

To: New Jersey Law Revision Commission
From: Rachael Segal, Legislative Law Clerk
Re: N.J.S. 47:1A–1.1 of the Open Public Records Act – (*Verry v. Franklin Fire District No. 1*)
Date: November 5, 2018

MEMORANDUM

Executive Summary

In *Verry v. Franklin Fire District No. 1*,¹ the New Jersey Supreme Court considered whether the Open Public Records Act (OPRA), N.J.S. §§ 47:1A-1 to 47:1A-13, required the release of the constitution and bylaws of a volunteer fire company that is a member of a fire district established pursuant to N.J.S. 40A:14–70. The Court concluded that the fire district was obliged to release the documents in its possession or obtain them from the member volunteer fire company and release them since it is a public agency subject to OPRA. The Court also held that the member volunteer fire company was not a public agency subject directly and independently to OPRA requirements.

Background

The Millstone Valley Fire Department (MVFD) is a non-profit entity that operated as an independent volunteer fire company for decades until 1973, when it requested membership in the Franklin Fire District No. 1 (District).² The MVFD “annually enters into a contract with the District to provide firefighting services to the public,” which allows them to receive public funds to cover the housing, equipment, and training.³ In 2013, plaintiff Robert A. Verry submitted an OPRA request to the District for the constitution and bylaws of the MVFD.⁴

The District denied the request⁵ and “Verry filed a [denial-of-access] complaint with the Government Records Council (GRC).”⁶ He sought “an order compelling the District’s Records Custodian to release [the] records.”⁷ The Records Custodian filed papers “to confirm that the MVFD’s constitution and bylaws were not in the District’s possession,”⁸ and stated that N.J.S. 40A:14–70.1(b) “does not require or mandate that the Fire District maintain a copy of a member Fire Department or Fire Company’s Constitution and By-Laws.”⁹ Verry disputed this position.¹⁰

To the GRC, the Executive Director addressed a threshold issue: whether the MVFD is a

¹ *Verry v. Franklin Fire District No. 1*, 230 N.J. 285 (2017).

² *Id.* at 288.

³ *Id.* at 289

⁴ *Id.*

⁵ *Id.* at 290 (He informed “Verry that the District does not consider the requested documents to be public records under OPRA.”)

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Verry*, 230 N.J. at 290.

¹⁰ *Id.*

“public agency” for purposes of OPRA.¹¹ The Director’s “proposed findings concluded that the MVFD ‘serves a governmental function under the supervision and control of [the District]’ and therefore ‘it is a public agency for purposes of OPRA.’”¹² The GRC adopted these findings and ordered records turned over to Verry.¹³ The District appealed.¹⁴

The Appellate Division directed that the MVFD be joined as a party and “affirmed the GRC’s interim order, concluding that the MVFD is a public agency subject to OPRA.”¹⁵ The Appellate Division remanded, and did not rule on the issue of whether the MVFD could withhold records unrelated to its firefighting function, but did note that its decision allowed the MVFD to later produce “‘a lawful basis for not providing’ the requested records, such as an OPRA exemption.”¹⁶ The District appealed.

In applying the statutory definition of “public agency” or “agency,” the New Jersey Supreme Court noted that the term is defined in two distinct sentences, the second of which “designates certain other entities as public agencies subject to OPRA, specifically political subdivisions of the State and bodies sharing a basic connection to those political subdivisions.”¹⁷

The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions.¹⁸

The Court examined whether Verry’s request had sought records from a public agency as it was defined in the latter portion of the above statutory definition.¹⁹

The District, joined by MVFD, argued “that the proper test to determine whether an entity is a ‘public agency’ under OPRA should begin with an examination of the ‘formation, structure, and function’ of the entity.”²⁰ The District explained that “the MVFD was created as a non-profit entity years before joining the District, that its contract with the District relates only to ‘prevention and extinguishment of fires and the regulation of fire hazards,’ and that the public funds it receives support only that function.”²¹ It emphasized “that its contract with the MVFD allows the MVFD to regulate its own internal affairs.”²² Verry argued that “the MVFD qualifies as a public agency under OPRA because it is an instrumentality of the District serving a governmental function” under

¹¹ *Id.* at 291.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 292 (They moved for reconsideration and appealed to the Appellate Division, obtaining a stay of the GRC’s order pending appeal.)

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 294.

¹⁸ N.J.S. 47:1A-1.1.

¹⁹ *Id.* at 294.

²⁰ *Id.* at 295.

²¹ *Id.*

²² *Verry*, 230 N.J. at 295.

the District’s “supervision and control.”²³

OPRA provides that an “instrumentality within or created by a political subdivision” is considered a “public agency,”²⁴ and the Court determined that a fire district “clearly” met the definition for OPRA disclosure-requirement purposes.²⁵

As to whether the MVFD is a public agency, the pertinent statute allows two types of relationships.²⁶ “N.J.S.A. 40A:14–70.1 permits newly formed volunteer fire companies to be created within a fire district; it also permits a contractual relationship between a fire district and a volunteer squad.”²⁷ The key inquiry is whether “the MVFD is a “division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State ... [or an] independent authority, commission, instrumentality or agency created by a political subdivision.”²⁸

A member volunteer squad under subsection (a) of N.J.S. 40A:14–70.1 may be regarded as an instrumentality of a fire district, but “because the District itself is not a political subdivision, but rather the instrumentality of one, the volunteer company is only the instrumentality of an instrumentality.”²⁹ The Court determined that OPRA “does not provide that an instrumentality of an instrumentality constitutes a public agency” because it requires a direct connection to a political subdivision.³⁰ The Court found that it could not “conclude from the language used by the Legislature that it intended for a volunteer fire company to be considered a separate public agency for OPRA purposes under N.J.S.A. 40A:14–70.1(a).”³¹ It further found “no evidence that the Legislature intended for an entity under a contractual relationship with an instrumentality of a political subdivision to become a public agency for OPRA purposes” under N.J.S. 40A:14–70.1(b).³²

The Court concluded that because the “District is an instrumentality of a political subdivision, it falls within the plain language of the statutory definition of public agency. By contrast, the MVFD is a non-profit association and, while it is supervised by the District, the volunteer company is not a public agency as defined by OPRA.”³³ Regarding the specific OPRA request in this case, the Court concluded that the District “was obligated to provide access to [requested] documents because [they] should have been on file with, or accessible to, the District pursuant to its authority to supervise the MVFD.”³⁴

Therefore, the Court affirmed the Appellate decision upholding the GRC order, modified

²³ *Id.*

²⁴ *Id.* at 299 (citing N.J.S. 47:1A–1.1).

²⁵ *Id.*

²⁶ *Id.* at 300.

²⁷ *Id.*; see N.J.S. 40A:14–70.1.

²⁸ *Verry*, 230 N.J. at 300-01 (citing N.J.S. 47:1A–1.1).

²⁹ *Id.* at 301.

³⁰ *Id.*; See N.J.S. 47:1A–1.1

³¹ *Verry*, 230 N.J. at 301.

³² *Id.*

³³ *Id.* at 302.

³⁴ *Id.* at 303.

to reflect the Court’s disapproval of the analysis “the MVFD was a public agency that was itself subject to OPRA demands.”³⁵

Justice Albin, joined by Chief Justice Rabner, filed a separate opinion, dissenting in part and concurring in part.³⁶ He found that releasing the Millstone Valley Fire Department’s constitution and bylaws was correct, but that the fire department was a public agency subject to OPRA.³⁷ Justice Albin wrote that the Franklin Fire District No 1 “possesses every characteristic of a political subdivision, except the name.”³⁸ Therefore, he believed that it “follows that if the Franklin Fire District No. 1 is a political subdivision, the Millstone Valley Fire Department is an “instrumentality” of the District,”³⁹ and that its records were subject to OPRA scrutiny. He also wrote that the “interchangeable use of the terms “agency,” “instrumentality,” and “political subdivision” in that statute and others⁴⁰ . . . illustrates that the Legislature does not take a formalistic approach in the classification of public bodies.”⁴¹

Conclusion

Staff seeks authorization to conduct additional research and outreach regarding this issue in order to determine whether amending N.J.S. 40A:14–70 and/or N.J.S. 47:1A–1.1 in some limited way would aid in interpreting the statute and potentially obviate the need for additional litigation regarding the issue addressed in *Verry v. Franklin Fire District No. 1*.

³⁵ *Verry*, 230 N.J. at 304.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 306 (“On application of the voters, the governing body of a municipality may pass an ordinance establishing a fire district as a “body corporate” with “the power to acquire, hold, lease, sell or otherwise convey ... real and personal property.” *Ibid.* The voters of a municipality elect the board of fire commissioners, *see ibid.*; *see also* N.J.S.A. 40A:14–72, and determine by ballot “the amount of money to be raised for the ensuing year” for the fire district, N.J.S.A. 40A:14–72; *see also* N.J.S.A. 40A:14–84. The fire district may borrow money “for current expenses and necessary repairs to fire apparatus and fire houses,” N.J.S.A. 40A:14–80, and taxes are separately assessed on real property in the municipality to support the fire district, N.J.S.A. 40A:14–79. Last, the fire district’s commissioners have the same “powers, duties and functions” as a municipality “relating to the prevention and extinguishment of fires and the regulation of fire hazards.” N.J.S.A. 40A:14–81.”)

³⁹ *Id.* at 307.

⁴⁰ *Id.* at 307; *see* N.J.S. 40:14A–7, :37C–4(a)–(b), :66A–38.

⁴¹ *Verry*, 230 N.J. at 306-07.