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Town Can't Mandate Prior Review Of OPRA Requests by Its Attorney

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Bergen County's top judge has rebuffed a town's attempt to have its lawyer review all "nonroutine" Open Public Records Act requests before fulfillment.

In a ruling released Tuesday, in *Borough of Paramus v. Shore*, L-8240-08, Assignment Judge Peter Doyne said the requested procedure would throw a wrench into OPRA's operation.

"Given ... 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," he wrote.

Paramus defined nonroutine requests as everything but tax and assessment information, pending zoning and planning board applications, and records specified by OPRA as being subject to immediate access, such as budgets and bills. By Paramus' estimate, the category would have encompassed roughly half the 3,300 to 3,500 requests it receives each year.

Doyne found Paramus' definition of nonroutine "simply too broad," adding that he might have ruled differently had the definition been narrower.

Doyne did, however, find that the borough attorney, John Ten Hoeve Jr., was entitled to a copy of every request, and ordered the clerk, Ian Shore, to revise the OPRA request form to reflect that.

The case drew amicus participation from the Municipal Clerks Association of New Jersey and from the North Jersey Media Group, owner of *The Record* of Hackensack. Though unpublished, the ruling could impact other municipalities.

The suit was filed on Oct. 30 by Paramus' mayor and council, who wanted the court to approve a practice initiated earlier in 2008 for prior attorney review of all requests.

After Shore moved for a more definite statement of what Paramus sought in the case, the borough narrowed the relief to cover only nonroutine requests. It also asked that the borough attorney be given a 24-hour window to get back to Shore with a legal opinion on any records he thought should be withheld.

The suit was brought in response to Shore's refusal in September to go along with the initial blanket review policy.

Shore complied at first but balked after a few months, complaining of delays and confusion among his staff, who had to keep track of the review process for the hundreds of requests made each month.

Some members of the public became abusive when told they could not get records on the spot and would have to come back and some people did not bother to return, complained Shore.

Shore, the Paramus clerk since 1993, resumed his former practice of consulting the borough attorney

only when he needs guidance on a particular request.

Paramus' position was that prior review was essential because if Shore mistakenly disseminated records, the damage could not be undone.

The town's lawyer, Wendy Weibalk, contrasted Ten Hoeve's 33 years of legal practice with Shore's 24 hours of OPRA training.

Doyne agreed Paramus has a stake in how Shore deals with OPRA requests because it is responsible for protecting the privacy and safety of its citizens, can be sued over Shore's actions and, if it loses, must pay the seeker's legal fees.

Though attorney oversight seemed a "logical means" for Paramus to limit its liability, Doyne denied relief because OPRA mandates quick, ready access and pre-empts Paramus' directive.

"Given OPRA's focus on expediency, the plaintiff's broad request regarding attorney review is in conflict with the Act's directive for promptness and efficiency," he wrote.

Doyne also noted that Paramus never provided evidence that it was the mayor and council, rather than Ten Hoeve, who had asked for attorney review, though on the day of the hearing, Jan. 12, Weibalk faxed him a copy of a resolution authorizing the declaratory action.

"It all came from Ten Hoeve," says Shore.

He says he has already spoken to a printer about revising the OPRA request form so Ten Hoeve gets a copy but will seek his advice only when the law is unclear, 35 to 60 times per year, by his estimate.

Shore's lawyer, Richard Gutman, says Paramus' definition of nonroutine covered about 80 percent of requests, rather than half as it claimed. "Either way, it's a hell of a lot of requests," says Gutman, a Montclair solo.

"The borough attorney wanted to impose procedures that would make it impossible to get prompt access," even for clearly public documents, he adds.

Ten Hoeve says the case was not about control but about notice to the town.

"Once you've released a document, the horse is out of the barn," he says.

Paramus sued "because the borough clerk sent a memo to his entire staff directing them not to provide copies of any OPRA request to the borough attorney," says the Hackensack solo.

"The decision gives me what I need, immediate copies of requests."

Weibalk, who is with a firm in Warren headed by Eric Bernstein, did not return a call for comment.

Dina Sforza, the lawyer for North Jersey Media Group, says the company came into the case to protect the right to prompt access to public records.

Michelle Tullio, of Lanfrit & Tullio in Somerset, represented the clerks' association.

Paramus vs. Shore: http://www.njfog.org/docs/paramus_v%20_shore.pdf