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NELSON C. JOHNSON, J.S.C.

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LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW	SUPERIOR COURT OF NEW JERSEY LAW DIVISION ATLANTIC COUNTY
PLAINTIFF(S)	DOCKET NO. ATL-L-832-15
VS	**ORDER**
ATLANTIC CITY BOARD OF EDUCATION, et al.	
DEFENDANT(S)	

THIS MATTER having been opened to the Court by Edward L. Barocas, Esquire, and Iris Bromberg, Esquire, of the American Civil Liberties Union of New Jersey Foundation by Verified Complaint and Order to Show Cause for an Order requiring Defendant, Atlantic City Board of Education to provide certain student records from the Defendant under the Open Public Records Act, viz., *N.J.S.A.* 47:1A-1 et seq. ("OPRA"); and the Defendant represented by Christopher A. Barrett, Esquire, of the law firm of Cooper, Levenson; and the Court having considered the papers submitted by the parties, and having heard oral argument on May 28, 2015 and January 12, 2016; and for the reasons stated in the court's Memorandum of Decision of even date herewith; and for good cause shown;

IT IS ON THIS 19th day of FEBRUARY, 2016, ORDERED, that Plaintiff's petition is DENIED. Plaintiff's Complaint is dismissed with prejudice.

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

NELSON C. JOHNSON, J.S.C.

SUPERIOR COURT OF NEW JERSEY

NELSON C. JOHNSON, J.S.C.

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MEMORANDUM OF DECISION

TO: Edward L. Barocas, Esquire
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Christopher A. Barrett, Esquire
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RE: Lawyers' Committee for Civil Rights vs. Atlantic City Board of Education, et al.

DOCKET NO. ATL-L-832-15

HAVING CAREFULLY REVIEWED THE MOVING PAPERS AND ANY RESPONSE FILED, I HAVE RULED ON THE ABOVE CAPTIONED MOTION(S) AS FOLLOWS:

PROCEDURAL STATUS

This matter comes before the Court on Plaintiff's petition seeking access to the records of the Atlantic City Board of Education. The Defendant, Atlantic City Board of Education (the "BOE") is a body politic, organized and existing under the laws of New Jersey and is obligated to comply with the requirements of the Open Public Records Act, viz., *N.J.S.A.* 47:1A-1 et seq. ("OPRA"). The Plaintiff, Lawyers Committee for Civil Rights Under Law ("the Committee") is an organization associated with the American Civil Liberties Union ("ACLU"), with offices in Washington, D.C. The Committee is dedicated to enlisting the private bar's leadership in combating racial discrimination. The Committee regularly submits public records requests seeking information regarding the working of government.

As noted in Plaintiff's initial pleadings and the exhibits accompanying the same, the thrust of the request(s) for public records from the Defendant focus primarily upon school-level enrollment and disciplinary data delineated by race and ethnicity. The Committee avers that its OPRA request(s) to Defendant are prompted by an interest in ensuring that all students receive equal educational opportunities, and a concern regarding the lack of public information pertaining to the enrollment and discipline of students in the Atlantic City School District.

This Court entered an Order to Show Cause on April 9, 2015, setting down a hearing date of May 12, 2015. Thereafter, the parties consented to an adjournment, and a hearing occurred on May 28, 2015, at which time the court heard oral argument and concluded that there may be a need for further refinement of the Plaintiff's requests for public records; and further, that there may be a need for a more diligent inquiry on the part of the BOE in an effort to ascertain the existence of certain public records which may, of necessity, be inclusive of requests made by Plaintiff. The Court continued its dialogue with counsel during an on-the-record telephone management conference on June 12, 2015, and, again, on June 26, 2015, at which time it became clear to the Court that Christopher A. Barrett, Esquire, may possibly be having difficulty securing the assistance of the appropriate School District employees.

The Court entered an Order on June 20, 2015, requiring the New Jersey State Monitor to appoint a BOE employee to work directly with Mr. Barrett toward the satisfaction of Plaintiff's OPRA request. Thereafter, the Court conducted an off-the-record telephone conference on August 13, 2015, wherein the Court requested Defendant to provide a Certification from the BOE. A second telephone conference was scheduled for November 5, 2015, and Defendant's counsel was instructed to advise the Court of its position on providing the OPRA records, namely, that the BOE rejects the Plaintiff's rights to demand public records from the BOE, because the Plaintiff is a not a citizen of New Jersey. The BOE has moved for the dismissal of Plaintiff's Complaint. (NOTE: The Court has not as yet conducted a fact-finding hearing to inquire into the availability of the public records sought by Plaintiff, nor as to the right of access to the same by the public, generally, and Plaintiff in particular.)

Defense counsel's sur-reply to Plaintiff's December 22, 2015, correspondence, eloquently presents four arguments which distill the BOE's position to its essence. First, Plaintiff's argument that the Legislature removed the citizenship standing requirement when repealing the *Right to Know Law* (the "RTKL") and adopting OPRA ignores the "citizens of this

State" phrase and lacks any support from the Legislative history. Second, Plaintiff ignores the unanimous decision of the U.S. Supreme Court in *McBurney v. Young*, 133 *S.Ct.* 1709 (2013), and rather submits an unpublished, remanded, and factually inadequate case to support their position. Third, Plaintiff's reliance on the pre-*McBurney*, January 2011, Government Records Council's position regarding the accessibility of New Jersey public records to out-of-state requestors is unavailing. Fourth, Plaintiff is not entitled to the records under the Common Law because the requestor's interest does not outweigh the governmental entity's interest.

In a letter to the Court dated January 4, 2016, Iris Bromberg, Esquire, advised the Court that:

> I am writing to streamline the issues Plaintiff will present to the court. Plaintiffs will be presenting its claim under the Open Public Records Act (i.e., the main claim that has been argued to date). We will not be moving forward with our secondary claim (the common law law).

Accordingly, notwithstanding the preservation of the "Common Law Right of Access" as set forth in OPRA at *N.J.S.A.* 47:1A-8, that portion of Plaintiff's Complaint is deemed voluntarily dismissed as per Rule 4:37-1(a).

A second hearing before the Court was held on January 12, 2016. At that oral argument the Court advised counsel that earlier the same day legal counsel in other proceedings before the Court had presented the Court with a copy of a ruling issued by the Honorable Ronald E. Bookbinder, A.J.S.C., dated October 8, 2015, wherein Judge Bookbinder interpreted OPRA to grant a right of access to public records by a non-citizen of New Jersey. The Court granted both counsel an opportunity to provide written comments on this unpublished decision in *Scheeler v. Atlantic Co. Mun. JIF*, Docket No.: BUR-L-990-15. The record is complete for the Court to rule on the limited issues presented by the BOE's Motion to Dismiss the Plaintiff's Complaint.

PRELIMINARY OBSERVATIONS

The central purpose of the OPRA is to empower New Jersey residents to scrutinize the operations of their government and to hold public officials accountable. The OPRA is the progeny of the Right to Know Law ("RTKL"), the purpose of which statutory amendment was to illuminate and avoid secrecy in government affairs. As such, according to Defendant's counsel, the benefits of the RTKL and OPRA are properly given to those who not only "foot the bill" for

such benefits but who also are directly affected by the very political processes the aforementioned Legislation was enacted to protect and serve. Defense counsel's recounting of the Legislative history of OPRA is impressive and helpful to the Court's analysis.

In its submission of January 20, 2016, counsel states that for more than fifty years, "Plaintiff's principal mission is to secure equal justice for all through the rule of law, targeting in particular the inequities confronting African Americans and other racial and ethnic minorities." In addition to litigating on behalf of ethnic minorities, one of the programs instituted by the Plaintiff is the South Jersey Educational Reentry Program ("SJERP"). That initiative (not currently functioning) was created to assist students transitioning from juvenile justice facilities and returning to schools in some of our region's poorest communities, in an effort to assure their rights to an education are not compromised. The precise records sought by Plaintiff in this instance have not been completely defined, and are not part of the Court's consideration of Defendant's challenge to Plaintiff's standing as a non-citizen petitioner.

STANDARD OF REVIEW AND STATUTORY INTERPRETATION

OPRA actions are intended to be summary proceedings governed by *N.J.S.A.* 47:1A-6. "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." *N.J.S.A.* 47:1A-6. Additionally, "any limitations on the right of access accorded by [OPRA] shall be construed in favor of the public's right of access." *N.J.SA.* 47:1A-1. OPRA actions are normally considered as cross motions for Summary Judgment. *See, e.g., Burnett v. County of Gloucester*, 415 *N.J. Super.* 506, 511 (App. Div. 2010). As the burden rests on the Defendant, Defendant must demonstrate that it is entitled to Summary Judgment as a matter of law. *Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520, 535 (1995).

When interpreting a statute, the Court's primary responsibility is to determine the Legislature's intent. *American Fire and Cas. Co. v. New Jersey Div. of Taxation*, 189 *N.J.* 65, 79 (2006). The starting point is to examine the plain language of the statute and ascribe to the words their ordinary meaning. *DiProspero v. Penn*, 183 *N.J.* 477, 492 (2005); *Mun. Council v. James,* 183 *N.J.* 361, 370-71 (2005). The Court's analysis of the parties' positions is guided by well-established principles of statutory construction, the most important being the intent of the Legislature. *In re T.S.*, 364 *N.J. Super.* 1, 7 (App. Div. 2003). To determine that intent, the plain

language of the statute is examined and in doing so it should be given "its ordinary meaning, absent a legislative intent to the contrary." *Burns v. Belafsky*, 166 *N.J.* 466, 473 (2001). The words of a statute must be given their common-sense meaning in the context of the entire statute, which should be afforded a "harmonizing construction . . . and read . . . so as to give effect to all of its provisions and to the legislative will." *T.S., supra*, 364 *N.J. Super.* at 6. In determining legislative intent, "[s]pecific meaning supersedes a general one." *City Council of Orange Twp. v. Brown*, 249 *N.J. Super.* 185, 191 (App. Div. 1991). *See also Lewis v. Bd. of Trs., Pub. Employees' Retirement Sys.*, 366 *N.J. Super.* 411, 416 (App. Div.) ("[T]he inclusion of specific words and phrases controls or limits more general words and phrases."), certif. denied, 180 *N.J.* 357 (2004).

Finally, as stated by the Court in *Foxworth v. Morris*, 134 *N.J.* 284, 288 (1993), our task is to have the law make sense: "it is a venerable principle that a law will not be interpreted to produce absurd results." *K Mart Corp. v. Cartier, Inc.*, 486 *U.S.* 281, 324 n. 2, 108 *S.Ct.* 1811, 1816 n. 2, 100 *L.Ed.*2d 313, 345 n. 2 (1988) (Scalia, J., concurring in part and dissenting in part). We "'effectuate the legislative intent [of the law] in light of the language used and the objects sought to be achieved.'" *Merin v. Maglaki*, 126 *N.J.* 430, 435, 599 *A.2d* 1256 (1992) (quoting *State v. Maguire*, 84 *N.J.* 508, 514, 423 *A.2d* 294 (1980).

DISCUSSION OF LAW AND RULING

The history preceding the repeal of the former Right to Know Law (the "RTKL") and the adoption of OPRA comprises a substantial Legislative record. What's clear from that record, and prior Court rulings, is that the OPRA was adopted primarily to grant citizens a more unfettered right of access to public records. From this Court's perspective, the most fundamental difference between the statutes was a shifting of the burden of proof for entitlement to records from the citizen to government. Under the RTKL, citizens had to prove they had an interest in and/or need for the record, and that the record sought was a public record. Under OPRA, the burden of proof has been placed squarely on the municipality to come forth with a rationale explaining why the citizen's right of access must be denied.

Burden shifting, coupled with counsel fee shifting in the event the municipality fails to meet its burden, have put teeth into the OPRA which the RTKL did not have. In making these fundamental changes to the statutory right to access public records, the Court must be mindful of

all the circumstances entailed and whether or not the right to access should be upheld over the objections of a municipal government. Teeth can be sharp. Finding the right of access, particularly as here, where the Plaintiff is a non-citizen, must be granted with due caution and judicious restraint.

Informative to this Court's analysis is the discussion regarding the U.S. Supreme Court's decision in *McBurney*. *McBurney* involved a challenge to Virginia's Freedom of Information Act ("Virginia's FOIA") which is similar to New Jersey's OPRA. The Petitioners in *McBurney*, like the Plaintiff here, were citizens of states other than the commonwealth of Virginia – the state in which the request for records was made. *Id.* 133 *S. Ct.* 1709 at 1714. Upon receipt of their requests, two different agencies of state government denied the requests (of both Plaintiffs) on the grounds that he was not a Virginia citizen. Petitioners then filed suit under 42 *U.S.C.* § 1983 and sought declaratory and injunctive relief for violations of the *Privileges and Immunities Clause* of the *U.S. Constitution* ("PIC") and the dormant *Commerce Clause* to the *United States Constitution. Ibid.*

In holding that Petitioners' rights under the PIC were not violated, the Court opined,

> This does not mean, we have cautioned, that state citizenship or residence may never be used by a State to distinguish among persons. Nor must a State always apply all its laws or all its services equally to anyone, resident or nonresident, who may request it so to do. Rather, we have long held that the Privileges and Immunities Clause protects only those privileges and immunities that are fundamental. [*Ibid.*] [internal quotations and citations omitted].

According to the BOE, a holding that OPRA applies only to New Jersey citizens fits squarely within the PIC jurisprudence, interpreting *Art.* IV § 2 *cl.* 1 of the U.S. Constitution. This Court respects the ruling in *McBurney* and can envision situations in which it's reasoning would apply to the OPRA. Despite the thorough and persuasive arguments made by the BOE's attorney, the facts here are so very different than those in *McBurney* that the Court is obligated to look to our own state's jurisprudence for guidance and the Legislative history in the transition from the RTKL to the OPRA.

Standing is fundamental to every lawsuit. This Court's experience has been that New Jersey law does not recognize any distinction between the concept of standing and "real party in interest." Historically, our courts –more so than most other states' courts- have taken a very

generous view of standing. Generally, if an individual or association claims to be aggrieved by the actions of another or asserts entitlement to particular rights under state law, and can articulate a justiciable claim within the jurisdiction of our courts, the doors of New Jersey's courthouses are open. That is often the situation under the Common Law but here Plaintiff is pursuing access under a statute, to wit, OPRA.

The Plaintiff claims that the Legislature amended the RTKL so that any person (non-citizens) can request government records. In *S. Jersey Pub. Co. v. N.J. Expressway Auth.*, 124 *N.J.* 478, 489 (1991), a decision this Court knows well, the Supreme Court applied the RTKL and stated in relevant part:

> In 1963, the Legislature supplemented the public's right of access to public records by enacting the Right to Know Law, *N.J.S.A.* 47:1A-1 to -4, declaring the public policy of the State to be 'that public records shall be readily accessible for examination *by the citizens of this State*, with certain exceptions, for the protection of the public interest.' *N.J.S.A.* 47:1A-1. Although the Legislature did not curtail or affect the common-law right to inspect and examine public records, *Irval Realty, supra*, 61 *N.J.* at 373, 294, A.2d 425, it did eliminate the standing requirement for access; under the Right to Know Law, *one need only be a citizen of the State to obtain access to public records. Id.* at 489. [Emphasis added.]

If the intent of the Legislature was to overrule the RTKL's standing requirement as set forth above, then the Legislative findings and declarations portion of OPRA, along with the transcript of the public hearing to discuss the enactment of OPRA, would have clearly stated that was the change in policy. If the Legislature had amended the RTKL so as to make records accessible both to citizens of this State as well as any person, including non-citizens, then the first sentence of OPRA might well have stated that: *The Legislature finds and declares it to be the public policy of this State that: government records shall be readily accessible for inspection, copying, or examination by all citizens of this State and any person, including non-citizens.* That language is not the law. *N.J.S.A.* 47:1A-1 reads, in limited/relevant part:

> The Legislature finds and declares it to be the public policy of this State 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 accorded by P.L. 1963, c.73 (C.47:1A-1, et seq.) as amended and supplemented, shall be

> construed in favor of the public's right of access... [Emphasis added.]

Accordingly, from this Court's perspective, Plaintiff's argument that "any person" broadens the scope of access under OPRA to non-citizens does not conform to the clear Legislative intent. Contrary to Plaintiff's interpretation of OPRA, OPRA was enacted to expand the scope of accessible government records, not to expand the scope of those who had access to these records.

Plaintiff's counsel would have this Court ignore the Legislative history of OPRA which noted that the Legislative changes required to make the transition from the RTKL to OPRA were limited to: (1) the definition of what constitutes a "government record"; (2) the definition of a "custodian of a government record"; (3) the ability for a public entity to assess a Special Service Charge; (4) the ability that a custodian of records may require a deposit against costs; and (5) clarification that a custodian of records will either grant access to government records or deny a request no later than seven (7) business days after receiving a request. *NJ Assembly Government Committee Statement on Assembly, No. 1309,* p. 2 (March 6, 2000). *Judiciary Committee Statement to Assembly, No. 1309*, p. 1 (December 6, 2001) ("the bill expands the public's right to access to all public records to include all government records and facilitates the way in which that access is provided by the custodian of a government record").

A reading of the New Jersey Senate bills preceding the adoption of OPRA demonstrates that the Legislature intended to make OPRA applicable only to citizens of this State. It is this Court's understanding of the Legislative enactments, particularly as to statutes which amend existing statutes, that when the Legislature includes limiting (or expansive) language in an earlier version of proposed legislation, but deletes it prior to enactment of the statute, it is presumed that the limitation (or expansion) was not intended by the Legislature. In this case, Senate Bill, No. 351, introduced on January 11, 2000, by Senators Kenny and Kyrillos stated in their proposed *Legislative findings and declarations*, in part: "[T]he Legislature finds and declares it to be the public policy of this State that public records shall be readily accessible for examination by members of the public", striking the phrase "citizens of this State." This change as initially proposed and as stated in the accompanying Statement was intentionally made to "broaden[s] the scope of the public policy regarding availability of public information to incorporate any

member of the public and not just citizens. Currently, the right to information access exists for citizens alone." [NOTE: Senate Bill, No. 351 was *not* adopted by the Legislature.]

It was Senate Bill No. 866, subsequently introduced by Senator Martin on January 31, 2000, which ultimately became OPRA. It was drafted to state, at *N.J.S.A.* 47:1A-1, that "[t]he Legislature finds and declares it to be the public policy of this State that government records shall be readily accessible for inspection, copying, or examination by the citizens of this State ... for the protection of the public interest." Senator Martin stated during the Senate Judiciary Committee Public Hearing regarding the adoption of OPRA that, "I fundamentally believe that the public is entitled to the records of its government, and the legislation that we've introduced today will be the subject of this hearing basically takes that approach." Plaintiff cannot call the New Jersey government "its government."

Similarly, the Assembly Floor Amendments are likewise devoid of any suggestion that OPRA "changed course" from RTKL and expanded who may freely access government records to include non-New Jersey citizens. *Statement to Assembly No. 1309,* Assemblymen Geist (March 27, 2000), Collins (June 26, 2000), Martin (May 3, 2001), Geist and Collins (January 3, 2002). Indeed, even the transcript of the *Public Hearing before the Senate Judiciary Committee* (the "Committee") (*Senate Bill Nos.* 161, 351, 573 and 866) (the "Hearing") is also devoid of Plaintiff's suggestion that OPRA "changed course" from the RTKL and deleted or otherwise amended its citizenship requirement.

Additionally, Plaintiff's argument that just because OPRA's provisions contain the phrase "*any person*" New Jersey's government records must be made accessible to "*any*" person, a New Jerseyan or not, is not persuasive. The Legislative "citizens of this State" limitation is similar to other New Jersey residency restrictions that also use Plaintiff's frequently cited, "*any person*" verbiage from the Act. For example, *N.J.S.A.* 19:31-1 ("Registration required to vote") provides that, "no '*person*' shall be permitted to vote at any election unless such '*person*' shall have been registered[.]"; *N.J.S.A.* 39:3-10 ("Licensing of drivers; classification") provides that, "no person" under 18 years of age shall be issued a basic license to drive motor vehicles[.]"

Under the Legislative construction of the phrase "*any person*" as proposed by Plaintiff, *a fortiori* a Washington, D.C. resident could vote in New Jersey's elections and obtain a New Jersey driver's license all while never obtaining New Jersey residency. Stated differently, voting in New Jersey's elections and domicile requirements for obtaining a New Jersey license to

operate a vehicle all require that the recipient (i.e., the New Jersey citizen) of the benefit (i.e., the ability to vote for public officials and the privileges of having a New Jersey license) to also bear the burden of said benefit's cost via tax dollars.

This Court also relies upon our Supreme Court's ruling in *Burnett v. County of Bergen,* et al, 198 *N.J.* 408, (2009) wherein the Court found that the initial precatory language at *N.J.S.A.* 47:1A-1 is not a non-operational "preamble" but rather is part of the substantive body of the law. At *N.J.S.A.* 47:1A-1 – "The Legislature finds and declares it to be the public policy of this State 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…". The Court in *Burnett*, 423, ruled that *N.J.S.A.* 47:1A-1 "…is neither a preface nor a preamble. It has not telltale "whereas" clauses that often appear in a preamble. It appears after OPRA's enactment clause, making the provision part of the body of the law."

Finally, this Court addresses the reliance of the Court in *Scheeler v. Atlantic Co. Mun. JIF* upon *N.J.S.A.* 47:1A-5F. This Court has always had difficulty understanding the enforceability of an "anonymous request." For the reasons stated by the Court in *A.A. v. Gramiccioni*, 442 *N.J. Super.* 276 (App. Div. 2015), Plaintiff's reliance upon *N.J.S.A.* 47:1A-5F is of no moment to this Court's analysis. Both the Trial Judge and the Appellate Court's opinion in *Gramiccioni* articulate well the law on anonymous legal proceedings.

Plaintiff's Complaint seeking access to student records of the Atlantic City School District under the OPRA is hereby dismissed with prejudice. An appropriate Order has been entered. Conformed copies accompany this Memorandum of Decision.

NELSON C. JOHNSON, J.S.C.

Date of Decision: 2/19/16