

To: New Jersey Law Revision Commission
From: Susan Thatch
Re: N.J. Open Public Records Act (“OPRA”) – N.J.S. 47:1A-1 et seq.
Date: April 11, 2016

M E M O R A N D U M

A member of the public contacted the N.J. Law Revision Commission to propose a project regarding the mandatory award of attorneys’ fees to the prevailing party in an OPRA action. This memorandum provides some information on this issue for the Commission’s consideration.

Background

In 2002, New Jersey replaced its existing Right to Know Act and enacted the Open Public Records Act.¹ OPRA’s intent is to “maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.”² Accordingly, OPRA empowers a person to request access to, or a copy of, identified government records, and requires the custodian of the government record to respond “as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived.”³ The failure to respond within seven business days is considered a denial of the request.⁴ A person who is denied access to requested government records may institute a proceeding in Superior Court or file a complaint with the Government Records Council to obtain access.⁵

The Legislature ensured that OPRA contained an effective enforcement mechanism by providing that (1) a public official who knowingly and willfully violates OPRA and has “unreasonably denied access under the totality of the circumstances” is subject to an escalating scale of civil fines⁶, and (2) “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney’s fee.”⁷ OPRA’s mandatory attorney’s fee award expanded the attorney fee

¹ *Asbury Park Press v. Ocean County Prosecutor’s Office*, 374 N.J. Super. 312, 329 (Law Div. 2004).

² *Id.* at 330.

³ N.J.S. 47:1A-5 (2016).

⁴ *Id.*

⁵ N.J.S. 47:1A-6 (2016).

⁶ N.J.S. 47:1A-11 (2016) (establishing fines of \$1,000 for an initial violation, \$2,500 for a second violation that occurs within 10 years of an initial violation, and \$5,000 for a third violation that occurs within 10 years of an initial violation). Under this section, a prevailing party is entitled to counsel fees. *Smith v. Hudson Cnty. Register*, 422 N.J. Super 387, 393 (App. Div. 2011).

⁷ N.J.S. 47-1A-6 (2016).

provision contained in the previous Right to Know Act, which instead stated that a successful petitioner “may be awarded a reasonable attorney’s fee not to exceed \$500.00.”⁸

Analysis

In New Jersey, fee determinations are generally guided by the “American Rule” in which the prevailing party is not entitled to collect attorneys’ fees from the losing party.⁹ However, the Legislature has created statutory exceptions to this rule in particular instances¹⁰ to ensure that plaintiffs with valid claims can retain competent counsel to assert important statutory rights and promote justice.¹¹ In some cases, the decision whether to award attorney fees are left to the court’s discretion, but in statutes such as OPRA, the recovery of attorney fees is the victor’s entitlement.¹² Broadly speaking, it is possible that the mandatory nature of such fee awards may provide incentive to pursue frivolous litigation against government agencies.

Since OPRA’s enactment, New Jersey’s courts have explored the requirements of the statute’s attorney’s fee provision, largely focusing on two areas:

(1) Award granted to “[a] requestor who prevails” – In a 2008 N.J. Supreme Court opinion, Chief Justice Rabner noted this statutory language and questioned, “[w]hat, then, does it mean to ‘prevail’?”¹³ This query has particular relevance to OPRA requests, as the government agency may produce requested records after a suit has been initiated (and legal fees presumably incurred), but before a final determination by either a court or the Government Records Council.

In its subsequent analysis, the Court affirmed its adherence to the “catalyst theory” when determining the prevailing party under a state statute, despite the U.S. Supreme Court’s rejection

⁸ N.J.S. 47-1A-4 (repealed 2002); *see also* *Mason v. City of Hoboken*, 196 N.J. 51, 75 (2008) (recognizing the expansion of attorney fee awards under OPRA); Brian J. Molloy and Keith L. Hovey, *Legal Fees Under New Jersey’s Open Public Records Act*, N.J. LAWYER 21, 22 (February 2012).

⁹ *New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections*, 185 N.J. 137, 152 (2005).

¹⁰ *See* *Mason*, 196 N.J. at 70 (identifying other fee-shifting statutes, rules and cases such as N.J.S. 2A:23B-25(c) (arbitration proceedings), N.J.S. 10:5-27.1 (Law Against Discrimination), N.J.S. 34:11B-12 (Family Leave Act), N.J.S. 34:19-5(3) (employer retaliatory claims), N.J.S. 56:8-19 (Consumer Fraud), N.J.S. 56:9-12a (Antitrust Act), N.J.S. 56:10-10 (Franchise Practices Act)).

¹¹ *New Jerseyans for a Death Penalty Moratorium*, 185 N.J. at 153 (quoting *Coleman v. Fiore Bros.* 113 N.J. 594, 598 (1989)).

¹² *Compare* N.J.S. 2A:23B-25(c) (stating that prevailing party **may be** awarded reasonable attorney’s fees); N.J.S. 10:5-27.1 (stating that prevailing party **may be** awarded reasonable attorney’s fees, with certain limitations, in action brought under the Law against Discrimination); N.J.S. 34:11B-12 (stating that prevailing party **may be** awarded reasonable attorney’s fees, with certain limitations, in action brought under the Family Leave Act); N.J.S. 34:19-6 (stating that the court **may** award reasonable attorneys’ fees to employer if employee action was without basis in law or in fact), *with* N.J.S. 56:8-19 (stating that the court **shall** award reasonable attorneys’ fees for successful Consumer Fraud Act claims); N.J.S. 34:19-5 (providing that the court “**shall** also order, where appropriate and to the fullest extent possible. . . reasonable costs, and attorney’s fees” for employer retaliatory actions.); N.J.S. 56:9-12a (stating that any person injured by a violation of the Antitrust Act **shall** recover reasonable attorneys’ fees); N.J.S. 56:10-10 (stating that successful franchisee **shall** be entitled to reasonable attorney’s fees in an action pursuant to the Franchise Practices Act).

¹³ *Mason*, 196 N.J. at 71.

of this theory in interpreting federal statutes.¹⁴ Citing New Jersey's long recognition of the catalyst theory, the Court held that an individual is entitled to attorney's fees under OPRA if the individual 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."¹⁵ In preserving this analysis, the courts' maintain a role in determining whether attorney fees are awarded in a particular factual situation.

(2) Reasonableness of fees - The N.J. Supreme Court has also addressed how a reasonable attorney fee should be determined in OPRA contests. In *New Jerseyans for Death Penalty Moratorium v. New Jersey*, the 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."¹⁶ The Court's preference for a quantitative, rather than qualitative, assessment provides judicial discretion based upon the attorney's degree of success; the court may reduce an attorney fee award when deemed excessive in light of partial or limited success, and may enhance the attorney fee award in unusual circumstances in which an attorney has achieved excellent results.¹⁷

At least forty-five other states permit the award of attorney's fees in challenges made pursuant to comparable open public records acts.¹⁸ However, states differ as to whether the award of attorney's fees is mandatory or discretionary.¹⁹ Additionally, some states permit a records custodian to collect attorney's fees in defending against frivolous or harassing actions.²⁰

Conclusion

With the Commission's authorization, Staff will conduct additional research and provide recommendations regarding OPRA's provision for attorney's fees. In particular, Staff will research whether this mandatory fee award is encouraging frivolous actions and will provide greater detail regarding the fee shifting provisions in other jurisdictions.

¹⁴ *Mason*, 196 N.J. at 61 (discussing *Buckhannon Board & Care Home v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001)); see also *Teeters v. Division of Youth & Family Services*, 387 N.J. Super 423 (App. Div. 2006), *certif. denied* 189 N.J. 426 (2007).

¹⁵ *Mason*, 196 N.J. at 76 (internal quotations and citations omitted).

¹⁶ *New Jerseyans for Death Penalty Moratorium*, 185 N.J. at 154 (citing *Silva v Autos of Amboy, Inc.*, 267 N.J. Super 546, 555-56 (App. Div. 1993)) (internal quotations and additional citations omitted).

¹⁷ *Id.* at 153, 157.

¹⁸ NAT'L ASSOC. OF COUNTIES, *Open Records Laws: A State by State Report*, 158-9 (Dec. 2010)

¹⁹ Compare A.R.S. § 39-121.02 (2016) (providing discretionary fee award); N.Y. PUB. OFF. LAW § 89(4)(c) (providing discretionary fee award) with CAL. GOV. CODE § 6259 (2016) (creating mandatory fee award); COLO. REV. STAT. § 24-72-204 (2016)(creating mandatory fee award).

²⁰ See e.g., COLO. REV. STAT. §24-72-204; DEL. CODE ANN. §10005.