Legal Fees Under New Jersey's Open Public Records Act

A Guide to a Prevailing Party's Right to Recovery

by Brian J. Molloy and Keith L. Hovey

In 2001, the New Jersey Legislature repealed the Right to Know Law in favor of the Open Public Records Act (OPRA).[1] Like the Right to Know Law, OPRA furthers New Jersey's "longstanding public policy favoring ready access to most public records."[2]

The purpose of OPRA is to ensure that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State."[3] New Jersey allows access to public records not only through OPRA, but also through the common law right to access and the court rules for civil litigants.[4] Each avenue varies regarding the scope of the records a public entity is required to produce, the time period the entity has to respond to a request, and the availability of legal fees to a party who ultimately prevails in obtaining records initially not produced by the governmental entity.

The records available under OPRA are more limited than those available under the common law right to access,[5] or the court rules.[6] Through its definition of a government record, OPRA narrows the scope of records a governmental entity is obligated to produce in response to a request for records made under OPRA. By definition, a government record is:

> 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...official business...or that has been received in the course of...official business.[7]

OPRA not only enumerates what constitutes a government record, but it also explicitly excludes from its definition 21 separate categories of information.[8] In light of the more narrow definition of what constitutes a government record, a governmental entity has the obligation either to make the requested records available for inspection in an expedited manner or to provide a written response regarding the availability of the records. OPRA states that a custodian of the record must, within *seven* business days after receiving a request, either "grant access to a government record or deny a request for access to a government record as soon as possible."[9]

Failure by a governmental entity to provide any response to a request under OPRA constitutes a denial.[10] If a governmental entity denies a request, the requesting party may file a complaint either with the Government Records Council or in the superior court for a summary action against the governmental entity to compel production of the government records.[11]

The OPRA statute recognizes that a governmental entity's statutory obligation to maintain its records, and also make the records available in response to a request by a member of the public, is by itself not sufficient to compel the entity's compliance with OPRA. As an incentive for governmental entities to cooperate with a requestor and "to even the fight,"[12] OPRA provides that a party who files an action against a governmental entity to compel the production of documents under OPRA after a denial and "prevails in any proceeding shall be entitled to a reasonable attorney's fee."[13] In the wake of OPRA's replacement of the Right to Know Law, New Jersey courts have had to resolve what renders a requestor a prevailing party, who bears the burden of proof, and what factors are considered in determining the reasonableness of the attorney's fee.[14]

The Prevailing Party

OPRA neither defines nor specifies what transforms a requestor into a prevailing party.[15] In the absence of an

express definition in the statute, the Appellate Division, in *Teeters v. Div. of Youth & Family Servs.*,[16] adopted the catalyst theory for purposes of determining when a requestor is a prevailing party under OPRA. The catalyst theory posits that a litigant is a prevailing party when the litigant's lawsuit achieves a desired result through either judicial decree or the adverse party's voluntary change in conduct. The New Jersey Supreme Court, in *Mason v. City of Hoboken*,[17] subsequently affirmed the *Teeter* Court's adoption of the catalyst theory for prevailing parties under OPRA.

In *Mason*, the Court rejected the more limited definition of prevailing party articulated by the United States Supreme Court in *Buckhannon Bd. & Care Home Inc., v. W.V. Dep't. Health & Human Servs*.[18] In *Buckhannon*, the Supreme Court refused to apply the catalyst theory to the term prevailing party as it appeared in the Fair Housing Amendments Act of 1988 and the American with Disabilities Act of 1990, both federal statutes.[19] The Supreme Court held that under federal law a prevailing party is one "in whose favor a *judgment* is rendered," or who "create[s] the material alteration of the legal relationship of the parties" (*i.e.*, a judicially enforced settlement agreement).[20] Because the catalyst theory "allows an award where there is no judicially sanctioned change in the legal relationship of the parties," the *Buckhannon* Court held that for federal statutes a prevailing party is not entitled to use the catalyst theory for the purposes of obtaining an attorney fee award.[21]

The *Mason* Court rejected *Buckhannon*, limiting it to the interpretation of federal statutes. Instead, the *Mason* Court relied upon New Jersey's longstanding recognition of the catalyst theory under its state law in other statutes for purposes of determining what constitutes a prevailing party under OPRA.[22]

In addition to prior application of the more expansive interpretation of the term prevailing party under New Jersey state law, the *Mason* Court also emphasized the change in the language of the attorney provision section of OPRA from its predecessor, the Right to Know Law, to further support the use of the catalyst theory. The Legislature, in repealing the Right to Know Law, replaced the permissive language of "may" in its attorney fee provision with the compulsory word "shall" in the prevailing party provision of OPRA.

The *Mason* Court also relied on the Legislature's decision to remove the $500 cap on attorneys' fees when repealing the Right to Know Law and adopting OPRA. Thus, the *Mason* Court held that the Legislature must have intended that OPRA be more permissive in awarding attorneys' fees than its predecessor, and that, unlike in *Buckhannon*, the catalyst theory is the proper analysis to determine if a litigant is a prevailing party.

In applying the catalyst theory, the *Mason* Court also held that a requestor is a prevailing party and entitled to attorneys' fees under OPRA when it can demonstrate: 1) "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved," and 2) "that the relief ultimately secured by plaintiffs had a basis in law."[23] Thus, a requestor turned litigant may be a prevailing party in the absence of a judgment or an enforceable consent decree, if it can show the governmental entity altered its position as a result of the litigation.[24]

Burden of Proof

Under OPRA, the prevailing party bears the burden of proof that its complaint was the catalyst for the production by the governmental entity, except in one instance, where the entity fails to provide *any* response to an OPRA request within the seven business days set forth in N.J.S.A. 47:1A-5(i). Irrespective of whether the public entity voluntarily discloses records after a requestor files suit, the public entity bears the burden of proof that the suit filed by the requestor was not the catalyst for the production.[25]

A denial by a governmental entity only shifts the burden of proof. It does not create a rebuttable presumption against the governmental entity.[26] As the Supreme Court in *Mason* recognized, creating a rebuttable presumption in favor of a requestor turned plaintiff would undermine the cooperative intent of OPRA.[27] The Supreme Court opined that if a governmental entity were faced with a rebuttable presumption for legal fees, requestors and governmental entities would have little incentive to cooperate and negotiate reasonable solutions after a requestor filed a complaint. Instead, requestors would quickly file lawsuits to try and recover legal fees, and governmental entities would withhold documents after a complaint had been filed, afraid any voluntarily production of records post-complaint might render them liable for attorneys' fees.

Because OPRA is designed to provide expedient access to governmental records—not serve as a fee-shifting statute—the Supreme Court recognized that imposing a rebuttable presumption against a governmental entity would create an adversarial system that is antithetical to OPRA's cooperative intent.[28]

If a governmental entity responds to a request under OPRA within seven business days, the requestor has the burden of proof. The response by the governmental entity need not be production, but merely a written response to a request, including a denial.[29] Where a governmental entity provides a written response, the threshold question becomes whether the request was proper under OPRA. New Jersey's appellate courts on numerous occasions have upheld denials of requests for attorneys' fees, despite the fact that a requestor

ultimately obtained government records after having filed litigation.[30]

Under OPRA, the requestor has the initial responsibility of specifically describing the government record it seeks.[31] New Jersey courts have repeatedly upheld a governmental entity's denial of "wholesale requests for general information to be analyzed, collated and compiled by the responding government entity" as research, which "is not among the custodian's responsibilities."[32]

Although a governmental entity has the authority to deny a request as improper, the entity's obligation to the requestor and avoidance of a prevailing party fee determination does not end with the denial of an improper request. An initial request that is overbroad does not bar a requestor's ability to recover its attorneys' fees.[33]

To further the cooperative intent of the parties, OPRA "authorizes custodians to propose a broad range of 'reasonable solutions' that accommodate competing interests when compliance would substantially disrupt agency operations," and "clearly permits outright denial of these requests *after* an attempt to reach a reasonable and mutually accommodating solution."[34] So although a governmental entity may have properly denied a request for governmental records initially, it still may be liable for legal fees if it does not provide a reasonable solution.[35]

What constitutes a reasonable solution has not been clearly defined. Such a bright-line rule seems impractical given the potential variables, such as the breadth and nature of the request, the type and location of the records, the resources of the governmental entity to respond, and potential non-OPRA-related litigation between the requestor and the governmental entity. Nevertheless, the burden of proof regarding the reasonableness of the governmental entity's response and the potential disruption of its operations lies with the requestor,[36] for a determination at a summary proceeding pursuant to Rule 4:67-2(a).[37]

An OPRA summary action pursuant to Rule 4:67-2(a) seeking legal fees does not permit depositions or other discovery.[38] If a litigant wants to conduct discovery for purposes of meeting its burden of proof, the litigant may request that a summary action proceed as a plenary action pursuant to Rule 4:67-1(a), but only upon a showing of good cause.[39]

What a litigant will need to establish to show good cause to convert a summary action to a plenary one, and what discovery will be permitted for the plenary hearing in the OPRA context, has yet to be decided. To date, New Jersey courts have rendered their decisions through summary actions, relying upon the OPRA request and the communications between the parties to determine whether the conduct of the parties was reasonable and furthered the interest of OPRA for the purposes of determining if a requestor was a prevailing party.[40]

A Reasonable Fee

Once a requesting party has been found to be a prevailing party, the court must then determine the reasonableness of the attorneys' fees.[41] Most requestors in the published decisions to date have failed to meet the threshold requirement of a finding of a prevailing party, obviating an analysis of the fee request.

The New Jersey Supreme Court, however, did address the issue squarely in *New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't of Corr.*[42] There, a *pro bono* attorney received all of his fees under OPRA as a prevailing party, in addition to a fee enhancement.[43]

In determining what constitutes a reasonable attorney's fee, the Supreme Court rejected "a mathematical approach comparing the total number of issues in the case with those actually prevailed upon because such a ratio provides little aid in determining what is a reasonable fee in light of all the relevant factors."[44] Consequently, the Court refused to prorate a request for attorneys' fees under OPRA based upon either the percentage of issues prevailed upon or the percentage of the government records ultimately obtained.[45]

Instead, the Supreme Court ruled that "the critical factor is the *degree* of success obtained," and that "where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee."[46] To make that determination, the Supreme Court held that a "trial court should conduct a qualitative analysis that weighs such factors as the number of documents received versus the number of documents requested, and whether the purpose of the OPRA was vindicated by the litigation," but that "success under the OPRA—even a high degree of success—might be acquiring that one 'smoking gun' record hidden amongst hundreds of pages or...it may be the absence of any records."[47]

As an initial matter, New Jersey courts have repeatedly held that the identity of the requestor or their intent is of no relevance in determining the propriety of a request under OPRA.[48] That does not appear to be the case in determining the reasonableness of a prevailing party's attorneys' fees. A requestor may be a prevailing party under OPRA simply by obtaining a single document[49] (*i.e.*, the smoking gun), or receives no records at all. What constitutes a significant vindication in those circumstances can only be based on the requestor's subjective intent. Because OPRA provides for disposition in a summary action, a party may need to request that the summary proceeding be converted to a plenary hearing to allow for limited discovery to provide sufficient information for a court to determine if the subjective intent of the requestor was, in fact, vindicated.

What the Supreme Court has confirmed is that an attorney's fees are available to a prevailing party, including *pro bono* attorneys. In fact, *pro bono* representation is a strong consideration for a fee enhancement, along with other factors, such as the novelty of the legal issues and quantum of success. The Supreme Court has rejected a simple mathematical multiplier for one's attorney's fees by using the percentage of governmental records obtained compared to the number of governmental records requested.[50] Instead, the factors a court considers in determining what constitutes reasonable attorneys' fees are the same as in other applications for fees, such as the novelty of the legal issues, reasonableness of the fees, etc.[51]

Conclusion

To be a prevailing party under OPRA, a requestor must have submitted a request, been denied government records, not been offered a reasonable solution by the governmental entity, and have the complaint be the catalyst for the ultimate production before a court will consider an application for attorneys' fees. When making an application for fees, courts as a threshold matter will scrutinize the OPRA request for compliance with the statute and inquire into the cooperative nature of the litigants. The court may even permit discovery to ascertain the intent of the requestor to determine if the purpose of the request was vindicated.

Even if a court determines that a prevailing party is entitled to legal fees, the court will review the reasonableness of the fee application. Based on the existing case law, however, such awards are rare, even if the requestor only received the government records after filing litigation. ⚖

Endnotes

1. N.J.S.A. 47:1A-2 to -4, repealed by L. 2001, c. 404.
2. *MAG Entm't, LLC v. Div. of Alcoholic Beverage Control*, 375 N.J. Super. 534, 544 (App. Div. 2005) and *Serrano v. S. Brunswick Twp.*, 358 N.J. Super. 352, 363 (App. Div. 2003).
3. N.J.S.A. 47:1A-1(1).
4. *MAG Entm't*, 375 N.J. Super. at 544.
5. *Bent v. Stafford Twp. Police Dep't*, 381 N.J. Super. 30 (App. Div. 2005).
6. R. 4:18-1.
7. N.J.S.A. 47:1A-1.1.
8. *Id.*
9. N.J.S.A. 47:1A-5.
10. N.J.S.A. 47:1A-5(i).
11. N.J.S.A. 47:1A-6.
12. *Courier News v. Hunterdon County Prosecutor's Office*, 378 N.J. Super. 539, 546 (App. Div. 2005).
13. N.J.S.A. 47:1A-6.
14. *Mason v. City of Hoboken*, 196 N.J. 51 (2008) and *Courier News*, 378 N.J. Super. 539.
15. *See* N.J.S.A. 47:1A-1.1.
16. 387 N.J. Super. 423 (App. Div. 2006).
17. 196 N.J. 51 (2008).
18. 532 U.S. 598 (2001).
19. *Buckhannon*, 532 U.S. 598.
20. *Id.* at 603-04.
21. *See Id.*
22. *Mason*, 196 N.J. at 72-74.
23. *Id.* at 76.
24. *See Id.*; *Teeters*, 387 N.J. Super. 423.
25. *Mason*, 196 N.J. at 76-77.
26. *Id.* at 77.
27. *Id.* at 77.
28. *Id.* at 77-78.
29. *Spectraserv v. Middlesex County Utils. Auth.*, 416 N.J. Super. 565 (App. Div. 2010).
30. *Id.*; *Mason*, 196 N.J. 51; *N.J. Builders Ass'n v. N.J. Council on Affordable Hous.*, 390 N.J. Super. 166 (App. Div. 2007).
31. *N.J. Builders Ass'n*, 390 N.J. Super. 166, 176.
32. *Id.* at 177.
33. *Spectraserv*, 416 N.J. Super. at 583.
34. *Id.*
35. *See Id.*
36. *Id.*
37. *MAG Entm't*, 375 N.J. Super. 534 (App. Div. 2005).
38. *MAG Entm't*, 375 N.J. Super. at 551-52.
39. *Id.* at 552 Fn. 3.
40. *See Spectraserv*, 416 N.J. Super. 565; *Mason*, 196 N.J. 51; *N.J. Builders Ass'n*, 390 N.J. Super. 166; and *MAG Entm't*, 375 N.J. Super. 534.
41. *New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't of Corr.*, 185 N.J. 137 (2005).
42. 185 N.J. 137 (2005).
43. *Id.*
44. *Id.* at 154 (*quoting Silva v. Autos of Amboy, Inc.*, 267 N.J. Super. 546, 555-56 (App. Div.1993)).
45. *Id.*
46. *Id.* at 155 (*quoting Silva,* 267 N.J. Super. at 555-56).
47. *Id.*
48. *Id.*; *Mason*, 196 N.J. 51; *N.J. Builders*, 390 N.J. Super. 166; and *MAG Entm't*, 375 N.J. Super. 534.
49. *K.L. v. Evesham Twp. Bd. of Ed.*, __ N.J. Super. (App. Div. 2011), petition for cert. pending.
50. *New Jerseyans for a Death Penalty Moratorium*, 185 N.J. at 155-56.
51. *See Id.*

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