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ANONYMOUS,	:	SUPERIOR COURT OF NEW JERSEY
Plaintiff,	:	LAW DIVISION, CIVIL PART
	:	ATLANTIC COUNTY
vs.	:	DOCKET NO. ATL-L-9552-11
	:	
BOROUGH OF LONGPORT	:	
Defendant	:	
	:	OPINION

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Decided: August 17, 2012

Donald M. Doherty, Jr., Attorney for Plaintiff

Christopher E. Torkelson, Attorney for Defendant

NELSON C. JOHNSON, J.S.C.

Presently before the Court is Counsel Donald M. Doherty, Esquire's application for counsel fees. Mr. Doherty's client is unknown to both the Court and the Defendant Borough of Longport. Defendant opposes this fee Application. The Court heard oral argument of counsel at a hearing conducted on August 16, 2012,

**Procedural History and Facts**

This matter arises from Plaintiff's multiple OPRA requests which were propounded upon the Borough of Longport. In September of 2011, an anonymous person made thirty-five individual OPRA requests seeking Borough Police Department incidents reports for the months [Page 2] of January thru August, 2011. Plaintiff requested these reports anonymously, as permitted by N.J.S.A. 47:1A-5f; 5i.

Longport responded to this request by advising that providing these documents would be a burdensome undertaking entailing the reproduction, and possibly editing, of more than 7,300 incident reports. It was the opinion of the Borough that a special service charge of \$20 an hour was necessary and would of necessity accrue for "several days" in order to furnish the requested information (See Defendant's Br., Exhibit D). Plaintiff requested that Longport respond with an estimated charge; however, Longport did not respond to this request, tacitly declining to provide a fixed sum estimate (See Defendant's Br., Exhibit F).

Thereafter, Plaintiff filed a petition for an Order to Show Cause, which was entered by the Court on January 16, 2012, setting a return date of February 23, 2012. Thereafter, at the request of counsel the hearing was adjourned and ultimately, the Court was advised by counsel that the Plaintiff and Longport settled this matter, resulting in the entry of a "Consent Order" on April 20, 2012. The question of counsel fees, if any, payable to Plaintiff was left unresolved. Plaintiff's Counsel now seeks counsel fees pursuant to N.J.S.A. 47:1A-6.

### **Discussion**

#### **Plaintiff's Status as an Anonymous Plaintiff**

Preliminarily, the Court notes that when this matter first appeared on the undersigned's docket, there were concerns regarding the lack of an identity for the Plaintiff. Plaintiff's complaint was the

first time this Court has received a pleading in the Civil Division in  
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which the Plaintiff is recited as "Anonymous." In the past, the Court has received pleadings where a party is identified via initials, together with a Certification of the attorney filing the pleadings but none, to date, where a party was simply labeled "Anonymous". Defense counsel did not raise the issue and the Court allowed this matter to go forward not knowing how it might proceed. In fact, the Borough did not file an Answer to Plaintiff's Complaint but rather, the means for a Dismissal was successfully negotiated by the Borough's attorney. Now, that counsel fees are being sought, the Court must resolve whether such a petition can be granted to a person unknown to the Court. [Page 3]

While the OPRA allows a person to request records anonymously, the statute is silent as to whether a suit may be brought anonymously for an alleged violation of an OPRA provision. Our Court Rules, however, are not silent on this issue. Rule 1:4-1(a)(1) provides that, generally, every paper filed in an action should identify all the parties. Said Rule states in pertinent part: "In a Complaint in a civil action, the title of the action shall include the names of all the parties, but in other papers, it need state only the name of the first party on each with an appropriate indication that there are other parties." Further, Rule 1:2-1 provides that all proceedings "shall be conducted in open court unless otherwise provided by rule or statute." Finally, as stated in Rule 4:26-1, "Every action may be prosecuted in the name of the real party in interest. . ."

As correctly noted by Mr. Doherty in his letter brief of June 11, 2012, “. . .the Court Rules have not been updated to address how this ‘right’ afforded by the Legislature is to be accommodated.” While the OPRA at N.J.S.A. 47:1A-5 (f) & (i) permits “an anonymous request” and for the requestor to “. . . elect[ed] not to provide a name . . .” the Legislature also provided at N.J.S.A. 47:1A-12: “The New Jersey Supreme Court may adopt such court rules as it deems necessary to effectuate the purposes of this act.” The OPRA has been the law for more than a decade, if our Supreme Court thought it appropriate to adopt new court rules to address the Act’s provisions; it was free to do so. This Court is obligated to observe the existing Court Rules and case law.

As the court noted in, *T.S.R. v, J. C.*, 288 N.J. Super. 48 (1996), providing the parties’ identities in litigation “tends to sharpen public scrutiny of the judicial process, to increase confidence in the administration of the law, to enhance the therapeutic value of judicial proceedings, and to serve the structural function of the first amendment by enabling informed discussion of judicial operations.” *Ibid.* at 59.

As noted by the Court in *Doe v. Frank*; 951 F.2d 320, 324 (1992),

Lawsuits are public events. A plaintiff should be permitted to proceed anonymously only in those exceptional cases involving matters of a highly sensitive and personal nature, real danger of physical harm, or where the injury litigated against would be incurred as a result of the disclosure of the plaintiffs identity. [Page 4]

In *A.B.C. v. XYZ Corp.*, 282 N.J. Super, 494 (1995), the Appellate Division addressed a plaintiff's appeal seeking permission to proceed anonymously against his employer in a LAD claim. The Court explained:

Court proceedings are public proceedings and the names of the parties and their addresses are essential not only to identify the various parties, but also in connection with aspects of the judicial process such as discovery, motion practice, jury selection, and execution to enforce money judgments. As a corollary, proper identification of a party assures against misidentification of some other party as being involved. There is a constitutional and customary presumption of openness in all judicial proceedings, except in juvenile court proceedings.

*Ibid.* at 499. The presumption of openness may be overcome if "disguising the identity of litigants 'serves a legitimate end where the interests of minor children are concerned, as well as upon other miscellaneous but rare occasions.' See *T.S.R. v. J.C.*, *supra* at 57 (1996), (quoting *Stern v. Stern*, 66 N.J. 340, 343 n.1 (1975)).

In *A.B.C.*, the Court held that

Common sense dictates that the disclosure of the identity of this plaintiff is not protected by any statute or rule of court and would be no more detrimental than disclosure of the identity of the doctor accused of sexual impropriety in *Coe v. United States District Court*, *supra*, 676 F. 2d 411, or of the alcoholic plaintiff in *Doe v. Frank*, *supra*, 951 F.2d 320. Cf. *Clowes v. Terminix International, Inc.*, 109 N.J. 575, 538 A.2d 794 (1988) (plaintiff who successfully argued that alcoholism is a "handicap" under the LAD proceeded under his true name).

*Ibid.* at 503. The Court reasoned that certain considerations should be balanced to weigh a litigant's privacy interest against the

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constitutional presumption in favor of open court proceedings, these are: (1) the litigation will create a genuine risk of physical harm; (2) the litigation may reveal highly private and personal information; (3) the relief sought would be defeated by revealing the party's identity; or (4) other substantial reasons why identification of the party would be improper. Ibid. at 505.

Finally as noted by the Third Circuit in *Doe v. Megless*, 654 F.3d 404, 408,

"Identifying the parties to the proceeding is an important dimension of publicness. The people have a right to know who is using their courts." (citing *Doe v. Blue Cross & Blue Shield United*, 112 F.3d 869, 872 (7th Cir, 1997) ... While not expressly permitted under Federal Rule of Civil Procedure 10(a), in exceptional cases courts have allowed a party to proceed anonymously. See, e.g., *C.A.R.S.*, [Page 5] 527 F.3d at 371 n.2. That a plaintiff may suffer embarrassment or economic harm is not enough. *Id.* Instead, a plaintiff must show "both (1) a fear of severe harm, and (2) that the fear of severe harm is reasonable." *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 596 F.3d 1036, 1043 (9th Cir. 2010). (emphasis added)

Here, Counsel has not established any significant reasons why the Plaintiff should be permitted to proceed anonymously, absent that OPRA permits anonymous records requests.

The Court is concerned that allowing counsel to obtain fees for a party unknown to the Court will contravene the Court Rules and case law which clearly require that a plaintiff cannot proceed anonymously except in the rarest of circumstances. Further, allowing counsel to

obtain fees where the plaintiff is unknown to the Court creates the

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potential for abuse of the legal system. This is so because pleadings of anonymous plaintiffs can be crafted as a means to obtain results, the motives, ends and future use of which remains undisclosed to the Court and adverse parties.

The court will not restrict itself to the narrow focus urged by Plaintiff's counsel. To cite the OPRA, without regard to our Court Rules and case law, is akin to asking this Court to wear blinders, much like a race horse. Absent exceptional circumstances involving matters of a highly sensitive and personal nature or the likelihood physical harm, permitting a party to litigate a claim while keeping their identity hidden from the Court and their adversary, serves no legitimate interest and undermines confidence in our legal system. In short, permitting unknown parties to engage in litigation is fraught with trouble for our society.

Accordingly, the Court concludes that Plaintiff's counsel has failed to establish sufficient grounds to justify waiving the express requirement of our Court Rules that "Every action may be prosecuted in the name of the real party in interest..." See Rule 4:26-1.

#### **Plaintiff's Petition for Counsel Fees**

Finally, the Court is concerned about the uncertainty that may be created by leaving the second issue unaddressed, viz, the unknown Plaintiffs entitlement to counsel fees. As noted at Paragraph #20 of Mr. Doherty's Certification, he was retained to handle this matter on a contingent fee basis. Mr. Doherty is to be commended for offering his *This text searchable document was created from the original, hard-copy document obtained from the Court, which is on-line at <http://ogtf.lpcnj.org/2012/2012276uG//ATLL00955211ANOLONSCAN.pdf> Bracketed page numbers denote the page numbers in the original document. While attempts have been made to ensure that the text within this version is identical to the original, such accuracy is not guaranteed.*

services on a contingent [Page 6] fee basis to a citizen purportedly unable to gain access to public records for a reasonable cost without the assistance of legal counsel.

According to Plaintiff the fear was that of "being roped into a \$20 per hour commitment without having an idea as to the ultimate cost." The Court notes that this is not a situation of a municipality unreasonably *stone-walling* a citizen's request to access public records, nor one in which the Borough quoted excessive fees in a transparent effort to frustrate the purpose of the OPRA by discouraging Plaintiffs request.

The Court has conducted several *in camera* reviews of police incident reports for potential redactions of sensitive information which ought not be released to the public. It's cumbersome, tedious and time consuming. The Borough's hesitancy to commit to an "ultimate number" estimate is understandable, especially in light of the time period involved and the number of police incident reports that must be reviewed prior to releasing them to the Plaintiff. In total, Plaintiff sought eight months of police reports - divided into thirty-six OPRA requests - comprising in excess of seven thousand incident reports. Compiling, copying, and reviewing that volume of public records is no small undertaking.

Both prior to Plaintiffs retention of legal counsel and thereafter, the Borough declined to commit to an "ultimate number" estimate, requesting the payment of a "special service charge" as

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expressly authorized by N.J.S.A. 47:1A-5, c. The factual predicate articulated by the Legislature for permitting the charge was the submission of a request by Plaintiff which "involves an extraordinary expenditure and effort to accommodate the request." In candor, it's reasonable for one to conclude that it was a request such as Plaintiffs (along with many others limited only by one's imagination) which the Legislature had in mind when it crafted the language of N.J.S.A. 47:1A-5, c.

Despite what the unknown Plaintiff may think, large OPRA requests which are cumbersome, tedious and time consuming require the allocation of personnel which could be put to other public purposes. The Court is satisfied that given the extremely voluminous and potentially sensitive nature of the response to Plaintiffs OPRA request, a special service charge was clearly warranted.

As to the award of counsel fees, the Court is guided by the decision in *Teeters v. DYFS*, 387 N.J. Super. 423 (2006), wherein the Appellate Division considered the two-prong test [Page 7] articulated by the Supreme Court in *Packard-Bamberger & Co, vs. Collier*, 167 N.J. 427 (2001) in determining whether or not a requester was a "prevailing party" entitled to attorneys fees in OPRA litigation. Quoting *Packard*, "The first prong requires that the litigant seeking fees established at the lawsuit was ... a necessary and important factor in obtaining the relief", at 431. The second prong requires that the relief have some basis in the law. These are threshold standards and the OPRA requester

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who is unable to satisfy these prongs is not a prevailing party and is not entitled to counsel fees.

Also helpful to the Court's analysis is the decision in *Warrington v. Village Supermarket, Inc.*, 328 N.J Super. 410 (2000) wherein the Court stated:

The test for determining whether a party is prevailing and entitled to receive an award of attorneys' fees is similar for state and federal fee-shifting statutes. Entitlement to attorneys' fees is predicated on the relationship between the relief sought and the relief obtained. *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 758 F.2d 897, 911 (3d Cir.1985); *Singer v. State*, 95 N.J. 487, 495, 472 A.2d 138, cert. denied, 469 U.S. 832, 105 S. Ct. 121, 83 L. Ed. 2d 64 (1984). A plaintiff is considered a prevailing party "when actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 111-12, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494, 503 (1992);

Notwithstanding the erudite and impassioned argument of Plaintiffs counsel, the facts prevail. Retaining legal counsel had no discernible impact upon the Borough's position between the initial anonymous emails back in September of 2011 and the discussions between counsel in February of 2012 following the entry of the Order to Show Cause. The estimated special service charge tendered to Plaintiff prior to retaining legal counsel was the same special service charge offered and agreed to between Messer's Torkelson and Doherty as confirmed in Mr. Torkelson's letter of February 15, 2012.

As result of the Plaintiffs refusal to identify the "name of the real party in interest" and there being no significant alteration of the Borough's position as result of the litigation, Plaintiff's application for counsel fees is DENIED with prejudice.

Finally, as first learned by the Court during oral argument, Plaintiff has made no effort to obtain the police incident reports now that they are available. Aside from Mr. Doherty's "testimony" at oral argument regarding his client's inaction on obtaining the records, what we have is an unknown citizen who's demand for documents no longer appears to be important to [Page 8] that person. Why was this lawsuit filed? Nearly a year after requesting the police records and several months after their availability, "Anonymous" has yet to retrieve these records. Where is the urgency? How did records that once were important become unimportant? From the Court's vantage point, it's difficult to understand what this litigation was all about.

An appropriate Order has been entered. Conformed copies accompany this Memorandum of Decision.