



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

JEFF CARTER,
Petitioner,
v.

OAL DKT. NO. GRC 5741-13
AGENCY DKT. NO. 2011-76

FRANKLIN FIRE DISTRICT NO. 1
(SOMERSET),
Respondent.

And

JEFF CARTER,
Petitioner,
v.

OAL DKT. NO. GRC 6038-13
AGENCY DKT. NO. 2011-73

FRANKLIN FIRE DISTRICT NO. 1
(SOMERSET),
Respondent.

CONSOLIDATED

Walter M. Luers, Esq., for petitioner Jeff Carter (Law Office of Walter M. Luers, attorneys)

Dominic P. DiYanni, Esq., for respondent Franklin Fire District No. 1 (Eric M. Bernstein & Associates, attorneys)

Record Closed: December 19, 2014

Decided: April 23, 2015

BEFORE **SUSAN M. SCAROLA, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

GRC 5741-13

On April 23, 2013, the Government Records Council (GRC) transmitted a Denial of Access Complaint under the New Jersey Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 et seq., to the Office of Administrative Law (OAL) for a hearing to determine two issues: first, whether the original custodian knowingly and willfully violated OPRA and unreasonably denied access to financial disclosure statements (FDS forms) for all Franklin Fire District No. 1 (FFD) commissioners in office from 2000 through to the present under the totality of the circumstances; and second, the determination of an award of reasonable attorney's fees because the GRC had determined the petitioner to be a prevailing party because "a factual causal nexus exists between the [petitioner's] filing of a Denial of Access Complaint and the relief ultimately achieved."

On April 25, 2013, the matter was filed under OAL Docket Number **GRC 5741-13**. This matter and the complaint filed under GRC 6038-13 were consolidated for hearing by Order entered on September 27, 2013.¹

This matter was heard on October 20, 2014, and the record remained open to December 19, 2014, for the receipt of briefs, at which time the record closed.²

On December 5, 2014, petitioner submitted a brief and attorney's certification on the issue of counsel fees.

GRC 6038-13

On April 29, 2013, the GRC transmitted a second Denial of Access Complaint under OPRA to the OAL for a hearing to determine whether the custodian lawfully

¹ As a result of the settlement in GRC 6038-13 (see below), this initial decision relates solely to GRC 5741-13.

² An extension of time was granted for the filing of this decision.

denied access to certain requested documents, including all legal appointments, contracts, and professional-services agreements for services provided by Cooper & Cooper, as well as payment vouchers and invoices for 2008, 2009, 2010, and 2011; whether the original custodian's actions rose to a level of a knowing and willful violation of OPRA; and whether the complainant was a prevailing party subject to an award of reasonable counsel fees.

The matter was filed on May 1, 2013, under OAL Docket Number **GRC 6038-13**, and was consolidated for hearing with GRC 5741-13 by Order entered on September 27, 2013. However, on June 30, 2014, counsel advised that the parties had negotiated a settlement in GRC 6038-13. By letter dated October 27, 2014, the petitioner withdrew this complaint. No further action is required in this matter and this file shall be returned to the GRC.

FACTUAL DISCUSSION

Many of the facts in this matter are not in dispute and, accordingly, I **FIND**:

1. On January 1, 2011, the petitioner submitted a written OPRA request to the FFD for "Copies of the annual Financial Disclosure Statements for all Commissioners in office from 2000 through present."
2. On January 21, 2011, Deborah Nelson acknowledged receipt of the request and indicated that she would forward the request to Melissa Kosensky, a fire commissioner serving out an unexpired term of office, who was the records custodian.
3. On February 10, 2011, William T. Cooper, Esq., counsel for the FFD, advised the petitioner that the FFD did not maintain these documents as its records, as public officials must file directly with the municipal clerk, and that Carter should direct his request to the township municipal clerk, as the FFD did not have the records petitioner was requesting.

4. On April 4, 2011, the petitioner filed a Denial of Access Complaint with the GRC.

5. On June 9, 2011, Kosensky filed a Statement of Information (SOI) with the GRC. She said in her statement that she was out of state for training between January 21 and January 27, 2011, and had received twenty OPRA requests from January 10 through January 21, 2011, of which eighteen were from the petitioner. She indicated that the petitioner's request was forwarded to counsel to obtain a legal opinion regarding disclosure of the requested documents, and that counsel responded on February 10, 2011. Kosensky felt that these were exceptional circumstances, in that she had been away for five of the thirteen business days it took her to fulfill the request; that she had reached out to counsel to find out the entity that was responsible for keeping such records, as the FFD had no obligation to maintain the FDS forms; that she relied on the advice of counsel when she referred the request to him; that the position of fire commissioner was unpaid; and that as custodian, she had to find the records on her own time.

6. On July 7, 2011, the petitioner responded that Kosensky was not forthright in her response: that the conference she attended out of state was shorter than the number of days she had reported; that she failed to disclose that four of the requested FDS forms were in fact contained in the FFD's files; and that she received a \$5,000 stipend as a fire commissioner.

7. On August 19, 2011, Kosensky's counsel objected to the July 7, 2011, submission of the petitioner.

8. On June 19, 2012, the executive director of the GRC made Findings and Recommendations.

9. On June 26, 2012, the GRC issued an Interim Order finding that the custodian did not timely respond to the petitioner's OPRA request, resulting in a "deemed" denial of the OPRA request.

10. On August 28, 2012, the GRC issued an Interim Order with the following findings: one, the current custodian timely complied with the June 26, 2012, Interim Order by providing access to the requested records; two, because the original custodian had received the responsive records on January 25, 2011, and subsequently certified that no responsive records existed, that the custodian's actions were intentional and deliberate with knowledge of their wrongfulness, and therefore the matter should be referred to the OAL for determination of whether the original custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances; and three, because a factual causal nexus existed between the filing of the Denial of Access Complaint and the relief ultimately achieved, the complainant is a prevailing party entitled to an award of reasonable counsel fees without an enhancement of the lodestar fee because there were no unusual circumstances justifying an upward adjustment, the matter was not one of significant public importance, the matter was not an issue of first impression, and the risk of failure was not high because the issues involved matters of settled law.

TESTIMONY

Dr. Jeff Carter is a resident within the district and was an elected commissioner of FFD from 1987 to 1997. He retired after twenty-five years as a police officer. He holds a bachelor's degree in sociology, a master's degree in leadership and public administration, and a doctorate in business administration.

On January 21, 2011, Carter requested copies of all FDS forms for the fire commissioners from the year 2000 to the present, which he believed the FFD had the responsibility of maintaining. If a public agency has the record, it is required to disclose it, and whether the FFD was required to keep these records is irrelevant. It was Carter's belief when he made his request on January 21, 2011, that the FFD was the public agency responsible for maintaining those records.

In January 2011 the fire district had four elected commissioners; the fifth commissioner was not included in the request because he had resigned. Carter was looking for the 2010 FDSs, but it was too early in 2011 for them to be available yet.

Carter's specific request was for the FDSs of the five elected commissioners each year from 2000 through January 21, 2011. The statements are filed in the spring, so those due for 2011 would not have yet been filed. The total was eleven years of statements; approximately fifty-five commissioners' financial statements would be the expected response. The custodian of records was Melissa Kosensky, a fire commissioner who was running for election that year.

On February 10, 2011, Carter received an email from attorney Cooper which said that the FFD did not have the records and that Carter should file directly with Franklin Township (township). Cooper said the FFD "does not have the records you are requesting," and cited a statute. Carter reviewed the law and determined that the FDS forms were maintained by the township municipal clerk. Carter thought Cooper's response meant the FFD had no responsive records. He did not know if this response encompassed all his requests. The FFD gave him the proper statutory citation and told him where to file to get the records, although the FFD did not tell him where to submit his request.

As the matter went forward, Carter had been hearing comments about what was happening behind the scenes, which formed the basis of his July 2011 certification certified on August 14, 2012, with the GRC. Although Kosensky had lost the election in February 2012, Carter formed the opinion that she had knowledge of the records he was seeking.

Carter then filed a second OPRA request, for emails between Kosensky and Deborah Nelson, an employee of the FFD. Nelson is Carter's sister. He received a copy of an email between Kosensky and Nelson that indicated that four of the FDSs he was seeking from 2007 existed. Carter also wanted other communications between Cooper and Kosensky, because he believed that even more nefarious conduct was occurring.

Carter found that Kosensky sent an email to the attorney, Cooper, on or about January 27, 2011, stating that the FFD did have four FDSs on file for 2007, and attaching the PDF statements. But no one sent these PDF statements to Carter.

On February 10, 2011, Cooper sent an email to Carter stating that the FFD did not have the records he requested. This is what prompted his June 2011 complaint to the GRC—the fact that he was denied access to the records by not receiving a response within fourteen days of his request.

Carter could not think of any factual reason why the FFD did not give him the FDS forms it had from 2007, as he was able to get all the documents he sought from the Franklin Township clerk after he made his request to that agency.

Carter knew, as a fire commissioner, that it was not true when Kosensky claimed she was out of state when he made his request for the records. He did know that there had been an increase in OPRA requests and that the FFD was defending against a sexual-harassment suit filed by Nelson. When the GRC issued its interim order on June 14, 2014, the FFD complied with it.

Deborah Nelson -- Stipulation of the Parties

The parties stipulated the following:

Nelson is the administrative aide for the FFD. She received Carter's OPRA request and forwarded it to Kosensky. On January 21, 2011, Kosensky asked Nelson to pull the records on file and send them in PDF form to her by year. On January 25, 2011, Nelson emailed to Kosensky an attachment containing the FDS forms that were on file. These were the same documents produced on July 2, 2012, in response to the GRC's interim order.

Deborah Nelson testified that she was the FFD aide from 2000 to 2010. It was part of her job to forward the original FDS forms to the township clerk if she received

them from the elected commissioners. However, she did not receive any FDS for any year other than 2007.

In 2011, William Cooper was the FFD attorney. Nelson spoke with him about the ORPA requests from Carter, and sent them to Kosensky. Cooper called Nelson and asked her to explain the procedure to him. She said that if a commissioner gave her a copy of the FDS form, she would put it in the file, and then she would then send the original to the township clerk.

Nelson knew that Cooper had copies of what she sent to Kosensky because he received them from Kosensky. Cooper did not explain why these documents should not be disclosed to Carter. Nelson saw Cooper's email saying these records did not exist, and they discussed this on the telephone. She had not been copied on the email.

Melissa Kosensky testified that she was a fire commissioner from March 2010 to February 2011 as she completed a one-year unexpired term. A full term for a fire commissioner is three years; elections are held in February; and the reorganization of the FFD is in March. The records custodian was always selected from among the elected commissioners. During her one-year term, Kosensky served as records custodian. She received a stipend of \$5,000 per year as a commissioner but received no additional stipend as records custodian. The FFD had one full-time employee, Deborah Nelson, who served as an aide.

Kosensky received Carter's OPRA request from Nelson on January 21, 2011, and acknowledged it. She sent it back to Nelson asking if there were any documents on file. Kosensky received four of the requested FDS forms from Nelson and then forwarded them to Cooper. Kosensky did not recall the exact discussion she had with the attorney, except that Cooper said he would respond to Carter on behalf of the FFD. She thought that she was being responsive to Carter by acting through Cooper.

Kosensky was copied on Cooper's response on February 10, 2011. She thought the district had responded to Carter's OPRA request and that the request had been handled appropriately and was closed. They were getting a lot of OPRA requests

around that time. She thought Cooper's response was good, because the petitioner could get all that he was seeking from the township clerk, since the FDSs were filed with that official and not with the FFD itself.

Kosensky did not think that she was doing something wrong by not providing the four FDSs from 2007. She would rather that Carter got all the records he was seeking from one source. She did not feel that she was intentionally withholding records. When the FFD provided its response through Cooper, she thought the inquiry was over. It was not until the GRC complaint was filed that she learned the inquiry was not concluded.

Kosensky recalled signing a Statement of Information (SOI), and that she had certified it was true. In the SOI, Kosensky did not disclose that the FFD had four of the requested FDSs from 2007.

Kosensky did not recall any discussions with Carter other than the January 27, 2011, email. She was not sure if additional communications were sent by email and she could not access her back emails. But she and Cooper spoke on the phone and Cooper agreed to handle the OPRA request from Carter.

Once Nelson identified the 2007 FDSs, Kosensky did not send them directly to Carter, but did send them to Cooper because of possible redactions, and because these documents were only a partial response to Carter's request. In addition, she was traveling, and Cooper had said he was taking care of it. She had referred most of Carter's OPRA requests (anything that had to do with money or third parties) to the attorney. She could not say for certain that she saw and read Cooper's response to the request, but agreed that she must have seen it at some point and thought the reply was appropriate.

Carter wanted fifty-five to sixty FDS forms, and she had only four dating back to 2007. She knew that the FFD was not the agency responsible for keeping these records. On an annual basis, Nelson made copies of the commissioners' FDS forms and forwarded them to the township clerk's office, where they were officially filed.

Kosensky relied on Nelson to handle most of the OPRA requests, as Nelson handled the office on a day-to-day basis. Kosensky still would have forwarded the responses to the attorney, because she relied on him for legal expertise.

Kosensky did not knowingly and willfully keep the records from Carter. She agreed that the FDS forms that were in the FFD's file should have been given to Carter when he requested them in January 2011. She should have told him that they had these four records and the records should have been given to him right away. She did not tell Carter that they had any of these records. Cooper did not tell Carter that they had any of the records. Cooper said they did not have anyone's FDSs, even though he was aware that they had four of the requested documents, which dated back to 2007. Kosensky did not respond to Cooper's email after he sent it to Carter.

Kosensky was not elected to a full term in 2011. Kosensky had received no specific training in OPRA requests. Prior to this complaint, she was not aware that the GRC offered training or counsel in this area. She had taken no courses on OPRA, but had read the statute. The GRC should have been told that four of the requested documents from 2007 were located in the FFD's files. Kosensky should have advised the GRC that she was unpaid to be the custodian of records, but did receive a stipend as a fire commissioner. Kosensky was aware that Nelson had filed two lawsuits against the FFD.

FINDINGS

On January 21, 2011, Kosensky received an OPRA request from Carter for all the FDSs for fire commissioners from 2000 to 2011. She asked Nelson about this information and Nelson responded to her that the FFD had four such statements dating to 2007. It was not the responsibility of the FFD to maintain these records, as they were kept by the township clerk in accordance with the statute. Carter was not aware of this law, and had assumed that the FFD maintained these records. Kosensky then immediately left for a conference and was unavailable until January 27, 2011. At that time, Kosensky forwarded the information she had about the four statements to her counsel, Cooper, who responded to Carter on Kosensky's behalf on February 11, 2011.

Cooper indicated that there were no FDS records maintained within the FFD. Because of the delay in the response, this was deemed a denial of access.

Carter later ascertained that four FDSs from 2007 had been located within the FFD's files which had not been provided to him after his request. Carter was able to obtain the approximately fifty-five to sixty records he was seeking from the township clerk, but he only received the four FDSs maintained in the FFD after the GRC issued its First Interim Order in June 2012.

After having the opportunity to listen to the testimony and review the documents, I accept the testimony of Kosensky as credible. She received the OPRA request on January 21, 2011, and promptly asked Nelson for the information. Nelson provided this information, namely, four FDSs out of the fifty-five to sixty requested, to Kosensky by January 27, 2011, after she returned to the FFD from a conference. Kosensky then forwarded this information to the FFD's counsel, Cooper, and relied upon him to handle the response to the request. Cooper, however, did not provide the documents sent by Kosensky to him, but rather, indicated to Carter that no such documents existed within the FFD, and that he should seek the documents from the agency responsible for maintaining them. Kosensky should have advised the GRC that these records existed and that she failed to provide them to the petitioner; however, she did provide them to the attorney, who assumed the responsibility of responding for Kosensky and releasing the records to the petitioner, but failed to do so.

I also **FIND** that there were extenuating circumstances that caused the delay in the response to the petitioner's OPRA request, including Kosensky's attendance at a conference for several days immediately after the request was made; the number of OPRA requests she received within the ten-day period preceding this OPRA request; the reliance she placed upon counsel to respond directly to the petitioner; and Kosensky's lack of any training and experience in handling OPRA requests, particularly when the records requested were not required to be maintained by the FFD.

LEGAL ANALYSIS AND CONCLUSION

The issues presented in this matter are, first, whether the original custodian (Kosensky) knowingly and willfully violated OPRA and unreasonably denied access to financial disclosure statements for all Franklin Fire District No. 1 commissioners in office from 2000 through to the present under the totality of the circumstances; and, second, the determination of reasonable attorney's fees because the GRC has determined that the petitioner is a prevailing party because "a factual causal nexus exists between the [petitioner's] filing of a Denial of Access Complaint and the relief ultimately achieved."

The Open Public Records Act (Act), N.J.S.A. 47:1A-1 et seq., known as "OPRA," provides that it is the public policy in this state that government records shall be readily accessible for inspection, copying, or examination, with certain exceptions for the protection of the public. N.J.S.A. 47:1A-1. Or, as the New Jersey Supreme Court succinctly stated in Mason v. Hoboken, 196 N.J. 51, 65 (2008), "OPRA calls for the prompt disclosure of government records." N.J.S.A. 47:1A-1.1 defines "Government record" or "record" as

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.

To this end, custodians of government records must grant access to them or deny a request for them as soon as possible, but no later than seven business days after receiving the request, provided that the records are available and not in storage or archived. N.J.S.A. 47:1A-5(i). Failure to respond shall be deemed a denial. Ibid. If the

records are in storage or archived, then the custodian must advise the requestor within those seven days when they will be made available. Ibid. Failure to make them available by that time shall also be deemed a denial. Ibid.

Consequently, a person who is denied access to public records may file a complaint in the Superior Court or with the GRC. N.J.S.A. 47:1A-6. Moreover, a custodian who is found to have knowingly and willfully violated the Act, and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty. N.J.S.A. 47:1A-11. N.J.S.A. 47:1A-11(a) provides:

A public official, officer, employee or custodian who knowingly and willfully violates P.L.1963, c.73 (C.47:1A-1 et seq.), as amended and supplemented, and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty of \$1,000 for an initial violation, \$2,500 for a second violation that occurs within 10 years of an initial violation, and \$5,000 for a third violation that occurs within 10 years of an initial violation. This penalty shall be collected and enforced in proceedings in accordance with the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.), and the rules of court governing actions for the collection of civil penalties. The Superior Court shall have jurisdiction of proceedings for the collection and enforcement of the penalty imposed by this section. Appropriate disciplinary proceedings may be initiated against a public official, officer, employee or custodian against whom a penalty has been imposed.

A knowing and willful violation, however, requires actual knowledge that the actions were wrongful and a positive element of conscious wrongdoing. Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 619 (App. Div. 2008) (citing Fielder v. Stonack, 141 N.J. 101, 124 (1995); Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)). Willful misconduct requires "much more" than mere negligence. Fielder, supra, 141 N.J. at 124. Willful misconduct falls somewhere on the continuum between simple negligence and the intentional infliction of harm. Id. at 123 (citing Foldi v. Jeffries, 93 N.J. 533, 549 (1983)).

In this matter, the petitioner bears the burden of proof, and argues that Kosensky knowingly and willfully violated OPRA. Petitioner argues that Kosensky was aware of his OPRA request and failed to respond to it in a timely manner, did not search for responsive records, relied on counsel to do her job, and certified that the records did not exist when she knew that four records from 2007 did exist.

It is conceded that Kosensky did not provide the requested documents within the time permitted by statute and, accordingly, this was deemed a denial of access. But she did not willfully withhold the documents from Carter. Rather, she relied on the attorney to make the determination of release for her, and he was the one who failed to pass the documents on to Carter. These documents were from 2007, and were not required to be maintained by the FFD. Nevertheless, Carter initiated his OPRA request with the FFD and he was entitled to the FFD's compliance if any records had been inadvertently maintained there. Carter did not receive the records he was seeking from the FFD, but was able to get them from the township clerk, and later received them pursuant to the First Interim Order addressed to a different custodian.

Having had the opportunity to observe Kosensky's demeanor throughout the course of these proceedings and during her testimony, she did not impress me as anything other than a worker who was doing her job to the best of her ability without an ulterior motive of denying Carter to access to records he requested. Once she returned from her conference, she immediately forwarded the four records which had been located by Nelson to Cooper, the attorney, and relied on his assurances that he would respond on her behalf to Carter.

Was Kosensky negligent in not immediately providing the documents to Carter? Yes. Was she negligent in relying on the attorney to respond to Carter for her? Yes. But did she act willfully and intentionally with knowledge that what she was doing was wrong? Given the totality of the circumstances presented here, I cannot reach that conclusion.

As a result, I **CONCLUDE** that petitioner has not met his burden of proof by a preponderance of the credible evidence that the records custodian's conduct in failing to

provide the information that was the subject of his OPRA request was knowing and willful under the totality of the circumstances. Accordingly, a civil penalty shall not be imposed upon Kosensky or the Franklin Fire District.

COUNSEL FEES

The GRC has previously determined that because a factual causal nexus existed between the filing of the Denial of Access Complaint and the relief ultimately achieved, Carter is a prevailing party entitled to an award of reasonable counsel fees without an enhancement of the lodestar fee because there were no unusual circumstances justifying an upward adjustment, the matter was not one of significant public importance, the matter was not an issue of first impression, and the risk of failure was not high because the issues involved matters of settled law.

Petitioner's attorney is seeking \$7,528.50 in reasonable counsel fees and costs of \$300.40. The respondent has not filed any objections to either the itemization or the hourly rate set forth in the fee certification filed by Walter M. Luers, Esq., on December 5, 2014.

The Open Public Records Act's fee-shifting provision states, "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Without the fee-shifting provision, "the ordinary citizen would be waging a quixotic battle against a public entity vested with almost inexhaustible resources. By making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the Legislature intended to even the fight." New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't of Corr., 185 N.J. 137, 153 (2005) (citation omitted) (hereinafter "NJDPM").

Under a State fee-shifting statute, such as OPRA's N.J.S.A. 47:1A-6, the first step in the fee-setting process is to determine the "lodestar"—the number of hours reasonably expended multiplied by a reasonable hourly rate. Rendine v. Pantzer, 141 N.J. 292, 334–35 (1995). The court should not passively accept the submissions of counsel in determining the lodestar amount, but rather "evaluate carefully and critically

the aggregate hours and specific hourly rates advanced by counsel for the prevailing party to support the fee application.” Id. at 335.

In calculating the lodestar, the initial focus should be the number of hours reasonably expended in the litigation. Singer v. State, 95 N.J. 487, 499 (1984). The most important factor in calculating the number of hours reasonably spent is the actual results obtained by the attorney. Ibid. “[W]here a ‘prevailing’ plaintiff has succeeded on only some of his claims for relief, ‘the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount.’” Id. at 500 (quoting Hensley v. Eckerhart, 461 U.S. 424, 436, 103 S.Ct. 1933, 1941, 76 L. Ed. 2d 40, 52 (1983)). However, courts have rejected a mathematical approach comparing total issues to total issues prevailed upon. New Jerseyans for a Death Penalty Moratorium, supra, 185 N.J. at 154. “[T]he fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit.’ Hensley, supra, 461 U.S. at 435, 103 S.Ct. at 1940, 76 L. Ed. 2d at 52. Because ‘the critical factor is the degree of success obtained,’ [Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 556 (App. Div. 1993)], ‘[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee,’ Hensley, supra, 461 U.S. at 435, 103 S.Ct. at 1940, 76 L. Ed. 2d at 52.” Ibid.

In the OPRA context, a qualitative analysis should be conducted that weighs such factors as the number of documents received versus the number of documents requested, and whether the purpose of OPRA was vindicated by the litigation. Id. at 155. In addition to weighing the success of the claim, hours that are not reasonably expended should be excluded. Hours are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. Hensley, supra, 461 U.S. at 434, 103 S.Ct. at 1939–40, 76 L. Ed. 2d at 51. “Hours that are not properly billed to one’s client also are not properly billed to one’s adversary pursuant to statutory authority.” Ibid. (quoting Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980)). Thus, no compensation is due under a fee-shifting statute for nonproductive time.

The second focus in the calculation of the lodestar mandates that the court determine “the reasonableness of the hourly rate of ‘the prevailing attorney in

comparison to rates “for similar services by lawyers of reasonably comparable skill, experience, and reputation” in the community.” Litton Indus., Inc. v. IMO Industries, Inc., 200 N.J. 372, 387 (2009) (citation omitted). It is also “appropriate to consider that any costs imposed on a governmental entity are ultimately borne by the public.” Kieffer v. High Point Reg’l High Sch., No. A-1737-09 (App. Div. December 28, 2010), <<http://njlaw.rutgers.edu/collections/courts/>>. In Kieffer, the court recognized that a public entity was involved and the amount that the public entity paid its own attorneys was half of the rate sought by the plaintiff’s counsel. By making an award halfway between the defendants’ hourly rate for attorney services and that of plaintiff’s attorney, the Kieffer court found that the trial judge properly exercised his discretion in adjusting the hourly rate downward.

Ordinarily, the facts of an OPRA case will not warrant enhancement of the lodestar because the economic risk in securing access to a particular government record will be minimal. Ibid. “[I]n a ‘garden variety’ OPRA matter, if a person’s request for a traffic or tax record is denied, resulting in an action that forces the custodian to promptly produce the record, enhancement will likely be inappropriate.” New Jerseyans for a Death Penalty Moratorium, supra, 185 N.J. at 157.

Based on the foregoing, the analysis begins with a determination of the hours reasonably expended in this litigation, taking into consideration the results achieved. Petitioner’s attorney, Walter M. Luers, Esq., has certified that he spent 23.9 hours working on the case. The records were released to the petitioner after the First Interim Order was entered by the GRC.

The next step in calculating the lodestar is to determine the reasonable hourly rate. Mr. Luers has charged a rate of \$315 per hour. In light of the extensive experience of Mr. Luers in the OAL and in the New Jersey Superior and Supreme Courts, this appears to be a reasonable hourly fee for attorneys in OPRA matters generally in this area with that level of expertise. See Lebbing v. Middlesex Cnty. Clerk’s Office, No. A-2738-10T3 (App. Div. May 4, 2012), <<http://njlaw.rutgers.edu/collections/courts/>>. Therefore, the total lodestar amount can be calculated as follows:

$$\$315 \times 23.9 = \$7,528.50$$

No contingency fee or enhancement of the lodestar fee is awarded because there were no unusual circumstances justifying an upward adjustment, the matter was not one of significant public importance, the matter was not an issue of first impression, and the risk of failure was not high because the issues involved matters of settled law. Indeed, there was nothing extraordinary about this matter requiring an enhancement of the lodestar fee.

The petitioner also seeks costs totaling \$300.45 (for copies, audio recording, and transcripts), which appears reasonable.

CONCLUSION

The petitioner is entitled to a total of \$7,528.50 in reasonable counsel fees, plus \$300.45 in costs (copies, audio recording and transcripts).

ORDER

Having concluded, under the totality of the circumstances presented herein, that the custodian of records did not intentionally and willfully fail to provide the requested documents, I hereby **ORDER** that no civil penalty be imposed upon Kosensky or the Franklin Fire District.

Having also concluded, pursuant to the findings of the Government Records Council, that the petitioner is a prevailing party in that the records originally sought were deemed denied to him, and only released after the First Interim Order, I **ORDER** that the petitioner's counsel, Walter M. Luers, Esq., is entitled to reasonable counsel fees of \$7,528.50, plus costs of \$300.45, for a total of \$7,828.95.

I hereby **FILE** my initial decision with the **GOVERNMENT RECORDS COUNCIL** for consideration.

This recommended decision may be adopted, modified or rejected by the **GOVERNMENT RECORDS COUNCIL**, who by law is authorized to make a final decision in this matter. If the Government Records Council does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **EXECUTIVE DIRECTOR OF THE GOVERNMENT RECORDS COUNCIL, 101 South Broad Street, PO Box 819, Trenton, New Jersey 08625-0819**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 23, 2015
DATE



SUSAN M. SCAROLA, ALJ

Date Received at Agency:

April 23, 2015

Date Mailed to Parties:

/cb

APPENDIX

WITNESSES

For petitioner:

Dr. Jeff Carter
Deborah Nelson

For respondent:

Melissa Kosensky

EXHIBITS

For petitioner:

- P-1 Denial of Access Complaint received April 11, 2011
- P-2 Certification of Jeff Carter
- P-3 Government Records Council Statement of Information Form
- P-4 Interim Order dated June 26, 2012
- P-5 Email to Counsel dated July 2, 2012
- P-6 Interim Order dated August 28, 2012

For respondent:

None