

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0118-12T3

DONALD F. BURKE,

Plaintiff-Appellant/
Cross-Respondent,

v.

OCEAN COUNTY, THE OCEAN COUNTY
DEPARTMENT OF CORRECTIONS, OCEAN
COUNTY BOARD OF FREEHOLDERS,

Defendants-Respondents/
Cross-Appellants.

Argued October 16, 2013 – Decided November 26, 2013

Before Judges Reisner, Alvarez and Ostrer.

On appeal from Superior Court of New Jersey,
Law Division, Ocean County, Docket No. L-
0971-11.

Donald F. Burke, appellant/cross respondent,
argued the cause pro se.

Mary Jane Lidaka argued the cause for
respondents/cross-appellants (Berry,
Sahradnik, Kotzas & Benson, attorneys; Ms.
Lidaka, on the brief).

PER CURIAM

Plaintiff Donald F. Burke appeals from a July 26, 2012
order, denying his motion to obtain certain records from

defendant Ocean County pursuant to the common law right of access.¹ He also appeals from the fee award granted under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-6, which he contends was inadequate. Defendant cross-appeals from the OPRA fee award, contending that Burke was not entitled to recover fees because he was representing himself in the litigation. Having reviewed the record,² we affirm on the appeal and the cross-appeal, for the reasons stated in Assignment Judge Vincent J. Grasso's comprehensive written opinions dated November 22, 2011, and July 26, 2012.

I

Plaintiff, an attorney, represented a woman whose husband committed suicide while incarcerated in the Ocean County Jail. In preparation for filing a lawsuit against the County, plaintiff sent the County a lengthy information request under OPRA. Many of the requests sought broad categories of information, rather than specific documents. They more closely resembled lawsuit discovery demands rather than OPRA requests.

¹ The Ocean County Department of Corrections and Board of Freeholders were also named defendants. In this opinion, we will refer to the County as the defendant.

² In violation of Rule 2:6-1(a)(2), plaintiff's appendix contains hundreds of pages of trial court briefs, as well as multiple copies of exhibits.

The County Clerk received the OPRA request on January 21, 2011. Due to a clerical error, the Clerk's office only forwarded the first page of the OPRA request to the county counsel's office. On January 26, 2011, an assistant county counsel sent plaintiff a letter responding to the first page of the two-page request. In the letter, she declined to provide the requested documents because they were either psychiatric or psychological records that were not subject to disclosure under OPRA and Executive Order 26, or they concerned "security measures and surveillance techniques" also excepted from OPRA, N.J.S.A. 47:1A-1.1. Plaintiff did not contact the assistant county counsel to discuss her analysis, offer a signed medical release form, or point out that his request included a second page that she had not addressed.

Instead, on March 14, 2011, plaintiff filed this lawsuit. Before the County was formally served with a copy of the filed complaint, the County Counsel sent plaintiff a March 31, 2011 letter acknowledging that, through a clerical error, his office had not received the second page of the request. The letter pointed out that most of the requests were overbroad and insufficiently specific, but nonetheless offered to provide plaintiff with some of the requested materials. Subsequent conferences with the judge and negotiations between the parties

resolved some but not all of the parties' disagreements over the requested materials. Plaintiff eventually obtained some but far from all of the materials he sought. At the conclusion of the lawsuit, he sought \$57,275 in counsel fees and costs.

In a forty-page opinion dated July 26, 2012, Judge Grasso applied the principles set forth in Mason v. City of Hoboken, 196 N.J. 51 (2008), to determine whether and to what extent plaintiff was a prevailing party entitled to counsel fees under OPRA. The judge found that the County inadvertently failed to respond to page two of plaintiff's initial request due to a clerical error, but reasoned that plaintiff could have resolved that error had he read the attorney's letter and given her a phone call.

The judge also determined that many of plaintiff's information requests were too broad and too lacking in specificity to be proper OPRA requests. He stated: "Much of the delay in fulfilling [plaintiff's] requests -- as well as the financial cost involved -- is attributable to plaintiff's failure to craft valid OPRA requests. Many of the requests were deficient in both form and substance." He found that other requests sought materials that fell within OPRA exceptions for medical and psychiatric records, N.J.A.C. 10A:22-2.3(a)(4), or records that would reveal security measures and surveillance

techniques. See N.J.S.A. 47:1A-1.1. The judge concluded that, for purposes of the OPRA fee application, plaintiff was a prevailing party only as to a very narrow category of documents.

The judge also found that plaintiff billed far too many hours relative to the degree of success achieved. He concluded that plaintiff's lawsuit was not the catalyst for much of the relief obtained. Instead, he recounted that the court brokered a number of compromises between the parties, and the County ultimately produced some documents it was not required to produce under OPRA. In that context, he reasoned that the County's voluntary production of such documents did not render plaintiff a prevailing party.

In making a fee award, the judge rejected the County's argument that plaintiff was "pro se," finding that he clearly was acting on behalf of a client. However, in light of the limited success obtained through the lawsuit, and considering the reasonable number of hours that should have been spent to obtain those results, the judge awarded plaintiff \$4500 in fees, at a rate of \$300 an hour.

At the end of his opinion, the judge also addressed plaintiff's demands for surveillance video footage from the jail and for a database of suicide records, under the common law right of access. Relying on his earlier opinion from November

22, 2011, the judge reaffirmed that the County's interest in preserving jail security outweighed plaintiff's right to obtain a copy of the surveillance footage. However, he held that allowing plaintiff and his client to privately view the video at the jail, without obtaining a copy of the video, represented a reasonable accommodation of their interests and the County's interests.

The judge also held that plaintiff's blanket request for all records of suicides and suicide attempts at the jail was overbroad and unreasonable, because there was no separate database consisting of only that information. Instead, the County would have to spend hundreds of employee hours sifting through "a database of 10,000 inciden[t] report[s]" to retrieve that information. The judge noted that "defendants have previously certified that seven officers and 110 hours were required just to provide plaintiff a list of sixty-three suicide or self-injury attempts."

II

On this appeal, we engage in de novo review of the trial judge's legal decisions concerning access to public records under either OPRA or the common law. Drinker Biddle & Reath LLP v. N.J. Dep't of Law and Pub. Safety, 421 N.J. Super. 489, 497 (App. Div. 2011); see MAG Entm't, LLC v. Div. of Alcoholic

Beverage Control, 375 N.J. Super. 534, 543 (App. Div. 2005). However, we defer to the judge's underlying factual findings as long as they are supported by sufficient credible evidence. See Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 475 (1988). We will interfere with a trial court's award of counsel fees "only on the rarest occasions, and then only because of a clear abuse of discretion." Rendine v. Pantzer, 141 N.J. 292, 317 (1995).

An OPRA request is not the equivalent of law suit discovery:

OPRA only allows requests for records, not requests for information. In this regard, OPRA "is not intended as a research tool . . . to force government officials to identify and siphon useful information." In other words, a records custodian is not required "to conduct research among its records . . . and correlate data from various government records in the custodian's possession." To qualify under OPRA then, the request must reasonably identify a record and not generally data, information or statistics.

Nor does OPRA "authorize a party to make a blanket request for every document" a public agency has on file. Rather, a party requesting access to a public record under OPRA must specifically describe the document sought.


[Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005) (citations omitted).]

Applying those standards, we find no basis to disturb any aspect of Judge Grasso's July 26, 2012 order. On this appeal, plaintiff repeats the arguments he advanced in the trial court concerning his right to obtain copies of the surveillance video from the jail and the requested information concerning all suicides and attempted suicides. He also repeats his contention that he was a prevailing party, and that the fee award was inadequate. Those arguments were addressed correctly and in detail in Judge Grasso's opinion. They are without sufficient merit to warrant further discussion here. R. 2:11-3(e)(1)(E).

Defendant's cross-appeal from the fee award is equally without merit. See R. 2:11-3(e)(1)(E). As in the trial court, defendant argues that plaintiff was "pro se" in the litigation and therefore cannot recover counsel fees. See Segal v. Lynch, 211 N.J. 230, 262-64 (2012). We disagree. As Judge Grasso found, plaintiff was obviously representing the deceased prisoner's family in the litigation, although he filed the complaint in his own name.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION