

COURT INITIATED

BRIAN E. JOHNSON,

Plaintiff,

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION  
ATLANTIC COUNTY

vs.

CITY OF ESTELL MANOR and FERN A.  
BROWN, in her official capacity as City of  
Estell Manor Acting Clerk and Records  
Custodian,

DOCKET NO. ATL-L-7617-12

Defendants.

**ORDER**

THIS MATTER having been brought by Salvatore Siciliano, Esq., Siciliano & Associates, attorney for plaintiff, Brian E. Johnson, on notice of motion for summary judgment in favor of plaintiff; and by Little E. Rau, Esq., Ruderman & Glickman, P.C., attorney for defendants, City of Estelle Manor and Fern A. Brown, on cross-notice of motion for summary judgment in favor of defendants; and the Court having considered the papers submitted, oppositions filed, and for good cause shown,

IT IS on this *25* day of *October* *2013*

**ORDERED** that the plaintiff's motion for summary judgment is GRANTED as a common public record, for the reasons set forth in the Court's attached Memorandum of Decision; and

**IT IS FURTHER ORDERED** that the defendants' cross-motion for summary judgment is DENIED, also for the reasons set forth in the Court's attached Memorandum of Decision; and

**IT IS FURTHER ORDERED** that a copy of the executed Order shall be served upon all parties within seven (7) days of its receipt.

**FILED**

OCT 28 2013

NELSON C. JOHNSON, J.S.C.

  
NELSON C. JOHNSON, J.S.C.



FILED

OCT 26 2013

NELSON C. JOHNSON, J.S.C.

**SUPERIOR COURT OF NEW JERSEY**

NELSON C. JOHNSON, J.S.C.

1201 Bacharach Boulevard  
Atlantic City, NJ 08401-4527  
(609) 594-3384

**MEMORANDUM OF DECISION ON MOTION**  
**Pursuant to Rule 1:6-2(f)**

**TO:** Littie E. Rau, Esq.  
Ruderman & Glickman, P.C.  
675 Morris Ave., Suite 100  
Springfield, NJ 07081  
Attorney for Defendants, City of Estell  
Manor and Fern Brown

Salvatore J. Siciliano, Esq.  
Law Offices of Siciliano & Associates  
16 South Haddon Ave.  
P.O. Box 25  
Haddonfield, NJ 08033  
Attorney for Plaintiff, Brian Johnson

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**RE:** Johnson v. Estell Manor, et al.

**DOCKET NO.** ATL-L-7617-12

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**NATURE OF MOTION(S): Summary Judgment**

**HAVING CAREFULLY REVIEWED THE MOVING PAPERS AND ANY RESPONSE FILED, I HAVE RULED ON THE ABOVE CAPTIONED MOTION(S) AS FOLLOWS:**

**Nature of Motion and Procedural Background**

Plaintiff, Brian Johnson, filed his complaint on November 16, 2012, alleging that defendants violated his rights under the New Jersey Open Public Records Act (OPRA) and the Common Law Right of Access (CLRA), by refusing to provide plaintiff with a copy of an audio-disk containing a transcript of the City’s August 23, 2012 committee meeting. Defendants, City of Estell Manor (“the City”) and Fern Brown (collectively referred to as “defendants”), filed their answer on December 31, 2012. Plaintiff now brings this motion for summary judgment. Defendants oppose this motion and bring a cross-motion for summary judgment.

The Court raised the following issue at a September 16, 2013 plenary hearing in this matter: Is the defendants’ issuance of subpoenas and convening of the investigatory committee, without approval of the governing body, an *ultra vires* act and a violation of plaintiff’s rights

requiring the disclosure to plaintiff of the audio-disk transcript made at the City's investigatory committee meeting, held on August 23, 2012?

### **Findings of Fact**

1. Plaintiff, Brian Johnson, is a resident of Upper Township, Cape May County, New Jersey. He is also an employee of the defendant City and serves as the Director of the Department of Public Works.
2. Defendant, the City of Estell Manor, is a public agency under the Open Public Records Act, N.J.S.A. 40:48-25, with its principal office located in Estell Manor, Atlantic City, New Jersey. On August 23, 2012, plaintiff attended a committee meeting, called to order by the City.
3. Defendant, Fern Brown, is the City's Acting Clerk and Custodian of Government Records.
4. Several days prior to the August 23, 2012 meeting, plaintiff received a subpoena from the City, compelling his attendance at the meeting and advising plaintiff that failure to appear would result in the issuance of a warrant for his arrest.
5. Plaintiff attended the August 23, 2012 meeting, which took place in Estell Manor's City Hall building. Upon arriving at the meeting, plaintiff was greeted by New Jersey State Troopers, who only granted access to the meeting to individuals whose attendance was compelled by subpoena. Other residents who desired to attend the meeting were denied entry.
6. Mayor Venezia and Councilman Cunningham, who are both elected officials and members of the City's governing body, were present at the meeting. Steven Glickman, labor counsel for the City, and defendant, Fern Brown, were also present at the meeting.
7. The majority of the governing body was not present at the meeting and the meeting was not publicly noticed.
8. During the meeting, Mr. Glickman indicated that the meeting was a fact finding meeting, and that the committee intended to gather information with regard to three specific issues – one issue involved pictures of the City's Fire Department Chief's son; one issue involved the alleged use of the City's Fire Department fire truck; and one issue involved the alleged loss of a checkbook that belonged to the City's Fire Department.

9. During the meeting, the committee questioned individuals who were subpoenaed and compelled to attend the meeting, including plaintiff. Upon conclusion of the meeting, Mr. Glickman stated he would prepare a written report of his findings.
10. Mr. Glickman prepared a report of his findings from the August 23, 2012 meeting, portions of which were read at a regularly held City Council meeting on October 11, 2012.
11. On October 19, 2012, plaintiff submitted a written OPRA request to defendants, requesting a copy of all minutes and audio from the August 23, 2012 meeting and all minutes from the October 11, 2012 meeting.
12. On November 9, 2012, plaintiff received correspondence that indicated that the minutes from the August 23, 2012 meeting were related to an internal investigation of a personnel matter and would not be released. The correspondence also indicated that the minutes from the October 11, 2012 meeting would be released after they were approved by City Council.
13. On December 7, 2012, plaintiff received the minutes from the October 11, 2012. He has not received any memorialization of the meeting of August 23, 2012.

#### **Parties' Contentions**

**Plaintiff:** In response to the issue raised by the Court at the plenary hearing and in support of its motion for summary judgment, plaintiff avers the following:

**First,** plaintiff argues that defendant, City issued unlawful subpoenas without appointing a committee of its governing body, contrary to N.J.S.A. 40:48-25; said subpoena compelled plaintiff to appear and testify at an investigative committee meeting on August 23, 2012, under the threat of arrest. Plaintiff also states that on September 11, 2013, the City conducted a regular Council Meeting, where it passed a resolution ratifying defendant's improper issuance of the subpoena and retroactively appointing an investigative committee with the authority to issue subpoenas for the August 23, 2012 meeting. Plaintiff argues that the resolution that defendants violated N.J.S.A. 40:48-25..

**Second,** plaintiff argues that the City does not possess the power to pass a resolution *nunc pro tunc* with retroactive legal effect. Plaintiff cites the definition of "nunc pro tunc" as defined by Black's Law Dictionary - *nunc pro tunc* is Latin for "now for then" and means having retroactive legal effect through a court's inherent power. Thus, plaintiff argues that only courts have the rightful authority to pass a resolution *nunc pro tunc* with retroactive effect; therefore,

the City's resolution cannot cure the violation of plaintiff's rights. Additionally, plaintiff argues that the City's conduct was an egregious violation of due process and should be found unconstitutional.

**Third**, plaintiff argues that should the Court find that the City has the power to adopt a resolution *nunc pro tunc*, the resolution does not comply with N.J.S.A. 40:48-25, because the investigative committee did not consist solely of members of governing body. Plaintiff states that the ad-hoc committee that subpoenaed him was made up of Steve S. Glickman, Esq., who serves as labor counsel to the City, Councilman John Cunningham and Mayor Joseph Venezia. Mr. Glickman is not a member of the City's governing body; thus, plaintiff argues that the City cannot confer the power to issue subpoenas on Mr. Glickman through its resolution. Additionally, plaintiff argues that other members of the governing body were not even aware that such an ad-hoc committee had been formed.

Defendants: In response to the issue raised at the September 16, 2013 plenary hearing, and in opposition to plaintiff's motion for summary judgment and in support of their cross-motion for summary judgment, defendants aver the following:

**First**, defendants argue that the audio-disk is exempted from OPRA because it is not a "government record" within the definition of OPRA. Rather, defendants argue that the audio-disk is the functional equivalent of the handwritten notes used by Mr. Glickman to create an investigative report. Defendants further argue that even if the audio-disk constituted a government record, it would fall under one of OPRA's exemption.

**Second**, defendants argue that the audio-disk is exempted from CLRA because it is not a public record and because plaintiff's interest in disclosure does not outweigh the municipality's interest in non-disclosure. Defendants argue that the audio-disk has no indicia as a public record; rather, the audio-disk is the functional equivalent of personal, handwritten notes by Mr. Glickman, which he used to write an investigative report. In addition, defendants argue that the August 23, 2012 meeting was part of an internal investigation compelled by the City's receipt of confidential complaints from a member of the City's Fire Company; therefore, the meeting inherently implicated confidential and/or personnel matters not subject to disclosure under OPRA or CLRA.

**Third**, defendants argue that the proposed *ultra vires* act is secondary in nature and, therefore, ratification by the governing body remedies, *nunc pro tunc*, any potential violation of plaintiff's rights. Defendant states that on September 11, 2013, the City's governing body passed a resolution retroactively appointing the investigative committee meeting in accordance with N.J.S.A. 40:48-25. Defendant claims that this *nunc pro tunc* ratification cures any defect that occurred in relation to the August 23, 2012 meeting. Defendant also claims that the subpoena issued to plaintiff was not issued for an improper purpose and that the investigative committee did not engage in bad faith or politically motivated behavior. In the alternative, if the Court finds that the subpoena was issued for an improper purpose, defendants argue that any defect in the issuance of the subpoena is cured by the City's resolution, which allowed the investigative committee to issue subpoenas and ask questions of the individuals subpoenaed at the August 23, 2012 meeting.

**Fourth**, defendants state that plaintiff does not allege that he was improperly compelled to attend the investigatory meeting on August 23, 2012, or that the committee did not have the authority to compel plaintiff to attend the meeting, or that any other violation of N.J.S.A. 4:48-25 occurred.

#### Standard

Rule 4:46-2 provides that Summary Judgment is appropriate where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." All inferences of doubt are drawn against the movant in favor of the opponent of the motion. See Brill vs. Guardian Life Ins. Co., 142 N.J. 520 (1985).

"[A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 530. Accordingly, "when the evidence is 'so one-sided that one-party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Id. (citation omitted).

### Discussion

- a. Was the City's issuance of subpoenas and convening of the investigatory committee, without approval of the governing body, on August 23, 2012 a violation of plaintiff's rights?

If an action by a government agency is considered "*ultra vires*, a court must consider whether the conduct is *ultra vires* in the primary sense, or *ultra vires* in the secondary sense." Middletown Twp. Policemen's Benevolent Ass'n Local No. 124 v. Twp. of Middletown, 162 N.J. 361, 368 (2000). Actions that are *ultra vires* in the secondary sense will permit the application of estoppel and will not preclude ratification of the government action. Id. An action is *ultra vires* in the primary sense if it is "utterly beyond the jurisdiction" of the municipality. Id. at 371. On the other hand, an action is *ultra vires* in the secondary sense if it is merely an "irregular exercise of a basic power." Id.

N.J.S.A. 40:48-25 provides,

When the governing body of a municipality shall have appointed a committee of its members upon any subject or matter within its jurisdiction, the committee may issue a subpoena ad testificandum, or subpoena duces tecum, to any person within this state, to appear before it to give testimony or information required. The subpoenas may be served by any police officer or constable of the municipality.

"It is apparent that this statute limits the power to issue subpoenas to committees composed of the members of a governing body; it does not confer such power upon any other committee." Traino v. McCoy, 187 N.J. Super. 638, 649 (Law Div. 1982). In addition, "subpoenas may not be issued, except upon constitutional and legislative authority." Newark v. Benjamin, 144 N.J. Super. 58, 72 (Law Div. 1976). "Every instance in which subpoenas may be issued in this State is one in which the basic authority comes from a statute." Id.

Here, the City's only authority to issue a subpoena comes from N.J.S.A. 40:48-25. The City clearly violated the statutory requirements of N.J.S.A. 40:48-25 and plaintiff's rights pursuant to the statute. The City did not convene a committee of members of its governing body for the August 23, 2012 meeting before issuing subpoenas to appear at the meeting; therefore, the issuance of subpoenas for the August 23, 2012 investigative committee meeting constituted *ultra vires* action. Additionally, the case law interpreting N.J.S.A. 40:48-25 makes it clear that

an investigative committee cannot be formed and subpoenas cannot be issued without legislative authority. Therefore, the Court finds that the City's issuance of the subpoena to plaintiff without first appointing a committee of its governing body members and the convening of an investigative committee in violation of N.J.S.A. 40:48-25 constituted *ultra vires* in the primary sense, because it was utterly beyond the jurisdiction of the City, and not just an irregular exercise of a basic power. Therefore, the City is precluded from giving its September 11, 2013 resolution retroactive effect to the August 23, 2012 investigative committee meeting.

Additionally, the New Jersey Constitution provides, “[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.” N.J. Const., art. I, para. 1 (emphasis added). In this instance, the City improperly issued a subpoena ad testificandum to plaintiff, which stated “failure to appear would result in the issuance of a warrant for his arrest.” The Court concludes that the City's August 23, 2012 unauthorized issuance of such a subpoena under improper threat of arrest violated the plaintiff's constitutional and inalienable right to freedom and independence, and his right to enjoy and defend his individual liberty.

In conclusion, the Court finds that, in viewing the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, in a light most favorable to the non-movant, that there is no genuine issue as to whether the defendants' *ultra vires* issuance of subpoenas and convening of the investigatory committee meeting on August 23, 2012 violated plaintiff's constitutional rights and N.J.S.A. 40:48-25.

**b. Is the plaintiff entitled to the audio transcript of the City's August 23, 2012 investigative committee meeting under CLRA?**

“New Jersey provides access to public records in three ways: (1) through the citizen's common law right of access; (2) OPRA; and (3) through the discovery procedures applicable to civil disputes.” Bergen County Imp. Authority v. North Jersey Media Group, Inc., 370 N.J. Super. 504, 515 (App. Div. 2004). In this instance, plaintiff only seeks access to the audio-disk transcript of the City's August 23, 2012 meeting under the common law rule of access and the open public records acts.

“Under the common law rule of access to public documents, a citizen is entitled to inspect documents of a public nature [...] provided he shows the requisite interest therein.” Nero v. Hyland, 76 N.J. 213, 222 (1978). Under CLRA, a public record “is one that is made by a public official in the exercise of his or her public function, either because the record was required or directed by law to be made or kept, or because it was filed in a public office.” Keddie v. Rutgers, 148 N.J. 36, 49 (1997). “The common-law right to access public records depends on three requirements: (1) the records must be common-law public documents; (2) the person seeking access must establish an interest in the subject matter of the material; and (3) the citizen's right to access must be balanced against the State's interest in preventing disclosure.” Id. at 50.

In this instance, the audio-disk transcript of the City’s August 23, 2012 meeting constitutes a common law public record. Contrary to defendants’ argument that the audio-disk is analogous to personal, handwritten notes taken by Mr. Glickman during the meeting and used by him to create a report, the audio-disk is a common law public document, since it is a recording of public business. Also, the audio-disk transcript was made by a public official of the City in the exercise of his public function, as it contains the minutes of an investigative, albeit improper, committee meeting held by the City, and not just personal notes taken by an individual. Such minutes were filed in in the City’s public office.

In addition, the plaintiff has a strong interest in gaining access to the subject matter of the audio-disk, as he was subject to interrogation by committee members at the August 23, 2012 meeting, pursuant to an improperly issued subpoena. Furthermore, plaintiff’s right to access the audio-disk outweighs the City’s interest in non-disclosure, as the City has failed to establish any justification for non-disclosure. The City only argues that the audio-disk contains information relating to an internal investigation of a personnel matter; however, the City does point to any specific facts to support a conclusion that the audio-disk contains any sensitive or confidential government information, such as social security numbers, credit card numbers, unlisted telephone numbers or driver license numbers of any person. Thus, the audio-disk is not protected by CLRA.

Therefore, the Court also finds, in viewing the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, in a light most favorable to

the non-movant, that there is no genuine issue as to whether plaintiff is entitled to access the audio-disk transcript of the City's August 23, 2012 meeting under CLRA. Plaintiff is entitled to access the content of the audio-disk transcript of the August 23, 2012 meeting.

**c. Is the plaintiff entitled to the audio transcript of the City's August 23, 2012 committee meeting under OPRA?**

OPRA provides that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest" N.J.S.A. 47:1A-1. One such exception to OPRA exists "where it shall appear that the record or records which are sought to be inspected, copied, or examined shall pertain to an investigation in progress by any public agency. N.J.S.A. 47:1A-3. "[T]he right of access [...] may be denied if the inspection, copying or examination of such record or records shall be inimical to the public interest; provided, however, that this provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced." N.J.S.A. 47:1A-3.

Also, under OPRA, "government record" means,

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 (emphasis added). The purpose of OPRA 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." Mason v. City of Hoboken, 196 N.J. 51, 64 (2008).

In this instance, the audio-disk transcript constitutes a government record, as defined by OPRA, because it contains information stored by sound recording that was made and kept on file

in the course of the City's official business. The recording was made by public officials acting in their official capacity. Specifically, the members of the City's investigative committee indicated at the August 23, 2012 meeting that they were conducting a fact finding meeting on behalf of the City to gather information with regard to a specific investigation into the use of City equipment. Although the committee members were not acting within their statutory power in convening the meeting, they were still acting in their official capacity as City Council members. Additionally, the disclosure of the audio-disk would not be harmful to the public interest, as it does not contain any sensitive or confidential government information.

On the other hand, the audio-disk appears to be exempted from OPRA as a record of an investigation in progress by a public agency. The City was in the process of an ongoing investigation, even though the August 23, 2012 investigative meeting and accompanying subpoenas were not authorized. OPRA does not elaborate on whether the "record of an ongoing investigation" exemption still applies if an investigatory meeting is held in violation of statutory authority. Therefore, the Court finds, in viewing the competent evidential materials presented in the light most favorable to the non-movant, there is no genuine issue of fact as to whether plaintiff is entitled to access the audio-disk transcript under OPRA. Plaintiff is not entitled to access the content of the audio-disk transcript under OPRA.

### **Conclusion**

Haste not only makes waste, but can trample citizens' rights. In their apparent need to move quickly to investigate the purported misuse of a City-owned vehicle, two members of the governing body – with no prior notice or approval from the other members of City Council - convened a meeting and directed the issuance of subpoenas, compelling citizens, under penalty of arrest, to appear at a hearing and provide testimony under oath.

Such actions display ignorance not only of the requirements of N.J.S.A. 40:48-25, but also of the need for the respectful and restrained use of subpoenas by government. Issuing a subpoena is serious business; no citizen should be compelled to leave their home and give of their time to answer questions of a government investigation. A more prudent path would have been to request voluntary appearance, and failing compliance, then the required appointment of a committee in accordance with N.J.S.A. 40:48-25, and then, the issuance of a subpoena. At a

minimum, a citizen who has been compelled to give testimony, is under New Jersey common law, together with the right of *enjoying and defending life and liberty* as assured by our State Constitution, entitled to a transcript of the proceedings he was unlawfully ordered to attend.

Accordingly, for the foregoing reasons, plaintiff's motion for summary judgment is GRANTED as a **common law public record**. Defendants' cross-motion for summary judgment is DENIED. An appropriate order has been entered. Conformed copies accompany this Memorandum of Decisions.



NELSON C. JOHNSON, J.S.C.

Date of Decision: 10-22-13

Rec'd  
3/19/14  
m



**SUPERIOR COURT OF NEW JERSEY**

**Nelson C. Johnson, J.S.C.**

Civil Division  
1201 Bacharach Boulevard  
Atlantic City, New Jersey 08401

Telephone: (609) 594-3384  
Facsimile: (609) 343-2214

March 14, 2014

Salvatore J. Siciliano, Esquire  
Siciliano & Associates  
16 South Haddon Avenue  
Haddonfield, New Jersey 08033  
*Attorney for Plaintiff*

Little E. Rau, Esquire  
Ruderman & Glickman  
675 Morris Avenue, Suite 100  
Springfield, New Jersey 07081  
*Attorney for Defendants*

Re: Johnson vs. City of Estell Manor  
Docket No.: ATL-L-7617-12

Dear Counsel:

I am writing to you with reference to the above-captioned matter. You'll find accompanying this letter the Court's Order of today's date, together with a Memorandum of Decision explaining how I arrived at the counsel fees award to Plaintiff.

I trust that this matter is *finally concluded* and that you need nothing more from the Trial Court in order to pursue this matter in the Appellate Division.

It's a pleasure dealing with both of you. Thank you.

Thank you.

Sincerely,

A handwritten signature in cursive script, appearing to read "Nelson C. Johnson".

NELSON C. JOHNSON, J.S.C.

NCJ/sam  
Enclosure

**FILED**

**MAR 14 2014**

NELSON C. JOHNSON, J.S.C.

COURT INITIATED

BRIAN JOHNSON

PLAINTIFF(S)

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION  
ATLANTIC COUNTY  
DOCKET NO. ATL-L-7617-12

VS

**ORDER**

CITY OF ESTELL MANOR

DEFENDANT(S)

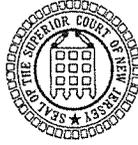
THIS MATTER having come before the Court on multiple occasions, the Plaintiff represented by Salvatore J. Siciliano, Esquire; and the Defendant represented by Littie Rau, Esquire; and the Court having previously entered Orders granting relief to Plaintiff, most recently on February 7, 2014, which Order confirming that Plaintiff is entitled to counsel fees; and the Court having received the submissions of counsel regarding the same; and the Court having prepared a Memorandum of Decision of even date herewith; and for the reasons stated therein;

IT IS ON THIS 14<sup>th</sup> day of MARCH, 2014, ORDERED and ADJUDGED that Judgment shall be an hereby is entered against the Defendant, City of Estell Manor for the sum of \$21,167.92, the same representing reimbursement of counsel fees and costs payable to the Plaintiff, Brian Johnson.

IS FURTHER ORDERED that a copy of this Order shall be served upon all parties within seven (7) days of its receipt.



NELSON C. JOHNSON, J.S.C.



**FILED**

**MAR 14 2014**

NELSON C. JOHNSON, J.S.C.

**SUPERIOR COURT OF NEW JERSEY**

NELSON C. JOHNSON, J.S.C.

1201 Bacharach Boulevard  
Atlantic City, NJ 08401-4527  
(609) 594-3384

**MEMORANDUM OF DECISION ON MOTION**

**Pursuant to Rule 1:6-2(f)**

**TO:** Salvatore J. Siciliano, Esq.  
Siciliano & Associates, LLC  
16 South Haddon Ave.  
Haddonfield, NJ 08033  
*Attorney for Plaintiff, Brian Johnson*

Little Rau, Esq.  
Ruderman & Glickman, P.C.  
675 Morris Ave., Suite 100  
Springfield, NJ 07081  
*Attorney for Defendants, City of Estell Manor and Fern A. Brown*

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**RE:** Johnson v. City of Estell Manor, et al.

**DOCKET NO.** ATL-L-7617-12

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**NATURE OF MOTION(S): Counsel Fees**

**HAVING CAREFULLY REVIEWED THE MOVING PAPERS AND ANY RESPONSE FILED, I HAVE RULED ON THE ABOVE CAPTIONED MOTION(S) AS FOLLOWS:**

This matter comes before the Court on the petition of Salvatore J. Siciliano, Esquire, attorney for the Plaintiff, Brian Johnson, seeking an award of counsel fees. The Defendant, City of Estell Manor is represented by Little Rau, Esquire. Plaintiff's application for counsel fees was submitted pursuant to the Court's Ruling of February 7, 2014. The terms of said Memorandum of Decision enforcing the Court's Order is incorporated herein by reference. The Court is in receipt of Mr. Siciliano's Affidavit of Counsel Fees dated February 18, 2014, together with Ms. Rau's opposition dated February 27, 2014.

**Award to Plaintiff**

The Court has made a thorough review of the billing entries submitted by Plaintiff's counsel together with the objections raised by the defense counsel. The primary aim of any award of counsel fees by the Court is to approve a reasonable attorney's fee that is not excessive. This Court has carefully evaluated both the hours expended and the hourly rates advanced by Plaintiff's counsel in support of this fee application, together with the opposition.

The first step is to determine whether the amount of time billed was reasonably expended by the applying party. The Court is satisfied that the hours indicated by the three attorneys who worked on this file, Salvatore J. Siciliano, Esquire, Mario J. Persiano, Esquire, and H. Matthew Taylor, Esquire, are credible and reasonable. The second step of the Court's calculation is to verify whether the hourly rates charged by Plaintiff's counsel in this litigation are reasonable. Subject to the modifications made as noted hereinafter, the Court is satisfied that the Plaintiff can and will be fairly reimbursed for the counsel fees incurred in bringing this meritorious claim against the City.

In reviewing an attorney's fee application the Court must find it to be reasonable when interpreted under the guidance of the Rules of Professional Conduct. Rule of Professional Conduct § 1.5(a) sets forth the standard governing fee applications. To verify the reasonableness of a fee, courts must address: 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and 8) whether the fee is fixed or contingent. RPC § 1.5(a).

Preliminary to a discussion of the adjustment made to the counsel fees as per Mr. Siciliano's Affidavit and the very detailed invoice dated February 18, 2014, the Court makes the following observations: First, nowhere in the original Verified Complaint does the Plaintiff assert that his rights under Article I, Paragraph 1 of the New Jersey Constitution were violated. Those rights were raised *sua sponte* by the Court. Second, Plaintiff's Complaint does not aver that the Defendant City had issued an unlawful subpoena in violation of N.J.S.A. 40:48-25. Neither in Plaintiff's pleadings nor at oral argument on the original return date of the Order to Show Cause, did Plaintiff's counsel raise the proscriptions of N.J.S.A. 40:48-25. The same were raised *sua sponte* by the Court. That said, the Court does not question that Mr. Siciliano and his law firm did provide valuable services to the Plaintiff and did pursue his rights in a diligent manner, ultimately resulting in an Order directing the City to release the public record of the *ad*

*hoc* Committee meeting to the Plaintiff and ruling that Plaintiff is entitled to counsel fees under the Common Law Right of Access.

When making a careful review of Mr. Siciliano's billing statement of February 18, 2014, the Court is satisfied that all the hours for services performed by his three law clerks and his three paralegals are not compensable. The undersigned practiced law for 31 years prior to becoming a member of the Superior Court. Ordinarily, the charges attributable to law clerks and paralegals are part of a law firm's overhead. It's hard to imagine that Mr. Siciliano compensates his clerks and paralegals on anything other than a salaried basis or possibly for the hours actually worked in the office. And while, no doubt, his clerks and paralegals did work on this file, it's been the undersigned's experience that in private practice, the only time an attorney directly bills a client for work performed by non-licensed professionals, is when there is an express understanding between the attorney and client making it clear that there will be billing entries by non-licensed professionals which the client will be responsible for. Obviously, that's not the situation here.

Accordingly, the charges of Mr. Siciliano's three law clerks and three paralegals totaling \$8,099.94 must be deducted from the award of counsel fees. Additionally, when the Court considers the preliminary matters discussed above, namely, the issues raised *sua sponte* by the Court it is difficult to permit an award of counsel fees at the hourly rates recited. Accordingly, the Court will award counsel fees to Mr. Siciliano based upon an hourly rate of \$225.00; to Mr. Persiano at an hourly rate of \$175.00; and to Mr. Taylor at an hourly rate of \$125.00. When those hourly rates are adjusted and multiplied by the hours shown in the invoice of February 18, 2014, the result is counsel fees to Mr. Siciliano of \$19,131.75; counsel fees to Mr. Persiano of \$595.00; and counsel fees to Mr. Taylor of \$932.50 for a total award of counsel fees to the benefit of the Plaintiff in the amount of \$20,659.25, together with costs of \$508.67 for a total Judgment of \$21,167.92.

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

  
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NELSON C. JOHNSON, J.S.C.

Date of Decision: March 14, 2014