

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2013-10T3

JOHN PAFF,

Plaintiff-Respondent,

v.

BOROUGH OF GARWOOD,

Defendant-Appellant.

---

Argued November 2, 2011 - Decided November 15, 2012

Before Judges Fuentes, Graves and Harris.

On appeal from Superior Court of New Jersey,  
Law Division, Union County, Docket No.  
L-1089-10.

Robert F. Renaud argued the cause for appellant  
(Palumbo & Renaud, attorneys; Mr. Renaud, on  
the brief).

Richard Gutman argued the cause for respondent.

Carella, Byrne, Cecchi, Olstein, Brody &  
Agnello, P.C., attorneys for amicus curiae  
New Jersey Institute of Local Government Attorneys  
and New Jersey State League of Municipalities  
(Carl R. Woodward, III, and Vincenzo M. Mogavero,  
on the brief).

PER CURIAM

This is an appeal by defendant Borough of Garwood (Borough) from the Law Division's July 13, 2010 order granting plaintiff John Paff access to a DVD pursuant to his common law right of access to public records. The Borough also appeals from a subsequent order entered on November 10, 2010, awarding attorney's fees and costs to plaintiff.<sup>1</sup> For the reasons that follow, we affirm the order granting plaintiff access to the requested DVD and reverse the second order requiring the Borough to pay plaintiff's legal fees and costs.

On September 3, 2009, a former member of the Garwood Police Department was charged in separate complaints with committing two disorderly persons offenses. One complaint charged the officer with criminal mischief, N.J.S.A. 2C:17-3(a)(2), for tampering with a currency-to-coin changer at a laundromat on August 18, 2009. The second complaint charged the officer with unlicensed entry of structures, N.J.S.A. 2C:18-3(a), for entering the locked office of the Borough Clerk on August 19, 2009. Both complaints stated the incidents were recorded by video surveillance cameras.

The Borough entered into a settlement agreement and release with the officer on September 23, 2009. The parties agreed the

---

<sup>1</sup> The November 10, 2010 order awarded attorney's fees and costs to Paff in the total amount of \$55,649.48. However, the trial court stated in its written decision that the "total award for attorney's fees and costs is \$56,030.88."

officer would resign "in good standing" from the police department and the pending charges would be dismissed. The officer submitted a letter of resignation on September 25, 2009, and the court granted the Borough's application to dismiss the disorderly persons complaints on October 14, 2009.

On February 5, 2010, plaintiff submitted a request to the Borough for information under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, and his common law right of access to public records. In response, the Custodian of Records provided him with copies of the municipal court complaints, the settlement agreement and release, the letter of resignation, and various other documents.

In a subsequent request, plaintiff asked for copies of the "video surveillance" that recorded the activities in the laundromat and the municipal clerk's office. The Custodian advised plaintiff that the request for the DVD of the clerk's office was denied because the recording was a "criminal investigatory record as provided in N.J.S.A. 47:1A-1.1."

On March 5, 2010, a Superior Court judge granted a petition to expunge the records relating to the charges against the officer pursuant to our expungement statute, N.J.S.A. 2C:52-1 to -32. The order directed that all records, "including but not limited to photographs, fingerprints, rap sheets, index or docket entries, reports (including lab reports) and statements,"

were to be placed "in the control of a person designated to retain control over the expunged records." The order further stated that the expunged records "shall not be released for any reason except as authorized by law," and "in response to requests for information or records, the court office or the law enforcement agency shall reply with respect to the arrest which is the subject of this order, that there is no record."

Thereafter, on March 16, 2010, plaintiff commenced this action with a verified complaint and order to show cause (OTSC) seeking to compel the release of the clerk's office surveillance DVD under OPRA and his common law right of access to public records. Plaintiff also sought an award of attorney's fees and costs.

In a certification in opposition to the OTSC, the Borough Police Chief, William Legg, confirmed that the DVD plaintiff requested was "a record of and evidence of [an] investigation of possible criminal activity." In addition, Legg stated: "On or about March 15, 2010, I was served with the attached Order for Expungement dated March 5, 2010. As I understand the expungement law, I am not permitted to release any records pertaining to this case unless an order is issued under N.J.S.A. 2C:52-9."

Following oral argument on April 30, 2010 and June 11, 2010, and the trial court's in camera review of the DVD, the

court rendered a written decision on July 13, 2010. The court ruled that the DVD was exempt from access under OPRA because it was a "criminal investigatory record."<sup>2</sup> However, after evaluating the factors set forth in Loigman v. Kimmelman, 102 N.J. 98, 113 (1986), the court determined "the public's interest in disclosure outweighs the Borough's interest in confidentiality." Consequently, the court ruled that the DVD was subject to disclosure pursuant to plaintiff's common law right of access.

Following the entry of the July 13, 2010 order that memorialized the judge's decision, plaintiff submitted a motion for attorney's fees and costs. In a written decision on November 10, 2010, the trial court determined that plaintiff was entitled to "an attorney's fee of \$54,389.48, consisting of a lodestar of \$40,288.50 and a 35% enhancement of \$14,100.98, plus litigation expenses of \$1,381.40 and costs of \$260 to be paid by the [Borough]."

On appeal, the Borough argues that the trial court erred in permitting plaintiff access to the DVD under the common law. We do not agree. The trial court balanced plaintiff's right to

---

<sup>2</sup> "'Criminal investigatory record' means a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding." N.J.S.A. 47:1A-1.1.

access against the Borough's interest in confidentiality and correctly concluded that plaintiff's interest in disclosure substantially outweighed "the concerns raised by the Borough about the effect of the disclosure on the security of the clerk's office."

We also agree with the trial court's determination that the DVD was not protected from disclosure by the expungement order. As the trial court correctly noted, the expungement order was not in effect when the Borough denied plaintiff's request for the DVD on February 12, 2010. In addition, the officer was given notice of plaintiff's request for documents, but never claimed the requested information was exempt from disclosure under OPRA or shielded from disclosure by the expungement order. Furthermore, there was substantial credible evidence in the record to support the trial court's determination that there was a strong public interest in the charges and how they were handled. Under these circumstances, we are satisfied the expungement order did not prevent the release of the DVD, which recorded the officer's alleged misconduct at the clerk's office. See G.D. v. Kenny, 205 N.J. 275, 302 (2011) ("Although our expungement statute generally permits a person whose record has been expunged to misrepresent his past, it does not alter the metaphysical truth of his past, nor does it impose a regime of silence on those who know the truth.").

Additionally, the Borough argues on appeal that the trial court erred in awarding attorney's fees and costs to plaintiff. "New Jersey generally follows the 'American Rule,' under which a prevailing party cannot recover attorney's fees from the loser." Mason v. City of Hoboken, 196 N.J. 51, 70 (2008) (citing Rendine v. Pantzer, 141 N.J. 292, 322 (1995)). "Fees may be awarded, however, when a statute, court rule, or contractual agreement provides for them." Ibid. Under OPRA, "[i]f it is determined that access has been improperly denied, the court or agency head shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Here, however, the trial court correctly concluded plaintiff was not entitled to counsel fees pursuant to OPRA because the DVD that plaintiff requested was exempt from disclosure under N.J.S.A. 47:1A-1.1.

Nevertheless, in a written decision on November 10, 2010, the trial court determined plaintiff was entitled to counsel fees and costs because he prevailed on his common law claim:

In Mason v. City of Hoboken, supra, 196 N.J. at 79, the Supreme Court directed the lower courts to determine, based on a fact-sensitive inquiry on a case-by-case basis, whether the plaintiff can establish a causal nexus between the litigation and the production of the requested records under OPRA, and the Court added the same test should be applied under the common law right of access, absent an apparent, theoretical

basis for making a distinction between the two.

. . . .

This court finds that, absent the lawsuit filed by the plaintiff and the ruling of this court, the defendant would not have provided a copy of the DVD to the plaintiff. Therefore, this court finds that the plaintiff has established a factual causal nexus between his litigation and the result ultimately achieved, and that the relief ultimately secured by the plaintiff had a basis in law, that is, the common law right of access to records.

Defense counsel argues that there are no published decisions in which a counsel fee has been granted to a plaintiff who prevailed on a claim under the common law right of access to public records. A review of the case law reveals that there simply have not been any published decisions since the Court's decision in Mason, supra, in 2008, where the plaintiff filed claims for access under OPRA and the common law, but only prevailed on the common law claim. This court finds that the authority to make the award is clear under the Mason case, supra, and under the catalyst theory this plaintiff is entitled to a reasonable counsel fee as the prevailing party on his common law claim under the facts of this case.

In reaching its decision, the trial court relied on the following comments by the Court in Mason:

The catalyst theory . . . empowers courts to award fees when the requestor can establish a "causal nexus" between the litigation and the production of requested records. Trial courts would conduct that fact-sensitive inquiry on a case-by-case basis, evaluating the reasonableness of, and



motivations for, an agency's decisions, and viewing each matter on its merits.

The parties have not addressed at length whether the question of attorney's fees merits different treatment in an action brought under the common law. Absent an apparent, theoretical basis for such a distinction, we conclude that the catalyst theory applies to common law suits as well.

[Mason, supra, 196 N.J. at 79.]

While N.J.S.A. 47:1A-6 expressly permits an award of counsel fees under OPRA, there is no statutory authority for such an award to a prevailing party in a common law right of access to public records lawsuit. Moreover, the Mason court did not state that it was abrogating the American Rule and establishing a new class of cases where attorneys' fees could be awarded to a prevailing plaintiff. Instead, the Court directed trial courts to conduct a "fact-sensitive inquiry on a case-by-case basis" to determine when an award of fees is appropriate. Mason, supra, 196 N.J. at 79.

In the present matter, plaintiff's initial request for the DVD of the clerk's office was denied based on the police chief's certification which stated, among other things, that disclosure would "jeopardize the security of the [municipal] building and create a risk of safety." In addition, the Borough contends that it "could not have responsibly released [the DVD]" until the court authorized its release on July 13, 2010, because it

reasonably believed the DVD was covered by the expungement order and, pursuant to N.J.S.A. 2C:52-30, the disclosure of expunged records is a disorderly persons offense. Under these circumstances, we are satisfied there were rational reasons for the Borough's decision and a counsel fee award was not warranted.

In view of the foregoing, the July 13, 2010 order that granted plaintiff access to the DVD is affirmed, and the November 10, 2010 order that awarded counsel fees and costs to plaintiff is reversed.

Affirmed in part and reversed in part.

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



CLERK OF THE APPELLATE DIVISION