

NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

BOROUGH OF PARAMUS,

Plaintiff

v.

IAN I. SHORE

Defendant.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION

BERGEN COUNTY

DOCKET No. BER-L-8240-08

CIVIL ACTION

OPINION

Argued: January 9th, 2009

Decided: January 12th, 2009
Honorable Peter E. Doyne, A.J.S.C.

Wendy L. Weibalk, Esq. appearing on behalf of the Plaintiff, Borough of Paramus (Eric M. Bernstein & Associates, L.L.C.).

Richard Gutman, Esq. appearing on behalf of the Defendant, Ian I. Shore (Richard Gutman, P.C.).

Michelle Tullio, Esq. appearing on behalf of the *amicus curiae*, Municipal Clerks' Association of New Jersey, Inc. (Lanfrit and Tullio, L.L.C.)

Dina L. Sforza, Esq. appearing on behalf of *amicus curiae*, North Jersey Media Group, Inc.

On October 30th, 2008, the Borough of Paramus ("plaintiff" or the "Borough") commenced this action by way of a verified complaint and order to show cause. The Borough seeks a judgment confirming and declaring it is appropriate and reasonable for

the Borough's attorney and governing body to review "non-routine" Open Public Records Act, N.J.S.A. 47:1A-1 to -13 ("OPRA" or the "Act") requests. In addition, the Borough seeks a declaration it is appropriate and reasonable for the Borough attorney to review the Borough clerk's "non-routine" OPRA responses when requested prior to the release of the same to the OPRA requestor. Ian I. Shore ("defendant" or "Shore") is listed as a defendant to provide him with notice concerning the request for declaratory judgment.

Facts/ Procedural History

In the verified complaint, the plaintiff alleges the facts are as follows.

Shore is the Borough clerk. As such, for OPRA purposes, he is the custodian of records and is required to review and timely respond to OPRA requests submitted to the Borough. John E. Ten Hoeve, Esq. ("Ten Hoeve"), the Borough attorney, has reviewed OPRA requests since the beginning of 2008. Ten Hoeve represents the Borough in many of its legal matters.

The Mayor and Council of the Borough purportedly requested Ten Hoeve review OPRA requests and the Borough's responses thereto to ensure compliance with the Act.¹ Specifically, Ten Hoeve asserts he has been requested to determine whether the requests are proper, the responses are appropriate, and ensure protected or privileged information is not disclosed. Likewise, Ten Hoeve wishes to review requests and responses for "issues involving privileged communications, ongoing litigation, and other areas where

¹ At oral argument, the court queried plaintiff's counsel, Wendy L. Weibalk, Esq. ("Weibalk"), as to why the Borough had not provided any certification from the Mayor or Council members to substantiate this assertion. Weibalk advised the Borough only acts through resolutions; seemingly the Borough executed a resolution directing the filing of this action. Same was not provided to the court prior to the hearing. On January 12th, 2009, Weibalk sent a facsimile of Resolution No. 08-10 authorizing the Borough to file a declaratory judgment action "to secure an interpretation with regard to open public records issues."

access is permissibly limited.” For documents regarding ongoing litigation, Ten Hoeve also is to ensure the Borough is complying with discovery mandates of OPRA – disclosing the appropriate records and withholding those inappropriate for release.

Shore stated recently he will no longer provide Ten Hoeve with copies of OPRA requests or responses. On July 10, 2008, Shore informed Ten Hoeve that he alone should be making determinations as to what records should be provided in response to OPRA requests. On September 16, 2008, Shore sent a letter to Ten Hoeve indicating Shore had the sole authority to review and respond to OPRA requests. Thereafter, on September 24, 2008, Ten Hoeve responded to Shore, with a copy to the Mayor and Council, stating the Borough attorney is specifically authorized by ordinance to provide legal advice to all departments and boards within the Borough unless another attorney was specifically appointed for that purpose.

The Borough alleges Shore adopted and is enforcing a policy whereby Ten Hoeve and the Mayor and Council are to have no knowledge of OPRA requests and responses. Currently, Ten Hoeve represents the Borough and Shore in response to residents’ complaints regarding OPRA requests.

Defendant suggests a different scenario.

Shore has been the Borough clerk for over 15 years. Since 2002, Shore has received extensive OPRA training. Shore receives approximately 3,000 to 3,500 OPRA requests per year. In January 2008, the Borough Administrator requested a copy of each OPRA request form. Shore altered the OPRA request form to provide a courtesy copy to the Administrator and has provided the same since that time. Shore consults Ten Hoeve when there is a legal determination to be made concerning an OPRA request.

Earlier last year, at Ten Hoeve's request, Shore provided OPRA requests to the Borough attorney for review prior to releasing the records to the public. Shore found this practice caused administrative difficulties, forced citizens to return to Borough Hall a second time for simple requests, and interfered with Shore's duty to provide certain records immediately. As such, in a letter dated September 16, 2008, Shore informed the Borough attorney his office would no longer be forwarding all OPRA requests to Ten Hoeve as a matter of course.

In response, on October 30, 2008, the Borough filed a complaint and order to show cause seeking a declaratory judgment granting the Borough attorney the right to review OPRA requests and responses thereto. The relief sought has since been limited.

On November 28th, 2008, the court signed an order granting the Municipal Clerks' Association of New Jersey leave to participate as amicus curiae. On December 10, 2008, the Borough consented to North Jersey Media's participation as amicus curiae.

On December 5th, 2008, the court heard Shore's motion for a more definite statement. By way of an order dated December 18th, 2008, the court denied the motion noting the Borough had clarified the relief sought by way of its letter dated December 16th, 2008 and would be bound thereby. In the December 16th letter, the Borough outlined the relief sought as follows:

1. The Borough clerk shall forward, upon receipt of the same, all non-routine OPRA requests to the Borough attorney for review via fax or e-mail;
2. The Borough clerk shall provide his proposed responses to non-routine OPRA requests upon request for same by the Borough attorney;

3. If the Borough attorney chooses to render a legal opinion with regard to an OPRA request, he shall do so within 24 hours of receipt of the Borough clerk's proposed response to the same;²
4. The Borough clerk may disregard the advice of counsel and/or release his OPRA responses in the absence of a legal opinion 24 hours after he has provided same to the Borough attorney for review, absent a court order staying such release.³

Within the same letter, the Borough defined non-routine requests as "all requests other than those defined as 'immediate access records' by [OPRA] ... and exclusive of tax and assessment information requests and requests for documents related to pending zoning and planning board applications." In a subsequent letter dated December 22nd, 2008, the Borough stipulated the Borough receives approximately 3,300 to 3,500 OPRA requests per year. The Borough approximates non-routine requests account for half the total amount received per year.

On January 9th, 2009, a hearing was held to address the issue of whether the Borough attorney may require review all non-routine OPRA requests and responses

² This language is drawn directly from the Borough's correspondence. There was some confusion between plaintiff and defendant's counsel regarding the response time. For clarity, the relief sought was restated at oral argument discussed below.

³ The code of the Borough of Paramus provides "[t]he Borough Clerk shall seek the opinion of the designated Borough attorney as to whether or not a record is public if there is any question as to its potential for copying, review and/or release. The Borough Clerk's actions on this type of matter shall be guided by such legal opinion." Paramus, NJ Code § 341-7 (2008)(available at <http://ecode360.com/?custId=PA1376>). The same seems to be in contradiction with plaintiff's current position. Nonetheless, the Ordinance was enacted in 1997 under the "Right to Know" Law, N.J.S.A. 471A-1 to -4 (1998), the previous public records act; as such its application concerning OPRA matters is questionable. Under cover of a letter dated January 12th, 2009, Weibalk informed it is the Borough's position the ordinance is valid and binding, but the Borough's "working policy is less restrictive than [its] ordinance to facilitate timely OPRA responses." Weibalk letter dated January 12, 2009. As the ordinance is not concretely before the court, the court does not rule with regard thereto.

thereto to ensure legal compliance with the Act and related laws if conducted in an expedited manner.

At oral argument, the relief sought was addressed once again for clarity. As to OPRA requests, plaintiff's capable counsel, Wendy L. Weibalk, Esq. ("Weibalk"), indicated the Borough requests non-routine OPRA requests be sent to the Ten Hoeve upon receipt via email or fax. Ten Hoeve would then be afforded 24 hours to respond if he so chooses. As to Shore's OPRA responses, should Ten Hoeve request the same, Ten Hoeve would have 24 hours from receipt of Shore's response to provide a legal opinion to Shore.

Weibalk argued disciplinary action against the clerk would not be a satisfactory alternate remedy, as the damage from inappropriate record dissemination would have already occurred. Counsel emphasized the privacy concerns implicated by the release of inappropriate records.⁴ In addition, Weibalk urged although disciplinary action may be an alternative, the relief sought presently is still appropriate. As to the lack of competent certification from the Mayor or Council, requesting Shore submit requests and responses to Ten Hoeve, Weibalk indicated the same was not necessary as the Borough was aware of the suit. Subsequently, Weibalk indicated there was a Borough resolution directing the filing of this suit.

Weibalk also highlighted the difficulty in providing a narrowed definition of "non-routine" OPRA requests. Seemingly, the definition provided was an attempt to address any circumstance in which the Borough attorney and clerk may disagree.

⁴ Weibalk could not indicate how many times Shore released records where the Borough attorney would have disagreed with Shore's decision.

Borough's counsel stressed the Borough attorney's 33 years of legal practice in contrast with the Borough clerk's 24 hours of training.

Defendant's counsel, Richard Gutman, Esq. ("Gutman"), argued it is appropriate for the clerk to decide when to seek legal advice given the construct of OPRA. Furthermore, Gutman urged given the comprehensive nature of the OPRA legislation, there is field preemption. Gutman admitted he had found no caselaw indicating a 24 hour review period to be unreasonable under OPRA or similar legislation. Likewise, Gutman conceded there was no support for the contention the Borough clerk would be less susceptible to political pressure than the Borough attorney would be.

Counsel for amicus curiae Municipal Clerks' Association of New Jersey, Inc. highlighted the importance of OPRA and raised "slippery slope" concerns with the Borough's position. Counsel for North Jersey Media Group raised concerns regarding access to public records and the requestors having to make several trips unnecessarily to obtain access to records, which should be provided promptly.

Legal Standards

Courts "commonly grant declaratory relief" by way of the Declaratory Judgments Act, N.J.S.A. 2A:16-50 to -62 (2008). In re Quinlan, 70 N.J. 10, 35 (1976). "It is essential for relief ... that there be a finding of both justiciability and standing." Camarco v. Orange, 111 N.J. Super. 400, 402 (Law Div. 1970). "[W]here the plaintiff is not simply an interloper and the proceeding serves the public interest, standing will be found." In re Quinlan, supra, 70 N.J. at 35.

"The Declaratory Judgment Act ... is remedial legislation entitled to liberal construction and administration." N.J. Assoc. for Retarded Citizens v. N.J. Dep't of

Human Servs., 89 N.J. 234, 242 (1982). “Its purpose is to end uncertainty about the legal rights and duties of the parties to litigation in controversies which have not yet reached the stage at which the parties seek a coercive remedy.” Id.; see also Union County Bd. of Chosen Freeholders v. Union County Park Comm'n, 41 N.J. 333, 336 (1964). The Supreme Court has found a declaratory judgment may be entered where there “is an actual controversy between the parties which involves differing views on the meaning of applicable statutory provisions.” Id.

In interpreting legislation, “statutes are to be read ‘sensibly rather than literally, with the purpose and reason for the legislation controlling.’” Hudson County v. Jersey City, 153 N.J. 254, 263 (1998) (quoting Reisman v. Great Am. Recreation, Inc., 266 N.J. Super. 87, 96 (App. Div. 1993)). Furthermore, “statutes should not be construed so as to lead to unreasonable, anomalous, or absurd results.” Hudson County, supra, 153 N.J. at 263. Likewise, the Supreme Court has “observed that the spirit of the law should control ‘where a literal interpretation would create a manifestly absurd result.’” Delisa v. County of Bergen, 165 N.J. 140, 147-48 (2000)(quoting Turner v. First Union Nat'l Bank, 162 N.J. 75, 84 (1999)).

That said, when the statute is clear, “[i]t is not the function of [the] Court to ‘rewrite a plainly-written enactment of the Legislature []or presume that the Legislature intended something other than that expressed by way of the plain language.’” DiProspero v. Penn, 183 N.J. 477, 492 (2005)(quoting O’Connell v. State, 171 N.J. 484, 488 (2002)). Rather, the courts are “to construe and apply the statute as enacted. . . . [The courts] will not engage in conjecture or surmise which will circumvent the plain meaning of the act.” In re Closing of Jamesburg High School, 83 N.J. 540, 548 (1980).

The Act “plainly identifies its purpose at the outset: to insure 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 (2008).

OPRA provides “**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 [under this Act], shall be construed in favor of the public's right of access.” N.J.S.A. 47:1A-1 (emphasis added). 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.

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

The records are typically available from the records custodian during the public agency’s regular business hours with an exception for smaller towns, agencies, and school districts. N.J.S.A. 47:1A-5. In a municipality, the custodian is the municipal clerk. N.J.S.A. 47:1A-1.1. A provision for oversight of the records custodian is not set

forth in any legislative enactment nor was such oversight contemplated in the legislative history. See Public Hearing before the Senate Judiciary Committee, March 9, 2000.⁵

Typically, any request for a record must be made using the agency's official request form. N.J.S.A. 47:1A-5. The records custodian ("custodian") may charge a fee for copying and related services. Id. The records may be redacted to protect personal information. N.J.S.A. 47:1A-1.1. The custodian must respond to all requests "promptly" and "**as soon as possible**, but not later than seven days after receiving the request," unless applicant fails to provide necessary contact information or the records are unavailable currently. N.J.S.A. 47:1A-5(g)(i) (emphasis added). However, the requestor shall be granted immediate access to "budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." N.J.S.A. 47:1A-5(e).

In determining whether a record should be released, the public agency must also consider the following:

A public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy; and **nothing contained in [the Act] as amended and supplemented, shall be construed as affecting in any way the common law right of access to any record**, including but not limited to criminal investigatory records of a law enforcement agency.

N.J.S.A. 47:1A-1(emphasis added).

⁵ The legislators did have concerns with the clerks having no resource to consult regarding record questions. See Public Access to Government Records: Public Hearing before the Senate Judiciary Committee, March 9, 2000 (statement of Ron Miskoff, President of the New Jersey Society of Professional Journalists). There was a discussion of a possible records question hotline. Id. In turn, the legislature provided for the Government Records Council ("GRC") where a record's custodian may reach out when he has a question concerning the disclosure of a particular record. See N.J.S.A. 47:1A-7(b).

If access to a government record is denied, the person denied access may challenge the decision by filing a complaint in superior court before the appropriate judge. N.J.S.A. 47:1A-6. Only the requestor may bring the application. Id.

In OPRA actions, the public agency has the burden of proving the denial is authorized by law. Id. 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 v. Hunterdon County Prosecutor’s Office, 358 N.J. Super. 373, 383 (App. Div. 2003). Furthermore, “a court must be guided by the overarching public policy in favor of a citizen's right of access.” Id.

According to the Act, some OPRA decisions appear to require legal analysis. For instance, the Act provides:

all government records shall be subject to public access unless exempt from such access by [the Act] as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, federal regulation, or federal order.

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

A determination as to whether an executive order, rules of court, or federal law apply creates legal issues requiring an attorney’s analysis. There is no indication in the Act such a determination is within the province of the clerk.

The Appellate Division has found it is not “unreasonable for the [government agency] to have consulted with its counsel and requested the assistance of counsel to

formulate a proper response” to an OPRA request. Bart v. City of Paterson Housing Authority, A-5826-06T1 (November 21, 2008)(approved for publication).

The clerk is a named party in challenges to OPRA requests. N.J.S.A. 47:1A-6. Generally, where the clerk is subject to “any action or legal proceeding arising out of and directly related to the clerk's lawful exercise of authority in the furtherance of official duties,” it is the obligation of the Borough to “provide its municipal clerk with necessary means for the defense.” N.J.S.A. 40A:9-134.1. There are exceptions to this obligation for disciplinary proceedings brought by the municipality and criminal proceedings brought on behalf of the municipality. N.J.S.A. 40A:9-134.1.

A clerk who knowingly and willfully violates OPRA may be subject to civil penalties and disciplinary action. N.J.S.A. 47:1A-11. The penalties are as follows: “\$1,000 for an initial violation, \$2,500 for a second violation that occurs within 10 years of an initial violation, and \$5,000 for a third violation that occurs within 10 years of an initial violation.” Ibid.

A municipal clerk is appointed for a three-year term by the governing body of the municipality. N.J.S.A. 40A:9-133(a).

The responsibilities of the municipal clerk include the following:

- (1) act as secretary of the municipal corporation and custodian of the municipal seal and of all minutes, books, deeds, bonds, contracts, and archival records of the municipal corporation. The governing body may, however, provide by ordinance that any other specific officer shall have custody of any specific other class of record;
- (2) act as secretary to the governing body, prepare meeting agendas at the discretion of the governing body, be present at all meetings of the governing body, keep a journal of the proceedings of every meeting, retain the original copies of all ordinances and resolutions, and record the minutes of every meeting;

...

(6) serve as coordinator and records manager responsible for implementing local archives and records retention programs as mandated pursuant to Title 47 of the Revised Statutes;

(7) perform such other duties as are now or hereafter imposed by statute, regulation or by municipal ordinance or regulation.

N.J.S.A. 40A:9-133(e)(emphasis added).

The Borough attorney of Paramus is “appointed by the governing body in accordance with the provisions of applicable New Jersey statutes.” Paramus, NJ Code § 81-3. The duties of the Borough attorney include providing advice and “furnish[ing] legal opinions when requested by the governing body or the Municipal Administrator.” Paramus, NJ Code § 81-5(D).⁶ In addition, The Borough attorney, as with all attorneys, is bound by ethical obligations. See NJ Rules of Professional Conduct.

Analysis

There is a conflict between the Borough (by way of its Mayor and Council⁷) and its clerk whether the clerk’s decisions with regard to OPRA requests are subject to the Borough attorney’s mandatory review, consideration, and comment. Requisite standing is demonstrated as the Borough is not simply an interloper and the proceeding serves the public interest. See In re Quinlan, supra, 70 N.J. at 35. As such, this conflict is appropriate for declaratory judgment.

OPRA provides for ready access to government records while providing exclusions to protect both public and private interests. See N.J.S.A. 47:1A-1 to -13.

⁶ In response to the court’s written inquiry dated November 12, 2008, plaintiff’s counsel advised there were no municipal ordinances that address, describe, or set for the duties, obligations and/or role of the Mayor, the council, and/or the Borough clerk. Letter dated November 18, 2008 by plaintiff’s counsel to the court.

⁷ Again, the court notes at the time of the hearing only the Borough attorney, not the Mayor nor a Council member, had certified concerning the purported request for review.

OPRA provides for expedient access by designating the municipal clerk and empowering him to release systematically records to the public. See N.J.S.A. 47:1A-1 through -5; see also Public Hearing before the Senate Judiciary Committee, March 9, 2000. However, OPRA requests and denials address serious privacy concerns the legislature discussed at great length while debating the enactment of the Act. See Public Hearing before the Senate Judiciary Committee, March 9, 2000(statement of William Kearns, Esq., president of the International Municipal Lawyers Association). The exceptions to the Act and the interplay between OPRA and the still applicable common law rights to access present various legal dilemmas inherent in OPRA requests. See N.J.S.A. 47:1A-1. Likewise, nowhere in the legislative history nor in a legislative enactment is there an indication the clerk's power is without review. See Public Hearing before the Senate Judiciary Committee, March 9, 2000.

Furthermore, the Borough has a stake in the records custodian's decisions with regard to OPRA requests and denials. Specifically, the Borough maintains responsibility for protecting its citizens' privacy and safety through the nondisclosure of certain records. See N.J.S.A. 47:1A-1. The Borough remains subject to legal action should the clerk not follow strictly the mandates of OPRA. See N.J.S.A. 47:1A-6. Likewise, a loss in an OPRA lawsuit requires the Borough to pay the record seeker's attorney's costs. See id. Similarly, the Borough is required by state statute to provide legal defense for the clerk in any lawsuit related to his job. See N.J.S.A. 40A:9-134.1. The Borough must have some recourse by which to limit its liability with relation to OPRA actions. In limited circumstances, attorney oversight appears to be a logical means of so doing.⁸

⁸ Parenthetically, oversight of non-routine records, if limited properly, appears to be a sensible solution – one that the legislature, not the judiciary, might consider.

Nonetheless, the relief sought will not be granted for the following three reasons: (1) the OPRA legislation is clear, (2) the Borough's request is preempted, and (3) the Borough's request was not certified properly.

1. OPRA legislation

The statute is clear and comprehensive; public records are to be "readily accessibly," and shall be provided "promptly" and "as soon as possible" to protect the public interest. See N.J.S.A. 47:1A-1 to -13; see also Mason, supra, 196 N.J. at 57.⁹ Furthermore, the statute designates explicitly the Borough clerk as the records custodian. See N.J.S.A. 47:1A-1-1.1. Plaintiff's current request would delay unnecessarily the citizenry's access to voluminous records (using plaintiff's approximation -- potentially 1,650 to 1,750 requests per year). Given the Act's focus on expediency, such a delay contradicts an important goal of OPRA.

Where the statute is clear, as it is here, the court shall not interfere with the Legislature's mandates. See DiProspero, supra, 183 N.J. at 492. Therefore although it is not unreasonable for the Borough clerk to seek the Borough attorney's counsel, see Bart v. City of Paterson Housing Authority, supra, A-5826-06T1, it is appears inconsistent with the Act to mandate mandatory attorney oversight on all non-routine OPRA matters,

⁹ Specifically, OPRA highlights expediency at least five times as follows:

1. "[G]overnment records **shall be readily accessible** for inspection, copying, or examination by the citizens of this State." N.J.S.A. 47:1A-1(emphasis added);
2. "A custodian **shall promptly comply** with a request to inspect, examine, copy, or provide a copy of a government record." N.J.S.A. 47:1A-5(g) (emphasis added);
3. "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 **promptly return** it to the requestor." Ibid. (emphasis added);
4. "If the government record requested is temporarily unavailable because it is in use or in storage, the custodian shall so advise the requestor and shall make arrangements to **promptly make available** a copy of the record." Ibid. (emphasis added);
5. "Unless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access to a government record or deny a request for access to a government record **as soon as possible....**" N.J.S.A. 47:1A-5(g) (emphasis added).

as defined by the plaintiff, where the same would cause unnecessary delay to many requestors.¹⁰

2. Preemption of municipal ordinance

OPRA's legislative scheme securing public access to records in an expedient manner likely preempts the plaintiff's request for a 24 delay for requests and responses. See Bubis v. Kassin, 184 N.J. 612, 629 (2005); see generally Tribune Co. v. Cannella, 458 So. 2d 1075 (Fla. 1984). Where a municipality and the state attempt to govern the same subject matter, preemption may bar the application of the state directive. See Bubis, *supra*, 184 N.J. at 629. "Preemption is a judicially created principle based on the proposition that a municipality, which is an agent of the State, cannot act contrary to the State." Overlook Terrace Management Corp. v. Rent Control Board, 71 N.J. 451, 461 (1976); see also Bubis, 184 N.J. at 629. There is no precedent directly on point in this State. However, the Florida Supreme Court, in analyzing a similar public records statute, held "the legislative scheme of the Public Records Act has preempted the [municipal] law relating to any delay in producing records for inspection." Tribune Co., *supra*, 458 So. 2d 1075, 1079.

Given OPRA's focus on expediency, see Mason, *supra*, 196 N.J. at 57, the plaintiff's broad request regarding attorney review is in conflict with the Act's directive for promptness and immediacy. See Paramus, NJ Code § 341-7; see also N.J.S.A. 47:1A-1 to -13; see also Bubis, 184 N.J. at 629. That is, the Borough seeks a mandate sanctioning delay with literally hundreds of requests annually, which the Act has

¹⁰ It is noted the plaintiff is not prepared to specify exactly how many requestors would be inconvenienced by this directive.

forbidden. See Overlook Terrace Management Corp., *supra*, 71 N.J. at 461. As such, there is conflict preemption between the Borough's directive and the Act.¹¹

3. No proper certification

The Borough's complaint states the following:

The Mayor and Council have requested the Borough Attorney to review requests submitted to the Borough and to review responses to said requests. . . .

The Mayor and Council have also requested the Borough Attorney review OPRA requests to make sure the responses comply with all statutory responses. . . .

The Mayor and Council have also requested that the Borough Attorney evaluate OPRA requests and responses with respect to issues involving privileged communications, ongoing litigation and other areas where access is permissibly limited.

Plaintiff's Compl. at ¶¶ 4,5,6.

Neither the Borough's Mayor nor Council members have certified the same is true. Furthermore, Shore's counsel indicated in his brief the same was "unsubstantiated and unofficial." Defendant's Brief at 9. In its response, the Borough did not submit supplemental certifications or any other evidence to substantiate its claims. As such, there is no verification of the Borough Mayor and Council's alleged requests, thereby requiring dismissal.

If this procedural infirmity were the only issue addressed, consideration of substance over form may have been appropriate. This is especially so as at oral argument, Gutman indicated Shore would not have followed a directive from the Mayor or Council to forward non-routine requests to the Borough attorney. As such, the

¹¹ At oral argument and in his brief, Gutman indicated there is also field preemption in this area. Given the finding of conflict preemption, the court need not address whether there may be field preemption.

outcome would have remained the same -- the filing of a lawsuit -- whether the directive came from the Mayor and Council or the Borough attorney. Suffice it to say, the incompetent certification is but one issue mandating the denial of the Borough's request.

Conclusion

A cogent argument can be proffered the clerk is simply an administrative functionary identified by the Legislature as it need necessarily identify an individual responsible to respond to OPRA requests. Further, the Mayor and Council, as the peoples' representatives, should have the right to direct its own employee in the administration of his/her functions. The same, though, must be considered in light of the comprehensive OPRA framework. This is particularly so when the plaintiff estimates the number of non-routine requests it seeks to have its attorney review is approximately 1,650 to 1,750 requests annually.

The plaintiff seeks a declaration its attorney has the right to review each such request and each proposed response. This is simply too broad. Had the definition of what is non-routine been more narrowly defined, possibly a different result might have been rendered. Given, though, the construct as presented, the delay engendered by the plaintiff's demand, the inconvenience to the OPRA requestor, and the inability of the disseminators of information, such as newspapers or any other media outlets, to readily obtain information to which it is entitled, the plaintiff's request simply cannot be countenanced.

Is the court discomforted by reposing with the clerk the sole authority to determine whether to request legal advice in light of the plaintiff's request its attorney

review such decisions; certainly. It is, though, not for this court to inject its concerns on comprehensive legislation, particularly given the plaintiff's current posture.

For the reasons set forth above, the Borough's application for a declaratory judgment declaring the Borough attorney shall have access to review OPRA requests and responses is denied. Nonetheless, the Borough's OPRA request form shall be altered so the Borough attorney will receive a copy of all requests, in the same manner as the Borough Administrator. This ensures the Borough attorney will receive all record requests promptly.

Defendant's counsel shall submit the appropriate order pursuant to the 5-day rule.