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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1608-16T1

LIBERTARIANS FOR TRANSPARENT
GOVERNMENT, A NJ NONPROFIT
CORPORATION,

Plaintiff-Appellant,

v.

THE OCEAN COUNTY PROSECUTOR'S
OFFICE and JOHN C. TASSINI,
in his official capacity as
Records Custodian for the Ocean
County Prosecutor's Office,

Defendants-Respondents.

Argued September 11, 2017 – Decided January 5, 2018

Before Judges Messano, Accurso and Vernoia.

On appeal from Superior Court of New Jersey,
Law Division, Ocean County, Docket No. L-1699-
16.

Michael J. Zoller argued the cause for
appellant (Pashman Stein Walder Hayden, PC,
attorneys; CJ Griffin, of counsel and on the
briefs).

John C. Tassini, Assistant Prosecutor, argued
the cause for respondents (Joseph D. Coronato,
Ocean County Prosecutor, attorney; Samuel
Marzarella, Chief Appellate Attorney, of
counsel; John C. Tassini, on the brief).

PER CURIAM

Plaintiff Libertarians For Transparent Government appeals from an order rejecting its request for an order finding the Ocean County Prosecutor's Office (OCPO) and its records custodian violated the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, by denying access to the reason for former OCPO employee John Doe's¹ separation from employment, and denying its request for access to records under OPRA and for an award of attorney's fees. We affirm the court's order finding the OCPO did not violate OPRA by providing a memorandum to Doe's personnel file noting the effective date of his resignation, but we vacate the order to the extent it includes a finding that the OCPO conducted the required search for the requested records, and remand for further proceedings.

I.

Plaintiff claims it received an anonymous tip that Doe failed a drug test and was told by the OCPO that he must resign or be terminated. Plaintiff served the OCPO with an OPRA request seeking Doe's "name, title, position, salary, date of separation and

¹ Throughout the proceedings before the trial court and this court, the parties identified the employee by the pseudonym John Doe in order to protect the employee's privacy. We use the pseudonym for the same reason here.

reason therefor'" and "any agreement" concerning "[Doe]'s separation from employment."

The OCPO replied in a letter and provided documents it stated were "responsive to [the] OPRA request." The documents showed Doe's name, title, position and salary, but did not include information concerning the reason for the date of Doe's separation from employment.

Plaintiff advised the OCPO that its response did not include the reason for Doe's separation from employment. Plaintiff also asserted it was unclear if the OCPO's response addressed the request for any agreements concerning Doe's separation. Plaintiff demanded a "complete response" to its OPRA request.

The OCPO's records custodian responded in an email that included a May 6, 2016 memorandum² from the OCPO First Assistant Prosecutor to Doe's personnel file. The memorandum stated "[Doe]'s resignation became effective" on a specified date. In the email, the records custodian represented that there was "no 'agreement' pertaining to [Doe]'s departure."

Plaintiff served a second OPRA request, which was prefaced by a statement that plaintiff had been informed Doe's "resignation

² The memorandum post-dated plaintiff's OPRA request and the OCPO's initial response to the request. In the records custodian's email, he advised that the memorandum had not been completed when the OCPO served its initial response to plaintiff's request.

was compelled by the threat of adverse employment action against him if he refused to resign." Plaintiff asserted it was entitled to a "more descriptive" explanation of the reason for Doe's separation beyond the date of his separation and that he resigned. Plaintiff suggested the appropriate response might include statements such as Doe "resigned voluntarily" or "resigned under threat of adverse employment action."

In plaintiff's second OPRA request, it sought:

1. [Doe]'s "date of separation and the reason therefor" as required by [N.J.S.A.] 47:1A-10.
2. Any memorandum, letter, e-mail or other writing that advised [Doe] that he would suffer adverse employment action if he did not resign.
3. Records that disclose the reason, such as the nature of [Doe]'s misconduct, underlying your agency's decision to seek [Doe]'s resignation.
4. Payroll records showing all money [Doe] received during 2015 and 2016. [And] records that identify the reason for each payment received, such as "regular salary," "sick leave" or "severance."

The OCPO's records custodian responded to the second OPRA request in a letter stating he reviewed Doe's personnel file and it did not contain any additional documents concerning the reason for Doe's resignation and the OCPO did not enter into an agreement with Doe concerning his separation from employment. The records

custodian further asserted that the OCPO was not obligated "to generate new documents or otherwise supply information other than what it is in its existing records," and that the OCPO was not required to create a record or supply information characterizing Doe's resignation as voluntary or otherwise as plaintiff requested. In addition to the letter, the OCPO supplied payroll records in response to the second OPRA request.

Plaintiff filed a verified complaint and order to show cause alleging the OCPO and its records custodian violated OPRA³ by failing to provide the reasons for Doe's separation from the OCPO. Plaintiff also alleged the OCPO violated OPRA because "Attorney General Guidelines" required the termination of a sworn law enforcement officer⁴ who fails a drug test, and the results of any failed drug test by Doe "constitute[d] 'data contained in information which disclose conformity with specific experiential,

³ Plaintiff also claimed the OCPO and its records custodian violated plaintiff's common law right of access to government records. We do not address plaintiff's common law claim because it does not challenge on appeal the court's dismissal of the claim. See Jefferson Loan Co. v. Session, 397 N.J. Super. 520, 525 n.4 (App. Div. 2008) (finding any argument not briefed on appeal is waived).

⁴ Plaintiff relies on the Attorney General's Law Enforcement Drug Testing Policy (May 2012). The record on appeal does not permit a determination as to whether the portion of the policy requiring termination based on a failed drug test is applicable here. The termination policy applies to "sworn law enforcement officer[s]." Id. at § VIII(C)(1) to (4).

educational or medical qualifications required for government employment or for receipt of a public pension'" to which plaintiff was entitled under N.J.S.A. 47:1A-10. Following the filing of an answer by the OCPO and its records custodian, the court heard argument on the order to show cause.

In a written opinion and order, the judge rejected plaintiff's assertion that it was entitled to a more detailed statement of the reason for Doe's separation. The judge found the OCPO provided the records responsive to the OPRA requests and satisfied OPRA's requirements. The judge further determined the OCPO was not obligated to create a record showing a more specific reason for Doe's separation than the one contained in the record provided. Plaintiff appealed.

On appeal, plaintiff makes the following arguments:

POINT I

IF . . . DOE RESIGNED IN LIEU OF TERMINATION OR DISCIPLINE BECAUSE HE FAILED A DRUG TEST, [N.J.S.A.] 47:1A-10 REQUIRES DISCLOSURE OF THAT FACT BECAUSE IT IS THE REAL "REASON" FOR HIS SEPARATION.

A. Section 10 Requires Full Disclosure of the Reason an Employee Separated From Employment with an Agency.

B. Section 10 Requires Disclosure of Both Information and Records.

C. Any Failed Drug Test Results Would Be a Tangible Record Which States John Doe's Real Reason for Separation.

II.

A "trial court's determinations with respect to the applicability of OPRA are legal conclusions subject to de novo review." K.L. v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337, 349 (App. Div. 2011) (quoting O'Shea v. Twp. of W. Milford, 410 N.J. Super. 371, 379 (App. Div. 2009)); accord Paff v. Ocean Cty. Prosecutor's Office, 446 N.J. Super. 163, 175 (App. Div.), certif. granted, 228 N.J. 403 (2016). "Our standard of review is plenary with respect to [a trial court's] interpretation of OPRA and its exclusions." Gilleran v. Twp. of Bloomfield, 440 N.J. Super. 490, 497 (App. Div. 2015), rev'd on other grounds, 227 N.J. 159 (2016); see also State v. Goodwin, 224 N.J. 102, 110 (2016) ("In construing the meaning of a statute, our review is de novo.") (emphasis in original).

"OPRA was enacted 'to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" Scheeler v. Office of the Governor, 448 N.J. Super. 333, 342 (App. Div. 2017) (quoting Mason v. City of Hoboken, 196 N.J. 51, 64 (2008)). The statute mandates that "government records shall be readily accessible for inspection, copying or examination by the citizens of [New Jersey],

with certain exceptions, for the public interest, and any limitations on the right of access . . . shall be construed in favor of the public's right of access." N.J.S.A. 47:1A-1.

Government records are defined as

any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

[N.J.S.A. 47:1A-1.1.]

The right to access to government records under OPRA is not absolute. Kovalcik v. Somerset Cty. Prosecutor's Office, 206 N.J. 581, 588 (2011); accord Scheeler, 448 N.J. Super. at 343. OPRA exempts certain categories of information from the definition of a government record. Kovalcik, 206 N.J. at 588. N.J.S.A. 47:1A-1.1 "excludes twenty-one categories of information from the definition of a 'government record.'" Scheeler, 448 N.J. Super. at 343.

In addition, N.J.S.A. 47:1A-10 exempts employee personnel and pension records from "government records" that must be provided under OPRA. The statute provides that "[n]otwithstanding the provisions of [OPRA] or any other law to the contrary, the personnel or pension records of any individual in possession of a public agency . . . shall not be considered a government record and shall not be made available for public access" N.J.S.A. 47:1A-10. Thus, under N.J.S.A. 47:1A-10, "personnel records are, by definition, not classified as government records at all." Kovalcik, 206 N.J. at 592. Documents that qualify as personnel records are not subject to being disclosed notwithstanding OPRA's other provisions. Ibid.

N.J.S.A. 47:1A-10, however, provides the following three exceptions to the exemption of personnel records from OPRA's definition of government records:

[1] an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record;

[2] personnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and

[3] data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.

[N.J.S.A. 47:1A-10.]

Plaintiff relies on the first exception to the personnel records exemption under N.J.S.A. 47:1A-10 and argues it requires more information than the OCPO provided here. Plaintiff claims the reason for Doe's separation constitutes a government record under the first exception, and therefore the OCPO is required to explain the circumstances surrounding Doe's resignation and the "real" reason Doe resigned, even if that information does not otherwise exist in a document containing a personnel record "that has been made, maintained or kept on file in the course of" the OCPO's "official business." See N.J.S.A. 47:1A-1.1.

When interpreting a statute, we are required to determine the "intent of the Legislature," Hardy v. Abdul-Matin, 198 N.J. 95, 101 (2009), and must first consider the plain language of the statute because that is the best indicator of legislative intent. DiProspero v. Penn, 183 N.J. 477, 492 (2005). We apply the "generally accepted meaning" of the statute's words, N.J.S.A. 1:1-1, and "read them in context with related provisions so as to give

sense to the legislation as a whole," DiProspero, 183 N.J. at 492. Accord N. Jersey Media Group, Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 570 (2017).

The plain language of the first exception to the personnel records exemption under N.J.S.A. 47:1A-10 expressly defines certain information as a "government record." Notably, the statute does not provide that documents containing the information are government records and does not limit its definition of government records to include only documents which contain the information. Instead, the first exception simply and unequivocally provides that an "individual's name, title, position, salary, . . . date of separation and the reason therefor . . . shall be a government record." N.J.S.A. 47:1A-10 (emphasis added). The information itself is therefore a government record that must be provided in accordance with OPRA's disclosure requirements independent of whether the information is reflected in a document.⁵ See N.J.S.A.

⁵ Similarly, N.J.S.A. 47:1A-3 requires the production of information. The statute provides that a public agency must "make available" certain defined "information concerning a criminal investigation." N.J.S.A. 47:1A-3(b). Our Supreme Court has observed that the plain text of N.J.S.A. 47:1A-3(b) requires the disclosure of "information and not the release of records." Twp. of Lyndhurst, 229 N.J. at 573. In Paff v. Galloway Township, 229 N.J. 340 (2017), the Court considered a public agency's duty to produce "information stored or maintained electronically," which N.J.S.A. 47:1A-1.1 expressly defines as a government record. Id. at 352-53. The Court determined that a public agency is required

47:1A-5 (requiring provision of access to government records). However, where "a document otherwise classified as a personnel record fits within" the first exception under N.J.S.A. 47:1A-10, the document "becomes subject to disclosure" under OPRA as well. Kovalcik, 206 N.J. at 592.

Here, the OCPO did not rely on the N.J.S.A. 47:1A-10 personnel records exemption for its refusal to provide additional information in response to plaintiff's request for the "real reason" for Doe's separation from employment. The OCPO does not dispute that the first exception to the personnel records exemption under N.J.S.A. 47:1A-10 required that it provide Doe's "name, title, position, salary, payroll record, length of service, date of separation and the reason therefor."

The record shows that in response to plaintiff's OPRA requests, the OCPO provided plaintiff with documents containing the information required under the first exception, including a memorandum explaining that the reason for Doe's date of separation was his resignation. The OCPO also informed plaintiff that Doe's personnel file does not contain any additional records disclosing any other reason for Doe's date of separation.

to make the information available, but only to the extent it exists at the time the OPRA request is made. Id. at 354.

Plaintiff contends the OCPO's response is deficient because the information provided indicates only that Doe resigned, and does not describe the circumstances surrounding his resignation or the reasons he decided to resign. We are not persuaded.

We turn again to the plain language of the first exception. See DiProspero, 183 N.J. at 492. It requires only the provision of the reason for an employee's date of separation. N.J.S.A. 47:1A-10. It does not require the provision of the circumstances that may have caused an employee to choose to resign, the employee's motivation for resigning, or anything beyond the reason for the employee's "date of separation." In other words, the statute does not require the provision of the information that plaintiff argues the OCPO failed to provide here.

Limiting the definition of government record to include only the specified information in the first exception is also in accord with the Legislature's intent to maintain the confidentiality of personnel records. The N.J.S.A. 47:1A-10 personnel records exemption "begins with a presumption of non-disclosure" and permits disclosure only within the statute's "narrow exceptions." Kovalcik, 206 N.J. at 594. Thus, in interpreting the scope of the personnel records exemption, "courts have tended to favor the protection of employee confidentiality." McGee v. Twp. of E. Amwell, 416 N.J. Super. 602, 615 (App. Div. 2010); see, e.g., N.

Jersey Media Grp., Inc. v. Bergen Cty. Prosecutor's Office, 405 N.J. Super. 386, 390 (App. Div. 2009) (finding disclosure of prosecutor's office employee's outside employment was not required under N.J.S.A. 47:1A-10).

Moreover, a "general rule of construction [is] that enumerated exceptions in a statute indicate a legislative intent that the statute be applied to all cases not specifically excepted." State v. Reed, 34 N.J. 554, 558 (1961); accord In re Plan for the Abolition of the Council on Affordable Hous., 214 N.J. 444, 487 (2013). "'[W]here a general provision in a statute has certain limited exceptions, all doubts should be resolved in favor of the general provision rather than the exceptions.'" Nini v. Mercer Cty. Cmty. Coll., 202 N.J. 98, 109 (2010) (alteration in original) (quoting Prado v. State, 186 N.J. 413, 426-27 (2006)); accord In re Plan for the Abolition of the Council on Affordable Hous., 214 N.J. at 487.

Although we are mindful that under OPRA "any limitation on the right of access . . . shall be construed in favor of the public's right to access," Gilleran v. Twp. of Bloomfield, 227 N.J. 159, 185 (2016) (quoting N.J.S.A. 47:1A-1), we are convinced the plain language of the first exception does not support plaintiff's assertion that the OCPO was obligated to provide information concerning the circumstances surrounding Doe's

decision to resign or his motivation for doing so. We discern no basis in the plain language of the first exception to require that the OCPO provide anything more than the information it provided – the effective date of his resignation.

Plaintiff argues our Supreme Court's decision in South Jersey Publishing Company Inc. v. New Jersey Expressway Authority, 124 N.J. 478 (1991), requires the OCPO to provide information concerning the circumstances resulting in Doe's decision to resign beyond what was supplied in the First Assistant Prosecutor's memorandum. In New Jersey Expressway Authority, the Court considered a request for a public agency's executive session meeting minutes under the common right of access to public records, the Open Public Meetings Act, N.J.S.A. 10:4-6 to -21, and the Right To Know Law, N.J.S.A. 47:1A-1 to -4.⁶ Id. at 495. The plaintiff requested the minutes of a meeting during which the termination of the executive director was addressed. Id. at 485-86.

In its discussion of the right of public access to the meeting minutes, the Court considered Executive Order No. 11, which includes language that parallels the first exception to the personnel records exemption in N.J.S.A. 47:1A-10. Id. at 495-96.

⁶ The Right to Know Law was repealed and replaced by OPRA in 2002. See Gilleran, 227 N.J. at 184 n.6.

Executive Order No. 11 provided "a general ban on release of personal records" but authorized disclosure of an employee's "name, title, position, salary, payroll record, length of service . . . and . . . date of separation from the government service and the reasons therefor." Id. at 495 (quoting Executive Order No. 11 (Nov. 15, 1974)).

The Court interpreted the Executive Order's "authorization of disclosure of 'reasons' for 'separation' . . . to include the results of" the public agency's investigation concerning the executive director. Id. at 496. The Court, however, did not find the Executive Order required that the public agency create new records concerning its investigation or explain the reasons for the employee's termination independent of what was shown in existing records. To the contrary, the Court limited the public agency's disclosure obligation to the provision of only what was contained in the existing "executive-session minutes." Ibid.

Similarly, plaintiff relies on Atlantic City Convention Center Authority v. South Jersey Publishing Company., Inc., 135 N.J. 53, 66 (1994), where the Court determined that audio tapes of two public agency executive session meetings "constitute[ed] public records subject to the common-law right to inspection[.]" During the first meeting, an employee's personnel performance was discussed. Id. at 57-58. Following the meeting, the employee was

fired or resigned. Id. at 57. In the second meeting, the employee was rehired. Id. at 58. The public agency sought a declaration as to whether it had an obligation to disclose the audio tapes of the meetings. Ibid.

The Court noted that in conducting the common-law "balancing test" to determine if the public should have access to the tapes, the trial court should consider if the tapes were necessary to determine the reasons for the employee's prior discharge from the agency, "if [that information] were not fully disclosed by the [meeting] minutes." Id. at 69. The Court did not require the public agency to create a record or explain the reason for any action taken. The Court discussed only potential access to existing government records. Ibid.

Plaintiff's reliance on the Court's decisions in New Jersey Expressway Authority and Atlantic City Convention Center is misplaced. To be sure, in both cases the Court required the disclosure of information concerning the reasons for an employee's separation from employment, but the Court limited the disclosure obligation to the reasons reflected in existing government records. The Court did not require the public agency in either case to create new records or to disclose any information concerning an employee's separation beyond what was contained in existing records.

New Jersey Expressway Authority and Atlantic City Convention Center were decided prior to OPRA's enactment in 2002. In neither case was the Court required to determine if the requested records were exempt from disclosure under N.J.S.A. 47:1A-10 or if disclosure was required under any of the statute's three exceptions. The Court's decisions do not support plaintiff's assertion the OCPO is required to provide more than the precise information detailed in the first exception under N.J.S.A. 47:1A-10, or create documents containing that information for production under OPRA. The Court has observed that "OPRA does not require public agencies to create records," Sussex Commons Assocs., LLC v. Rutgers Univ., 210 N.J. 531, 544 (2012), and "is 'not intended [to be] a research tool [that] litigants may use to force government officials to identify and siphon useful information,'" In re N.J. Firemen's Ass'n Obligation, 230 N.J. 258, 276 (2017) (quoting MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005)).

In response to plaintiff's requests for the reason for Doe's separation from employment, the OCPO produced what it represented was the sole personnel record showing that Doe separated from employment on a particular date because he resigned. We find no basis in the plain language of N.J.S.A. 47:1A-10 to conclude that in addition to providing the reason for Doe's date of separation,

the OCPO was required to investigate, determine and disclose Doe's motivation for resigning or the circumstances surrounding his decision to resign. The first exception requires only the production of the specified information and, as the Court found in Kovalcik, 206 N.J. at 592, existing "document[s] otherwise classified as personnel records fit[ting]" within the exception. We are therefore convinced the OCPO provided plaintiff with what it was entitled under N.J.S.A. 47:1A-10: a government record, in the form of the First Assistant Prosecutor's memorandum, stating the effective date of Doe's resignation.

Plaintiff also claims the OCPO's response to the OPRA requests was deficient because the records custodian limited his search to a review of Doe's personnel file. Plaintiff asserts the OCPO was required to conduct a review of records beyond Doe's personnel file to determine if there are records responsive to plaintiff's OPRA requests. We agree.

OPRA broadly defines "government records," N.J.S.A. 47:1A-1.1, and provides that "government records shall be readily accessible . . . 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 first exception to the personnel records exemption requires the production of specified information, including the reason for an employee's date of separation, N.J.S.A.

47:1A-10, existing records "fitting within" the exception must also be disclosed in response to an OPRA request, Kovalcik, 206 N.J. at 592. OPRA's purpose of "maximiz[ing] public knowledge about public affairs," Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005) (quoting Asbury Park Press v. Ocean Cty. Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)), would be easily defeated if a public agency could limit its obligation to provide access to records by its placement of a record in a particular file or by limiting its search to particular files.

We discern no permissible reason the OCPO limited its search for the requested records to Doe's personnel file, and perceive no justification for it. We therefore remand for the court to direct that the OCPO conduct a reasonable and thorough search of its agency records to determine if there are additional government records fitting within the first exception under N.J.S.A. 47:1A-10 that are responsive to plaintiff's OPRA requests.

In Paff v. New Jersey Department of Labor, 392 N.J. Super. 334, 341 (App. Div. 2007), we required the public agency to produce an affidavit detailing the following information concerning its search for records in response to an OPRA request:

- 1) the search undertaken to satisfy the request;

2) the documents found that are responsive to the request;

3) the determination of whether the document or any part thereof is confidential and the source of confidential information;

4) a statement of the agency's document retention/destruction policy and the last date on which documents that may have been responsive to the request were destroyed.

[Id. at 341.]

On remand, the OCPO shall provide an affidavit containing that information as well. If any additional government records responsive to plaintiff's requests are recovered, access to the records shall be granted in accordance with OPRA's requirements.⁷

Plaintiff's remaining arguments are without sufficient merit to warrant discussion in a written opinion.⁸ R. 2:11-3(e)(1)(E). We add only that we have not addressed, and do not offer any opinion on, plaintiff's claim that the OCPO was required to produce records of Doe's purported failed drug test under the third exception to the personnel record's exemption in N.J.S.A. 47:1A-

⁷ Any objections, assertions of privilege or reliance on claimed exemptions to the provision of access under OPRA that are asserted by the OCPO shall be determined by the remand court.

⁸ Plaintiff does not present any argument that the court erred by denying its request for an attorney fee award. Because we remand for further proceedings, any request for attorney's fees shall abide the remand proceedings and shall be decided by the remand court.

10. Plaintiff did not request records concerning the alleged test. In addition, plaintiff's claimed entitlement to the putative records is based on the Attorney General's Law Enforcement Drug Testing Policy (May 2012), which applies to "sworn law enforcement officers," id. at § VIII(C)(1) to (4), and the record is devoid of evidence showing Doe was employed in that capacity.

Affirmed in part, vacated in part. Remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION