March 26, 2015 OPRA request; (2) enjoining him from filing any future OPRA or common law requests for CCTV video recordings; (3) enjoining him from filing any action, either in Superior Court or with the Government Records Council (GRC), relating to the March 26, 2015 OPRA request; and (4) requesting counsel fees and costs of suit.

In the second count of the amended complaint, the Township asks for similar relief with regard to requests for the video recordings from "Amy Von Bosse." Amy Von Bosse is a fictitious

name used by Scheeler in filing additional requests for the video recordings. He used the fictitious name pursuant to N.J.S.A. 47:1A-5i, the OPRA provision that allows a requestor for government records to make a request anonymously. The second count of the amended complaint seeks judgment against Amy Von Bosse for substantially the same relief the Township sought against Scheeler in the first count.

The amended complaint contained a third count, in which the Township sought (1) relief from any obligation to respond to Scheeler's OPRA and common law requests; (2) relief from an obligation to respond to OPRA and common law requests in the future for surveillance footage; and (3) counsel fees. On April 16, 2015, another judge of this court signed an ex parte order temporarily relieving the Township from responding to Scheeler's request for documents.

Scheeler objects to the Township filing the declaratory judgment action. He asserts that filing the action deprived him of statutory rights under OPRA: the right to obtain a written response to an OPRA request within seven business days from the government agency, N.J.S.A. 47:1A-5i; the ability to select the appropriate forum to have the denial of the document request reviewed, i.e., either appeal to the GRC or to the Superior Court, N.J.S.A. 47:1A-6; and the right to counsel fees if he is the prevailing party, N.J.S.A. 47:1A-6; N.J.A.C. 5:105-2.13.

Scheeler answered the amended complaint and filed a counterclaim asserting that by filing the declaratory judgment action, the Township denied him those rights, which violates the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 to -2. He also sought counsel fees.

Prior to the return date of the order to show cause, the parties briefed both the procedural and substantive aspects of this case. Three primary issues have come to light. The first, as noted, is whether the procedure followed by the Township filing a declaratory judgment action in response to Scheeler's record requests warrants dismissal of the complaint. The second issue is whether Scheeler, as a resident of North Carolina at the time he submitted the OPRA request, had standing to file such a request given the provision of OPRA that "government records shall be readily accessible for inspection, copying or examination by the citizens of this State." N.J.S.A. 47:1A-1.

The final issue goes to the substance of the request. That is, whether the requested video footage, which both parties acknowledge qualifies as a public record under OPRA and the common law, need not be provided by the Township because the video contains "security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of building or facility or persons therein"; or "security measures and surveillance techniques which, if

disclosed, would create a risk of the safety to persons, property, electronic data or software." N.J.S.A. 47:1A-1.1.

Procedurally, the court is addressing the Township's application in a summary manner under Rule 4:67-1. Although the declaratory judgment action was not instituted under OPRA, both the complaint and the answer directly implicate OPRA as well as the common law claim for access to public records. As such, because OPRA directs that the "right to institute any proceeding under [OPRA] . . . shall proceed in a summary or expedited manner," N.J.S.A. 47:1A-6, the court is treating this application accordingly. Neither party has objected to the court resolving these issues without the need to create a factual record.

The court now turns to the fundamental issue addressed in this opinion: whether the Township's filing a declaratory judgment complaint against Scheeler, in lieu of simply sending him a letter denying his request for inspection of the requested government records, is contrary to the plain language of OPRA, and the policies that underlie both OPRA and the common law right to access public records. The court will first address the statutory scheme embedded in OPRA.

The Legislature included within OPRA a procedure to be followed by both the requestor, in submitting a request for government records, and by the government agency, in responding

to that request. N.J.S.A. 47:1A-5, -6. Requests for access to government records are to be in writing and hand delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate records custodian. N.J.S.A. 47:1A-5g. The custodian is to "promptly comply" with the request, and if unable to do so, "the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor." Ibid. If a portion of the document being requested needs to be deleted, the custodian may do so, but must then "promptly permit access to the remainder of the record." Ibid.

Subject to certain exceptions, the request for access to a government record must be denied or granted by the government agency "as soon as possible, but not later than seven business days after receiving the request." N.J.S.A. 47:1A-5i. A failure to respond within seven business days after receiving the request shall be considered a denial of the request. Ibid.

In response to a request denial, the requestor, "at the option of the requestor," may:

Institute a proceeding to challenge the custodian's decision by filing an action in Superior Court which shall be heard . . . by a Superior Court Judge who has been designated to hear such cases . . .
; or

In lieu of filing an action in Superior Court, file a complaint with the Government Records Council [GRC].

The right to institute any proceeding under this section shall be solely that of the requestor. Any such proceeding shall proceed in a summary or expedited manner. The public agency shall have the burden of proving that the denial of access is authorized by law. If 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.

[N.J.S.A. 47:1A-6.]

This language unequivocally gives the requestor, not the government agency, the right to go to court or take other action if the records request is not granted. The public policy of this state, included in the first section of OPRA, provides the rationale for the statutory procedure. It reads:

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 what was previously known as the Right to Know Law, N.J.S.A. 47:1A-1 to -13 as amended and supplemented, shall be construed in favor of the public's right of access.

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

These legislative findings are more than just a preamble to the OPRA statute; they are substantive law. Burnette v. Cnty of Bergen, 198 N.J. 408, 422-23 (2009).

The purposes and goals of OPRA are well settled. In Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004), the Law Division judge observed the following:

Clearly, the court must always maintain a sharp focus on the purpose of OPRA and resist attempts to limit its scope The salutary goal, simply put, 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. . . . OPRA is founded on the premise that society as a whole suffers . . . if governmental bodies are permitted to operate in secrecy.

Our Supreme Court agreed. "The [OPRA] statute is designed both to promote prompt access to government records and to encourage requestors and agencies to work together toward that end by accommodating one another." Mason v. City of Hoboken, 196 N.J. 51, 78 (2008). In 2011, the Court observed:

The purpose of OPRA is to maximize public knowledge about public affairs . . . and to minimize the evils inherent in a secluded process. . . . Those who enacted OPRA understood that knowledge is power in a democracy, and that without access to information contained in records maintained by public agencies citizens cannot monitor the operation of our government or hold public officials accountable for their actions. An underlying premise of OPRA is that society as a whole suffers when governmental bodies are permitted to operate in secrecy.

[Fair Share Housing Ctr. Inc. v. N.J. State League of Municipalities, 207 N.J. 489, 501 (2011) [internal quotation marks and citations omitted].]

Consistent with these policies, OPRA's procedural requirements impose obligations on both the requestor and the public agency for the submission and processing of requests for public records. In doing so, "OPRA shifts the traditional burden of proof to the responding agency." Mason, supra, 196 N.J. at 76.

In this case, no dispute exists that the government agency did not timely deny the March 26, 2015 OPRA request. Indeed, it has never denied the request. Instead, the Township filed suit against the requestor. The Township asked for restraints against the requestor; and for an order relieving the Township from any obligation to respond to the current and future requests for surveillance videos. These actions did not comply with the plain language of OPRA.

The procedure set forth in N.J.S.A. 47:1A-6 establishing the requestor's rights upon denial of its records request is not a legislative suggestion. It is substantive law. The law does not authorize the government agency to choose the forum in which to have the request for documents adjudicated; that choice lies with the requestor. The law is unambiguous. "The right to institute any proceeding under this section shall be solely that of the requestor." N.J.S.A. 47:1A-6 [emphasis added]. By filing a lawsuit against Scheeler, the Township deprived him of his right to choose the forum in which to have a denial of his request adjudicated, or, indeed, to simply walk away if the request was denied. N.J.S.A. 47:1A-6.

One of the goals of OPRA is to foster cooperation between requestors and agencies to reasonably accommodate both of their interests. Mason, supra, 196 N.J. at 66. The Township's action does not foster that purpose.

The Township has argued that pursuant to the declaratory judgment statute it is entitled, without exception, to file suit to adjudicate its rights vis-à-vis another party. The court disagrees.

The Declaratory Judgments Act (the Act) states, in part:

The enumeration of other sections of this article of the questions determinable and rights declarable in a proceeding brought under the provisions of this article does not limit or restrict the exercise of the general powers conferred by this section in a proceeding for declaratory relief, in which a judgment will terminate the controversy or remove an uncertainty.

[N.J.S.A. 2A:16-52]

In Rego Industries, Inc. v. American Modern Metals Corp., 91 N.J. Super. 447, 453 (App. Div. 1966), the court spoke to the purpose of a declaratory judgment proceeding:

Such proceeding is intended to serve as an instrument of preventative justice, to relieve litigants of the common law rule that no declaration of right may be judicially adjudged until that right has been violated, and to permit adjudication of rights or status without the necessity of a prior breach. Stated in another way, there is ordinarily no reason to invoke the provisions of the Declaratory Judgments Act where another adequate remedy is available.

"Stated somewhat differently, declaratory judgment is not an appropriate way to discern the rights or status of parties upon a state of facts that are future, contingent, and uncertain." Independent Realty Co. v. Twp. of N. Bergen, 376 N.J. Super. 295, 302 (App. Div. 2005) (quoting N.J.S.A. 2A:16-

51). The Act is not available when the request "is in effect an attempt to have the court adjudicate in advance the validity of a possible [claim or] defense in some expected future lawsuit. Ibid. "'The declaratory judgment procedure may not be used to pre-judge issues that are committed for initial resolution to an administrative forum, any more than it may be used as a substitute to establish, in advance, the merits of an appeal from the forum.'" Ibid. (quoting Pennsylvania Dep't of Gen. Serv. v. Frank Briscoe Co., 502 Pa. 449, 459 (1983)).

In Rego Industries, supra, the Appellate Division, in affirming the trial court, agreed that the Act could not be used as an attempt to have the court adjudicate in advance the validity of a possible defense to a defendant's imminent lawsuit. 91 N.J. Super at 453. The court agreed with Vice Chancellor Jayne in Ewing Twp. V. Trenton, 137 N.J. Eq. 109, 110 (Ch. 1945), who, in commenting upon the use of the Act, observed that it was not "'intended to be utilized defensively to bag in advance an imminent and impending law suit.'" Ibid.

This is substantially what the Township has done here. It has attempted to use a declaratory judgment proceeding to head off a lawsuit by Scheeler under OPRA, in which he would be entitled to counsel fees if successful; and to prevent him from taking his claim to the GRC, which also allows for counsel fees to the prevailing party. N.J.A.C. 5:105-2.13(2008). And, not

insignificantly, the Township's lawsuit has prevented Scheeler from simply walking away if the Township denied his request.

In support its decision to file a declaratory judgment lawsuit against Scheeler, the Township has offered a number of citations; to a published New Jersey opinion, to multiple unpublished opinions, and to opinions from other jurisdictions. The published opinion is Bergen County Improvement Authority v. North Jersey Media Group, Inc., d/b/a The Record, 370 N.J. Super. 504 (App. Div. 2004), a consolidated action involving three lawsuits. There, the public agency asked the court to determine whether certain documents requested of the Improvement Authority should be deemed public documents under the common law. Id. at 508. The complaint also included a claim for a judicial declaration as to whether the release of the documents was required under OPRA. Id. at 509.

The trial court determined that the requested documents were exempt from disclosure under OPRA. That ruling was not appealed. Ibid. The Law Division further found, however, that the release of documents was required under the common law. Ibid. On appeal, it was the latter ruling of the trial court that was placed before the Appellate Division. Ibid. The issue here, whether it is proper for a government agency to file suit against the document requestor, was not addressed by the Appellate Division. And no record of the trial court proceeding

has been provided; this court simply does not know if the subject issue was ever addressed in that proceeding. Thus, Bergen is neither dispositive nor informative.

This court has also reviewed the unpublished decisions brought to its attention and the decisions from other jurisdictions. Initially, the court observes that unpublished opinions are not to be cited by any court. R. 1:36-3. And further, the unpublished opinions and those from other jurisdictions offered by the Township here either addressed issues that are not before this court, or the underlying legislation upon which the decisions are based differs from the OPRA statute. Accordingly, the court does not find any of those decisions precedential, informative, or useful in arriving at a decision.

The court concludes that the Township circumvented the substantive provisions of OPRA by filing a declaratory judgment action to ask the court to relieve it of its obligation to respond to Scheeler's request. The government agency may not, in the guise of a declaratory judgment action, file suit against a requestor solely for the purpose of having a court determine whether the request is appropriate. The choice of whether to file suit, seek relief from the GRC, or take no action belongs to the requestor. The failure by the Township to comply with

the procedures set forth in OPRA warrants, by itself, dismissal of the declaratory judgment action. But there is more.

Even without the violations of the substantive procedural process set forth in OPRA, filing a declaratory judgment action against a document requestor is contrary to the public policies that serve as the as foundation for OPRA and the common law right to access government records. As with OPRA, common law standards are based upon "traditions of openness and hostility to secrecy in government." North Jersey Newspapers Co., v. Passaic Cnty Bd. of Chosen Freeholders, 127 N.J. 9, 16 (1992). To allow a government agency to file a lawsuit against someone who has submitted a request for government records would undoubtedly have a chilling effect on those who desire to submit such a request, undercutting the public policy previously described.

A government agency's lawsuit against document requestors subjects them to involuntary litigation with all of its concomitant financial, temporal, and emotional trimmings. A public policy that gives a government agency the right to sue a person who asks for a government document is the antithesis of the policy underlying both OPRA and the common law - to provide citizens with a means of access to public information to keep government activities open and hold the government accountable.

For all of these reasons, the court dismisses the complaint and dissolves the temporary restraints.

The court does not reach the issue of whether one has to be a citizen of the state of New Jersey to file an OPRA request; nor does it reach the substantive issue of whether the Township is entitled to deny the request for the specific surveillance video Scheeler sought. These issues must abide a decision in the proper forum.

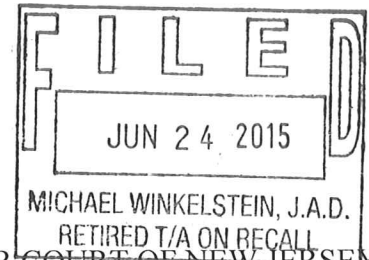
That leaves defendant's counterclaim, in which he has asserted a violation of New Jersey Civil Rights Act, and a claim for counsel fees. The court cannot address the claim for Civil Rights Act violations as that claim is not subject to summary disposition and may, in fact, require discovery. Moreover, in the answer to the amended complaint, the Township has demanded a jury trial on that claim.

Nevertheless, the counsel fee claim is ripe for adjudication. Scheeler is the prevailing party. N.J.S.A. 47:1A-6 specifically states that "a requestor who prevails in any proceeding shall be entitled to a reasonable attorney fee." While this proceeding was not brought under OPRA, it involved a request for documents under OPRA and caused Scheeler to answer the complaint. Though this is not a typical OPRA action warranting counsel fees, as the court has not decided the substantive issue of whether the requested video footage should

be provided to Scheeler, it is the Township that imposed an unwanted lawsuit upon him by not following the OPRA procedure.

OPRA's fee-shifting provisions "are a vital means" of providing citizens with the right to access government records. Courier News v. Hunterdon Cnty Prosecutor's Office, 378 N.J. Super 539, 546 (App. Div. 2005). "Without these provisions, the ordinary citizen would be waging a quixotic battle against a public entity with almost inexhaustible resources." Ibid. To deny a counsel fee application in a case such as here would essentially reward the Township for violating OPRA. Consequently, defendant's counsel shall submit a counsel fee application pursuant to the five-day rule.

The court has attached an order memorializing its decision.



COURT INITIATED:

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
ATLANTIC COUNTY
DOCKET NO.: ATL-L-0833-15

TOWNSHIP OF HAMILTON, COUNTY OF ATLANTIC,

:
: Civil Action

Plaintiffs,

: **ORDER**

vs.

HARRY B. SCHEELER, JR., AMY VON BOSSE, JOHN DOES 1-10, MARY DOES 1-10 and ABC BUSINESS ENTITITES 1010 (being fictitious names), jointly, severally and/or in the alternative,

Defendants.

THIS MATTER having been brought before the court on the return date on an Order to Show Cause on June 12, 2015; and the court having heard oral argument on that date, and for the reasons expressed in the court's written opinion of June 24, 2015,

IT IS ORDERED, this 24th day of June, 2015, that plaintiff's complaint is dismissed;

IT IS FURTHER ORDERED that counsel for the defendant, Harry B. Scheeler, Jr., shall submit, within ten days of the date of this order, its application for counsel fees;

IT IS FURTHER ORDERED that the counterclaim of defendant for alleged violation of the New Jersey Civil Rights Act remains extant; and

IT IS FURTHER ORDERED that a copy of this Order shall be served upon all parties within seven (7) days of its receipt.

MICHAEL WINKELSTEIN, J.A.D.
(retired and temporarily assigned on recall)