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Admitted in NJ, NY, TX & DC

February 25, 2021

Via Email (rmoore2929@gmail.com) & Regular Mail

Mr. Rory Moore
462 Chestnut Street
Nutley, New Jersey 07110

Re: Request for Internal Review of OPRA Requests 72-21 and 90-21

Dear Mr. Moore,

As you know, I serve as Special Counsel to the Township of Nutley (the “Township”). I am in receipt of your various emails dated February 24, 2021 seeking an internal review of the above-referenced OPRA requests (the “Internal Review Request”). As is explained more fully below, each of the Custodian’s responses your OPRA requests was accurate and completely within the scope of OPRA and the common law right of access.

Your first OPRA request (72-21) submitted on Sunday, February 7, 2021 and received by the Township on Monday, February 8, 2021 states, “I seek the original request, the approval and the reason for the following bill request, 20-00267, 20-00316, 20-00685, 20-03559, 00311, 20-00645, 20-003111, 20-00002847, 19-03438. I seek the original contract, the approval and the actual contract for the following. The 7-day rule will be enforced. I required the response to be in an excel format.” On February 18, 2021,¹ the Custodian responded that “PO # 20-00002847 and PO # 20-003111 are not valid purchase order numbers”. The remaining requested purchase orders and supporting records were produced in their native PDF format with appropriate reactions to protect confidential account numbers, tax identification numbers and attorney-client

¹ Your repeated reference to the “7-day rule,” presumably referring to the seven-business day response deadline under N.J.S.A. 47:1A-5, conveniently ignores the provisions of P.L. 2020, c. 10, in which the State Legislature extended this statutory deadline during a declared state of emergency like the COVID-19 public health emergency that currently exists in the State of New Jersey.

privileged information. On February 24, 2021, you responded to the Custodian stating “Dear Ceci Tramontana, mediation”.

The fact that 20-00002847 and 20-003111 are not valid purchase order numbers does not entitle you to threaten the Township with legal process via mediation, litigation or otherwise. Simply stated, the Township cannot produce records which do not exist. Moreover, the records associated with the valid purchase order numbers stated in your OPRA request were produced in a readily available and computer readable PDF format. The requested records are not made, kept or maintained by the Township in an Excel format, nor can said records be reasonably converted to Excel format. Your repeated demands that the Township provide records in Excel format, when those records are not made, kept or maintained in that format, are not supported by law.

As you have been repeatedly advised, OPRA provides that a requestor is entitled to a government record “in the medium requested **if the public agency maintains the record in that medium.**” N.J.S.A. 47:1A-5(d) (emphasis added). Thus, if the record is maintained in an electronic medium, the requestor is entitled to the document in electronic form. If the record is not maintained “in the medium requested,” the custodian must “convert the record to the medium requested **or provide a copy in some other meaningful medium.**” Ibid; Paff v. Galloway Twp., 229 N.J. 340, 354 (2017) (emphasis added). The electronic PDF medium, which is recognized and used throughout the world to produce and view page-generated image files, is exactly the type of “meaningful medium” that Custodians are authorized to use under OPRA.

As you know, most Township records are largely kept in paper or digital image (PDF) format. This includes the records sought in your OPRA request 72-21. The Township will not bear the administrative burden and expense of converting records to Microsoft Excel format when they are stored and available to be produced in their native paper and PDF formats. Moreover, it is technically impossible to render the requested records in Microsoft Excel format because the subject PDF files originated in paper or other non-spreadsheet formats. If you cannot view PDF documents for whatever reason, you may request and receive paper copies of responsive records, subject to the statutorily authorized copying fees.

Your second OPRA request (90-21) submitted on February 15, 2021 states, “I seek any and all documents submitted to the State of New Jersey for the project known as Diamond Springs property located in New Jersey. I seek all the initial and additional documents and correspondence to the State of New Jersey for the initial and additional PILOT plans.” On February 22, 2021 the Custodian responded that a search of Township files did not reveal any records responsive to this request. On February 24, 2020, you responded to be Custodian by stating “According to the State of new Jersey Nutley has to submit plans for the PILOT project. I seek all documents submitted to the State. This is not research.”

The Custodian's response to your OPRA request 90-21 was based on the simple fact that no such PILOT documents exist and none have been submitted to the State of New Jersey. Again, the Custodian cannot produce a record that does not exist. While you are correct that the Custodian's response to this OPRA request did not require research, this does not change the fact that there are no responsive records in the Township's files. This is primarily because, to date, no redeveloper has been selected and no such PILOT or other financial agreements have been submitted to the State for that site. As such, it would be impossible for any such PILOT or other financial agreements to have been negotiated or submitted to the State. Moreover, the Custodian is not required to generate PILOT documents or submit any such documents to the State in response to an OPRA request. Accordingly, this OPRA request was lawfully closed with no responsive records being located.

The Township continues to be disappointed in your repeated attempts to use the threat of frivolous litigation to coerce the production of documents and information which either do not exist or to which you are not legally entitled. As is clearly established above, the Custodian's response to your OPRA requests 72-21 and 90-21 was appropriate, timely and entirely compliant with the requirements of OPRA and the common-law right of access. Accordingly, no further action with respect to your said OPRA requests is required.

I trust that the foregoing is fully responsive to your Internal Review Request. Please be guided accordingly.

Yours truly,



JUSTIN A. MARCHETTA

cc: (via Electronic Mail)
Alan Genitempo, Esq.