

This tentative disposition of the motion(s) before Judge Ronald E. Bookbinder in Burlington County, New Jersey is based on the papers submitted in the case below. The tentative disposition may not reflect the Judge's final decision, as discussed on the record at oral argument. Pursuant to New Jersey Court Rules, Judge Bookbinder may expand his findings of fact and conclusions of law. No further paper submissions will be permitted.

**ORAL ARGUMENT IS SCHEDULED FOR  
WEDNESDAY, JANUARY 14, 2015, AT 2:00 PM.**

**John Paff v. Hainesport Township and Leo F. Selby, Jr., in his official capacity as  
Municipal Clerk and Records Custodian of Hainesport Township  
Docket No. BUR-L-570-14  
January 14, 2015**

**Application for Attorney's Fees**

**Moving Party**

Walter M. Luers, Esq., Attorney for Plaintiff John Paff

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**Bookbinder, A.J.S.C.**

**Preliminary Statement**

Plaintiff John Paff filed a common law right of access document request on Defendant Hainesport Township (hereinafter the "Township") for the names of all enrollees receiving health insurance from the Township over the past three years, as well as the corresponding type and annual cost of coverage. The Township denied the request. On September 23, 2014, this Court granted Plaintiff's Motion for Summary Judgment on the sole count of Plaintiff's Complaint, and denied Defendants' Cross-Motion for Summary Judgment. The Court ordered Defendants to provide Plaintiff with copies of all requested documents. On or about October 15, 2014, Plaintiff's Attorney filed for attorney's fees.

Pursuant to the unanimous Supreme Court decision written by Chief Justice Stuart Rabner, *Mason v. City of Hoboken*, 196 N.J. 51, 79 (2008), the Court holds that Plaintiff's request for attorney's fees is granted because the catalyst theory applies to common law suits, just as it applies to OPRA matters, absent an apparent, theoretical basis. Defendants fail to show any theoretical basis warranting differential treatment by the Court in determining attorney's fees. In applying the catalyst theory, Plaintiff has shown a factual causal nexus between the litigation and the relief achieved, as well as a basis in the law. *Id.* at 76. Therefore, Plaintiff's Attorney is entitled to attorney's fees.

#### **Statement of Facts and Procedural History**

Paff is a resident of Franklin Township, New Jersey. The Township is a municipality in New Jersey.

On January 11, 2014, Paff submitted an email to the Township requesting the names of all enrollees that received health coverage from the Township between January 1, 2011, and January 11, 2014, as well as the corresponding type of coverage and annual cost to the Township. Paff alleges that his request was motivated by a general interest in preventing official misconduct.

On January 27, 2014, the Township denied Paff's request.

On or about March 11, 2014, Paff filed an action in lieu of prerogative writ.

On or about May 22, 2014, Paff filed a motion for summary judgment.

On or about June 30, 2014, the Township filed a cross-motion for summary judgment.

On or about July 16, 2014, the Court held oral argument and issued a tentative decision in favor of Plaintiff, which was finalized in the September 23, 2014 Order of the Court. The Court

granted summary judgment in favor of Plaintiff, and denied Defendant's cross-motion for summary judgment.

On or about October 15, 2014, Plaintiff's Attorney filed the instant application for a lodestar award of reasonable attorney's fees in the amount of \$4,770 and costs of \$452.92 for services performed before the Court.

### Arguments

#### **I. Plaintiff's Brief in Support of his Application for Attorney Fees**

Plaintiff requests a lodestar award of reasonable attorney's fees of \$4770 and costs of \$452.92 for services performed before this Court. Plaintiff argues that in all cases, an attorney's fee must be reasonable. Plaintiff argues that applications for attorney's fees in fee-shifting cases must address "pertinent" factors, including those set forth in R.P.C. 1.5(a). *Furst v. Einstein Moomjy, inc.*, 182 N.J. 1, 21 (2004). Plaintiff addresses all of the factors in R.P.C. 1.5(a).

Plaintiff argues that his hourly fee for OPRA and common law right of access matters is reasonable at \$300 per hour, and slightly less than what other attorneys who work in the field of OPRA charge. Plaintiff argues that the Court should award compensation on current rates rather than those in effect when the services were performed. *Rendine v. Pantzer*, 141 N.J. 292, 337 (1995). Plaintiff argues that he achieved disclosure of all of the documents sought. Plaintiff also includes his credentials and a detailed description of his experience handling OPRA matters. Plaintiff argues that according to the fee agreement between himself and his attorney, if Plaintiff prevailed in the litigation, Plaintiff would be entitled to seek an attorney's fee award. Plaintiff argues that pursuant to that agreement, Plaintiff's Attorney has not received any counsel fees.

Plaintiff argues that the purpose of fee shifting provisions is to ensure "that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent

counsel in cases involving statutory rights, . . . and to ensure justice for all citizens.” *Coleman v. Fiore Bros.*, 113 N.J. 594, 598 (1989); *Litton Industries, Inc. v. IMO Industries, Inc.*, 200 N.J. 372, 405 (2009). Plaintiff argues that a fee-shifting statute permits deviation from the American Rule that requires each party to bear its own litigation costs. *Best v. C&M Door Controls, Inc.*, 200 N.J. 348, 354 (2009). Plaintiff argues that without the OPRA fee-shifting provision, the ordinary citizen would be waging litigation against a public entity with almost inexhaustible resources. Plaintiff argues that the legislature intended to even the fight by making the custodian of the government record responsible for the payment of counsel fees. *NJDPM v. DOC*, 185 N.J. 137, 153 (2005).

Plaintiff argues that the catalyst theory applies to common law right of access cases. *Mason v. City of Hoboken*, 196 N.J. 51, 79 (2008). “Absent an apparent, theoretical basis for such a distinction, we conclude that the catalyst theory applies to common law suits as well.” *Id.* Plaintiff argues that under OPRA and the common law right of access, requestors are entitled to attorney’s fees when they 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. *Mason*, 196 N.J. at 76.

Plaintiff argues that the Appellate Division interpreted the holding in *Mason* in an unpublished decision entitled *Kahler v. New Jersey State Police*, 2011 WL 208285 (App. Div. Jan. 25, 2011). Mr. Luers argues that the Appellate Division in *Kahler* stated, “[W]e believe the [Supreme] Court’s language was intended to make clear that application of the “catalyst theory” applies to actions brought under either or both OPRA and the common law right of access to public records.” *Id.* at \*6. Plaintiff argues that upon satisfying the two prongs from *Mason*, a plaintiff is entitled to an award of counsel fees under the catalyst theory as a prevailing party. *Id.*

Plaintiff argues that Plaintiff has prevailed because he achieved a court order requiring disclosure of the documents requested. Plaintiff argues that after determining whether Plaintiff is the prevailing party, the next step is for the Court to determine a reasonable fee award. Plaintiff argues that the starting point for determining a reasonable fee is to multiply the hours reasonably expended by a reasonable hourly rate, which is called the "lodestar." *NJDPM v. DOC*, 185 N.J. 137, 153 (2005). Plaintiff argues that if a plaintiff has achieved excellent results, then the attorney should recover a fully compensatory fee. *Silva v. Autos of Amboy, Inc.*, 267 N.J. Super. 546, 556 (App. Div. 1993). Plaintiff argues that "[i]f, after consideration of all the relevant factors, the court concludes that the requestor has obtained a high degree of success, the requestor should recover the full lodestar amount." *NJDPM*, 185 N.J. at 155.

Plaintiff argues that the Court should award him 100% of the hours he expended on the OPRA claim, which was 15.9 hours. Plaintiff argues that the time spent on this case was average and appropriate for a common law right of access case, with two dispositive motions, one court appearance and one motion. Plaintiff argues that in *NJDPM*, the Supreme Court awarded counsel for the plaintiff 100% fee award, even though the plaintiff only gained access to 70% of the records sought. *NJDPM*, 185 N.J. at 147. Plaintiff argues that the disclosure of all records sought represents a high degree of success that justifies an award of 100% of the hours spent.

Plaintiff argues that with respect to the reasonableness of his attorney's hours, his attorney tries to bill conservatively, with the knowledge that his hours will be reviewed by the Court in successful cases. Plaintiff also argues that the Court should assess the experience and skill of the prevailing party's attorneys and compare their rates to the rates prevailing in the community. *Rendine*, 141 N.J. at 337. Plaintiff argues that current rates should be used rather than the rates that were in effect when the legal services were performed. *Id.* Plaintiff argues that

his attorney's hourly rate of \$300 per hour is reasonable considering his concentration and success in OPRA matters. Plaintiff also argues that his attorney's rate is lower than other lawyers who have successfully litigated OPRA cases in Superior Court and the Appellate Division.

In conclusion, Plaintiff asks for \$4,770 in attorney's fees, calculated as follows: 15.9 hours times \$300 per hour. Plaintiff also asks for \$452.92 in Court costs, postage and copying charges.

## **II. Defendants' Brief in Opposition to Plaintiff's Application for Attorney Fees**

Defendants argue that the Court has already ruled against the Plaintiff on the issue of counsel fees by virtue of the Court's Order dated September 23, 2014. Defendants argue that Plaintiff now acts on a motion for reconsideration, which normally would have to be filed within a twenty-day window ending on October 13, 2014. Defendants argue that Plaintiff's motion papers are procedurally out of time, since they are dated October 14, 2014.

Defendants nevertheless respond to the merits of Plaintiff's argument. Defendants argue that New Jersey follows the American Rule, which does not allow counsel fee shifting without a statutory, contract, or court rule supporting the basis. *Rendine v. Pantzer*, 141 N.J. 292 (1995). Defendants argue that had Plaintiff successfully brought an OPRA action before the Government Records Council [*hereinafter* GRC], he would have been entitled to attorney's fees due to the specific statutory allowance. *N.J.S.A. 47:1A-6*. Defendants argue that Plaintiff did not bring a GRC complaint because the GRC had already ruled against the requested relief under strict OPRA rules. Defendants argue that Plaintiff forum-shopped by pursuing a claim at the Superior Court, rather than a GRC action. Defendants argue that the common law action does not sanction any fee-shifting at all. Defendants argue that Plaintiff had knowledge of this when he initiated the action, but chose to pursue it nevertheless.

Defendants argue that Plaintiff's reliance on *Mason* is misplaced. Defendants argue that in *Mason*, the Supreme Court held against the plaintiff, not in favor of plaintiff, on the issue of attorney's fees. Defendants argue that while the Supreme Court related one particular situation where a fee-shifting feature may be applicable for a frivolous defense, that situation is not applicable to the instant case. Defendants argue that in *Mason*, the Supreme Court mentioned that attorney's fees could conceivably apply to a common law claim where the city's disclosure refusal was frivolous. Defendants argue that in *Mason*, Hoboken never announced any rationale for its disclosure refusal, and gave the records to the plaintiff within about one day after plaintiff filed suit, prompting *Mason* to seek counsel fees. Defendants argue that it is implied in *Mason*'s argument that the defendant early recognized the error of its position, but nevertheless persisted in denying a reasonable request until having to be sued. Defendants argue that this is not the instant case.

Defendants argue that here, before the instant suit was filed, the Township gave Plaintiff a formal written opinion accompanying the denial, along with a letter from Township Clerk Leo Selb dated January 27, 2014. Defendants also argue that after Plaintiff filed his Complaint in Superior Court, the Township did not suddenly reverse its opinion, but vehemently continued to deny any obligation to turn over the medical benefit documents. Defendants argue that it filed a formal brief to advise the Court why the Plaintiff was not entitled to the requested documents, relying on federal HIPAA and state laws. Defendants argue that its defense was not frivolous, and that federal HIPAA laws provide for civil and criminal sanctions against the entity disclosing the confidential records under review. Defendants argue that without the Court's September 23, 2014 Order, the Township's record keeper would have been subject to HIPAA sanctions.

Defendants also argue that Plaintiff's reliance on the 2011 unpublished Appellate Division case *Kahler* is misplaced. Defendants argue that because it is unpublished, it has no precedential value. Defendants argue that the Court ruled against the plaintiff, and that the facts of the case dealt with an entirely different type of document in *Kahler*. Defendants argue that *Kahler* adds no more substance to the *Mason* opinion.

Defendants argue that *Kahler* bolsters Hainesport's legal argument. Defendants argue that if a court were to allow fee-shifting in common law access cases, this may unduly motivate custodians to release sensitive information, for the sole purpose of escaping potential civil and criminal liability. Defendants argue that as a matter of public policy, a court should give due deference to a custodian's reasonable sense of propriety. Defendants argue that the trial court in *Kahler* stated, "To penalize defendants who choose to withhold documents under the assumption that they are not proper for public access would motivate custodians to release sensitive information to all requestors in order to escape potential liability, despite possible overriding interests in keeping the information private." *Kahler*, No. A-3790-09T3, at \*4 (citing Judge Feinberg's trial court opinion). Defendants argue that this cautionary language is highly relevant to the instant case.

Defendants argue that Plaintiff's argument is oversimplified and overly broad. Defendants argue that most lawsuits have a winner and loser and that fact should not compel a Court to violate the long-established rules governing fee-shifting. In conclusion, Defendants argue that the Court has not acted in an arbitrary, capricious or unreasonable manner, the standard of review for a motion for reconsideration, and therefore, Plaintiff's application for counsel fees should be denied.



### III. Plaintiff's Reply

Plaintiff replies in response to Defendants' arguments that its application for attorney fees is a Motion for Reconsideration. Plaintiff argues that it is not a Motion for Reconsideration as the Court did not previously consider attorney's fees. Plaintiff argues that the September 23, 2014 Order granted Plaintiff Summary Judgment on the sole count of Plaintiff's complaint and denied Defendants' cross-motion for summary judgment. Plaintiff argues that the issue of attorney's fees was not addressed by the Court in its order, was not raised by the parties in their papers, and was not briefed. Plaintiff argues that motions for attorney's fees cannot be addressed until the substantive issues have been resolved. Plaintiff argues that he is not proceeding pursuant to *Rule 4:49-2*, but rather pursuant to *Rule 4:42-9*.

Plaintiff argues that if the Court were to apply the twenty-day time period, the Court should toll Plaintiff's time to file for eight days, the time period during which Plaintiff and Defendants were engaged in active settlement discussions. Plaintiff argues that even if the Court were not to toll the twenty-day time period, Plaintiff's application was still timely pursuant to *Rule 1:3-3*, which adds 3 days to the period for service of papers made by ordinary mail. Plaintiff also argues that Defendants were notified of Plaintiff's intentions on October 6, 2014 by email, and cannot have suffered any prejudice from an alleged two-day delay in filing.

Plaintiff argues that the GRC lacks jurisdiction over common law right of access claims. Plaintiff argues that he brought a case under the common law right of access, and not OPRA, because the GRC has no jurisdiction over the common law right of access. *Rowan v. Warren Hills Regional School District*, GRC Complaint No. 2011-347 at 3 of the Findings and Recommendations of the Executive Director (Jan. 2013). Plaintiff argues that therefore, any citation to GRC cases is unreasonable.

Plaintiff also argues that Defendants' denial of access was unreasonable. Plaintiff argues that he intentionally sought very specific information about the Township's health benefit plan based on the decision of the Appellate Division in *Michelson v. Wyatt*, 379 N.J. Super. 611 (App. Div. 2005). Plaintiff argues, that as set forth in *Michelson*, the law is settled that under New Jersey's common law right of access, the information requested is public information. Plaintiff argues that the Court agreed, and held that this was a case of *stare decisis*. Plaintiff argues that Defendants were entitled to disagree with the holding in *Michelson*, however, their disagreement was unreasonable given the published Appellate Division case that controlled the outcome.

### Analysis

#### **I. Plaintiff's Application for Attorney's Fees is not a Motion for Reconsideration.**

Defendants argue that the Court has already ruled against the Plaintiff on the issue of counsel fees by virtue of the Court's Order dated September 23, 2014. However, this argument is not meritorious, as the Court had not previously considered attorney's fees in this matter. The September 23, 2014 Order granted Plaintiff's Motion for Summary Judgment on the sole count of Plaintiff's Complaint, and denied Defendants' Cross-Motion for Summary Judgment. The Court ordered Defendant to provide Plaintiff with copies of documents showing the names of all enrollees who are receiving or who have received health coverage from Hainesport from January 1, 2011 to January 11, 2014, the type of coverage elected by each individuals and the cost on an annual basis to the Township for each type of election.

The issue of attorney's fees was not addressed by the Court in its Order, and was not raised by the parties in their briefs. Moreover, neither party objected to ruling on the merits without consideration of attorney's fees. The Court finds that Plaintiff did not apply for

Attorney's fees until the Court received the Certification of Walter M. Luers on or about October 15, 2014.

Defendants argue that Plaintiff's motion papers are procedurally out of time, and had to be filed within a twenty-day window ending on October 13, 2014, for a Motion for Reconsideration. Plaintiff argues that his motion is not a Motion for Reconsideration pursuant to *Rule 4:49-2*, but a motion for attorney's fees pursuant to *Rule 4:42-9*. The Court will address this issue of the timeliness of Plaintiff's application for attorney fees.

The Court finds that Plaintiff made his request for attorney's fees pursuant to *Rule 4:42-9*, Attorney's Fees. However, *Rule 4:42-9(d)* states, "An allowance of fees made on the determination of a matter shall be included in the judgment or order stating the determination." This rule has been construed to require the application to be made either before entry of the final judgment or within the time prescribed by *Rule 4:49-2* for a motion to alter or amend the judgment. Pressler & Verniero, *Current N.J. Court Rules*, comment 5 on R. 4:42-9 (2015); *Czura v. Siegal*, 296 N.J. Super. 187 (App. Div. 1997); *Franklin Med. v. Newark Pub. Sch.*, 362 N.J. Super. 494, 516-517 (App. Div. 2003). The time period prescribed by *Rule 4:49-2* requires the motion be "served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it" (*emphasis added*).

Plaintiff was served with the Court's Order on September 23, 2014 via first-class mail. *Rule 1:3-3* states that "[w]hen service of a notice or paper is made by ordinary mail, and a rule or court order allows the party served a period of time after the service thereof within which to take some action, 3 days shall be added to the period." Therefore, three days shall be added to the twenty-day period prescribed by *Rule 4:49-2* in which Plaintiff had to serve his Motion for Attorney's fees. Twenty-three days from September 23, 2014 was October 16, 2014. As

Defendants aver they received the motion papers on October 14, 2014, and the Court received them on October 15, 2014, either date is within the time period required by *Rule 4:42-9* (Attorney's Fees), *Rule 4:49-2* (Motion to Alter or Amend a Judgment or Order), and *Rule 1:3-3* (Additional Time After Service by Ordinary Mail), taken together. Therefore, the Court finds that Plaintiff filed for attorney's fees properly pursuant to *Rule 4:42-9*.

## **II. The Catalyst Theory Applies to Common Law Right of Access Cases.**

Plaintiff argues that the catalyst theory applies to common law right of access cases. *Mason v. City of Hoboken*, 196 N.J. 51, 79 (2008). The Supreme Court of New Jersey stated, "Absent an apparent, theoretical basis for such a distinction, *we conclude* that the catalyst theory applies to common law suits as well." *Id.* (*emphasis added*). This Court is bound by the Supreme Court precedent established in *Mason*. Unless Defendants establish a "theoretical basis for such a distinction," the catalyst theory applies to common law cases, the same as it applies to OPRA matters.

Defendants argue that *Mason* is distinguishable from the instant matter. Defendants argue that in *Mason*, the Supreme Court mentioned that attorney's fees could conceivably apply to a common law claim where the city's disclosure refusal was frivolous. Defendants further argue that in *Mason*, Hoboken never announced any rationale for its disclosure refusal, while in the instant matter Defendants relied on federal HIPAA and state laws as the rationale behind denying the requested documents. The Court will address each of these arguments in turn.

### **a. Discussion of *Mason***

In *Mason*, the appeal involved two separate lawsuits filed by plaintiff Elizabeth Mason consolidated by the Appellate Division requesting public documents under OPRA and the common law right of access. *Mason*, 196 N.J. at 58. In the first lawsuit, Plaintiff sought

Hoboken's general ledgers for fiscal years 2003 and 2004. *Id.* On March 4, 2004, Mason filed a verified complaint seeking access to the ledgers under ORPA and the common law. *Id.* The next day during a telephone conference with the parties held by the Court, Hoboken advised Mason that copies of the requested records were available to be picked up. *Id.* at 59. Mason retrieved the documents a few days later. *Id.* Mason raised the issue of attorney's fees for the first time the following year, asserting that she was entitled to attorney's fees as a prevailing party under OPRA. *Id.* Both the trial court denied her request, and the Appellate Division affirmed. *Id.*

In the second lawsuit, Mason sought Hoboken's "Introductory Budget (in paper format and electronic format)." *Id.* at 59. Hoboken officials provided Mason with a paper copy within an hour of the request, and advised her that the budget would be available on the Internet at a future time. *Id.* Mason filed a complaint on September 27, 2004 alleging that the failure to supply her with the budget in electronic form denied her access to records. *Id.* Approximately three weeks later, Hoboken's defense counsel advised Mason's counsel that the requested information was available on the Internet and could be downloaded. *Id.* Counts 29 and 30 involved Mason's request to review all OPRA requests for 2002-2004, which Hoboken responded to two days later, and the parties arranged for Mason to review the OPRA requests. *Id.* at 60. Counts 1 through 26 related to other OPRA requests that Mason alleges were not produced timely. *Id.* The trial court denied Mason's request for attorney's fees, and the Appellate Division affirmed. *Id.*

The New Jersey Supreme Court applied the catalyst theory of attorney's fees to Mason's OPRA and common law actions. *Id.* at 76. The Court held that to establish a right to attorney's fees under the catalyst theory, "(1) there must be a factual causal nexus between plaintiff's litigation and the relief ultimately achieved; . . . and (2) it must be shown that the relief ultimately secured by plaintiffs had a basis in law." *Id.* at 73 (internal quotations and citations

omitted). The Court advised that trial courts are to conduct a "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." *Id.* at 79. The burden of proof lies on the requestor unless the defendant failed to respond to the OPRA request within seven days, as required by statute. *Id.* at 57. As previously mentioned, the Court also held that the catalyst theory applies to common law suits as well. *Id.* at 79.

With these rules established, the Court held that Mason was not entitled to attorney's fees in either lawsuit *Id.* The Court explained that in the first lawsuit, Hoboken responded to Mason's request one day beyond the statutory limit, and therefore, the burden was on Hoboken to prove that Mason's lawsuit was not the catalyst behind the City's voluntary disclosure. *Id.* The Court found that based on the record, Hoboken carried their burden of proving that Mason's lawsuit was not the catalyst for their release of records. *Id.* at 80. In the second lawsuit, Hoboken agreed to Mason's request before she even filed suit, and therefore, the Court found that she was not entitled to fees under the catalyst theory. *Id.* at 81.

With the facts of *Mason* set forth, this Court will address Defendants' argument that in *Mason*, the Supreme Court held that attorney's fees could conceivably apply to a common law claim where the city's disclosure refusal was frivolous. This argument is without merit as the *Mason* Court used no such language to qualify its holding. The Court stated, "Absent an apparent, theoretical basis for such a distinction, we conclude that the catalyst theory applies to common law suits as well." *Mason*, 196 *N.J.* at 79. There is no mention that the catalyst theory only applies if the denial of records is frivolous.

Defendants further argue that in *Mason*, Hoboken never announced any rationale for its disclosure refusal, while in the instant matter Defendants relied on federal HIPAA and state laws

as the rationale behind denying the requested documents. However, this is an inaccurate reading of the facts in *Mason*. The *Mason* Court did not analyze whether Hoboken's disclosure refusal was frivolous in determining whether Mason should be awarded attorney fees. *Id.* at 79-81. The Court applied the catalyst theory to determine whether Mason's filing of the lawsuit caused the relief ultimately achieved. *Id.* at 81. In OPRA cases, the focus is on whether plaintiffs can prove that their lawsuits caused the disclosure of public documents that should be accessible to citizens under the law. *Id.* at 76.

As to the award of attorney's fees under the common law, and whether the catalyst theory applies, the Court must determine whether there is a "theoretical basis" for making such a distinction. *Mason*, 51 *N.J.* at 79. Defendants' argument that they relied on federal HIPAA and state laws as the rationale behind denying the requested documents goes to this question. Both Plaintiff and Defendants cited an unpublished Appellate Division case, *Kahler v. N.J. State Police*, No. A-3790-09T3 (App. Div. Jan. 25, 2011), to support their respective positions. However, as set forth in *R. 1:36-3*, an unpublished opinion shall not constitute precedent or be binding on any court. The parties may bring unpublished opinions to the attention of the court, but "the court may not cite an unpublished opinion except to the limited extent required by the preclusionary legal principles or case history." Pressler & Verniero, *Current N.J. Court Rules*, comment 2 on *R. 1:36-3* (2015).

The Court will briefly discuss *Kahler* in reference to the parties' arguments, however, recognizing that *Kahler* has no precedential or binding authority on any court. The Plaintiff, Louis Kahler, filed a request for criminal investigatory records maintained by defendant, the New Jersey State Police, in connection with the death of her daughter. *Kahler v. N.J. State Police*, No. A-3790-09T3 (App. Div. Jan. 25, 2011) (slip op. at 1). The trial court held that

Kahler was entitled to the documents under the common law right of access to public records, and Kahler then requested counsel fees as a prevailing party, which she was denied by the trial court. *Id.* at \*3.

On Appeal, the Appellate Division, in interpreting *Mason*, held that “the ‘catalyst theory’ applies to actions brought under either or both OPRA and the common law right of access to public records . . . .” *Id.* at \*6. The Court went on to explain that in the case before it, there was, however, and “apparent, theoretical basis,” “for not applying the catalyst theory to a request for criminal investigative records submitted to the [New Jersey State Police].” *Id.* Executive Order # 48 Governor Richard J. Hughes prohibits the New Jersey State police from disclosing these records absent a court order or an order of the Governor. *Id.* at \*6-7. Therefore, the Court reasoned, a plaintiff seeking such records from the New Jersey State Police must turn to the courts for relief in order to gain access to the records. *Id.* at \*7. The Court stated, “We do not believe that adherence to this process should then form the basis for an award of counsel fees to the successful plaintiff unless the court finds the [New Jersey State Police’s] interest in non-disclosure was ‘slight’ or ‘non-existent.’” *Id.* at \*8.

In the instant matter, this Court must decide whether Defendants’ reliance on federal HIPAA and state laws as the rationale behind denying the requested documents constitutes a “theoretical basis” for distinction under *Mason*. 196 *N.J.* at 79. The Court holds that Defendants’ reliance on HIPAA in denying the requested documents was unreasonable, and does not constitute a theoretical basis for distinction given the binding precedent of *Michelson v. Wyatt*, 379 *N.J. Super.* 611 (App. Div. 2005).

In this Court’s July 16, 2014 decision, made final in the September 23, 2014 Order, the Court found that it was bound by the appellate court precedent established in an opinion by



Judge Mary Catherine Cuff, *Michelson v. Wyatt*, 379 N.J. Super. 611 (App. Div. 2005). In *Michelson, supra*, 379 N.J. Super. at 615, the appellate division held that under the common law right of access, plaintiff William H. Michelson could compel the town that he lived in to produce the names and corresponding type of health insurance coverage for all employees receiving health insurance in the town. Production under state common law is bound by HIPAA to the same extent as state statutes such as the Open Public Records Act. 45 CFR 160.202. Therefore the court's ruling in *Michelson* necessarily relied upon a finding that HIPAA did not protect the requested information. The Court held that because this Court is bound by the Appellate Division precedent set in *Michelson*, and as *Michelson* necessarily relies upon a finding that the names and types of coverage elected by public employees is not protected by HIPAA, Paff's request was not preempted by HIPAA.

In this case there was no requirement of a court order for the release of the requested documents. Instead, there is a published Appellate Division case that directly goes to the facts in the instant case. *Michelson* dictated the result here: release of public documents showing the names of all enrollees receiving health coverage from Hainesport from January 1, 2011 to January 11, 2014, the type of coverage elected by each, and the cost on an annual basis to the Township for each type of election. Therefore, Defendants fail to show any theoretical basis for distinguishing the instant matter from an OPRA case.

**III. Plaintiff is entitled to reasonable attorney fees under the *Mason* two-prong test.**

In *Mason, supra*, 196 N.J. at 73, the New Jersey Supreme Court applied the catalyst theory of attorney's fees to OPRA and common law actions. The Court held that to establish a right to attorney's fees under the catalyst theory, "(1) there must be a factual causal nexus

between plaintiff's litigation and the relief ultimately achieved; . . . and (2) it must be shown that the relief ultimately secured by plaintiffs had a basis in law." *Mason, supra*, 196 N.J. at 73 (internal quotations and citations omitted). The burden of proof lies on the requestor unless the defendant failed to respond to the OPRA request within seven days, as required by statute. *Id.* at 57.

#### A. Causal Nexus

The finding of a causal nexus is a fact sensitive inquiry. *Id.* at 79. In *Mason*, the Court indicated that trial courts are to conduct a "fact-sensitive inquiry on a case-by-case basis." *Id.* The initial burden rests on the movant. However, "[w]hen . . . the extent and timing of the interim relief obtained by [the movant] strongly suggests a causal link between the litigation and the actions taken by [the opponent], the burden shifts to [the opponent], to show that [the movant's] suit was not a catalyst for the actions taken." *Jones v. Hayman*, 418 N.J. Super. 291, 306 (App.Div. 2011). The opponent must then produce "evidence showing that the actions taken were wholly independent of plaintiffs' legal efforts." *Id.* Certifications alone may be insufficient to meet this burden, and if the opponent relies solely upon certifications then the movant must be provided with the opportunity to challenge the credibility of those certifications. *Id.*

The custodian must report if the record is in storage or archived within seven business days. *N.J.S.A.* 47:1A-5(i). Failure to respond within seven business days is deemed a denial of the request. *Id.* In the instant case, Paff submitted an email to the Township requesting the documents on January 11, 2014. On January 27, 2014, the township denied Paff's request, ten business days later, or three days beyond the statutory limit. *N.J.S.A.* 47:1A-5(i); *Mason*, 196 N.J. at 79. Therefore, the burden shifts to Defendants to prove that Plaintiff's lawsuit, filed on March 11, 2014, was not the catalyst behind the disclosure of the requested documents.

Defendants argue in their brief that after Plaintiff filed its Complaint in Superior Court, Hainesport did not suddenly reverse its opinion, but vehemently continued to deny any obligation to turn over the medical benefit documents. It was the Court order dated September 23, 2014, that caused Defendants to disclose the requested documents. Therefore, it is quite clear that there is a direct factual causal nexus between Plaintiff's litigation and the relief ultimately achieved in conducting a fact-sensitive inquiry.

***B. Basis in Law***

Plaintiff must also demonstrate that the relief ultimately secured had a basis in law.

*Mason, supra*, 196 N.J. at 73.

In determining whether there is a 'basis in law' for any relief secured by plaintiffs for purposes of awarding attorneys' fees under the catalyst theory, a court must consider plaintiffs' success in obtaining interim relief, as well as in defending against defendants' efforts for summary disposition of the litigation as a matter of law. Especially relevant to this analysis is the magnitude or degree of plaintiffs' success as compared to obtaining a complete and final judgment on the merits.

[*Jones v. Hayman*, 418 N.J. Super. 291, 307-308 (App.Div. 2011)].

Here, as previously discussed, Plaintiff achieved the disclosure of all the documents sought in an Order issued by this Court, dated September 23, 2014. This complete and final judgment on the merits has a direct basis in law. See *Michelson v. Wyatt*, 379 N.J. Super. 611 (2005). This published, Appellate Division case dictated the result in the underlying matter. As Defendant's denial was improper, the subsequent production of the specific responsive documents had a basis in law.

***C. Determination of a Reasonable Attorney Fee***

The starting point for determining a reasonable fee is to multiply the hours reasonably expended by a reasonable hourly rate to calculate the "lodestar." *New Jerseyans for a Death Penalty Moratorium*, 185 N.J. 137, 153 (2005); *Rendine*, 141 N.J. at 324 (quoting *Hensley v.*

*Eckerhart*, 461 U.S. 424, 433 (1983)). Since "the critical factor is the degree of success obtained," *Silva*, 267 N.J. Super. at 556, "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee," *Hensley*, 461 U.S. at 435; *New Jerseyans for a Death Penalty Moratorium*, 185 N.J. at 154. In *New Jerseyans for a Death Penalty Moratorium*, the Supreme Court awarded a 100% fee award, even though the plaintiff only gained access to 70% of the records it sought. 185 N.J. at 147. With this precedent established, this Court holds that Plaintiff's Attorney should recover 100% of the hours expended on the common law right of access claim, as Plaintiff recovered all of the records sought. Plaintiff's attorney avers that he spent 15.9 hours working on the instant matter, itemized and billed to the nearest tenth of an hour. [Pl.'s Ex. 2]. These hours spent included preparation and argument for two dispositive motions, one court appearance, and one motion. [Pl.'s Ex. 2]. The Court finds the time spent reasonable for a common law right of access matter that involved several motions, and a court appearance.

Plaintiff's attorney charges an hourly rate of \$300, which this also Court finds reasonable in light of Mr. Luers' years of experience, education, and training. The total hours, 15.9, multiplied by the hourly rate of \$300, equals a total fee of \$4,770. Plaintiff's attorney also requests costs of \$452.92 for filing fees, postage and delivery, printing and copying, and scanning. Plaintiff's attorney is not requesting a contingency enhancement in this case. This Court awards \$4,770 in attorney's fees, and \$359.92 in costs, which does not include printing and copying, or scanning costs.

Plaintiff has established: (1) a causal nexus between the instant litigation and the production of the specific responsive documents, and (2) that Plaintiff was entitled to

production of the specific responsive documents produced. Plaintiff has therefore met its burden, and is entitled to attorney's fees. Plaintiff's motion is granted.

**Disposition**

Plaintiff's motion for attorney fees is **GRANTED** in the amount of \$4,770 in attorney's fees, and \$359.92 in costs.