

NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

Shabsi Ganzweig,

Plaintiff,

v.

Township of Lakewood, Mary Ann
Del Mastro in her official capacity as
Records Custodian and Township
Clerk of the Township of Lakewood,
Office of the Prosecutor of the County
of Ocean and Marc E. Roessler in his
official capacity as Assistant
Prosecutor of the County of Ocean,

Defendants.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION

OCEAN COUNTY

DOCKET NO. OCN-L-1292-14

CIVIL ACTION

OPINION

Decided: March 24, 2015

Vincent J. Grasso, A.J.S.C.

Walter M. Luers, Esq. on behalf of the plaintiff, Shabsi Ganzweig (Walter M. Luers, LLC)

Victoria R. Emanuele, Esq. on behalf of the defendant, Township of Lakewood (Bathgate,
Wegener & Wolf, P.C.)

Samuel Marzarella, Esq. on behalf of the defendant, Ocean County Prosecutor's Office, William
Kyle Meighan, Esq. on the brief (Ocean County Prosecutor's Office)

Summary

This matter comes by way of plaintiff Shabsi Ganzweig's motion for attorney's fees and expenses following this court's previous written opinion dated October 2, 2014 in connection with plaintiff's action asserting a violation of the Open Public Records Act (OPRA), N.J.S.A.47:1-1 to 13 by defendants, Township of Lakewood (Township) and Ocean County

Prosecutor's Office (Prosecutor's Office). In the previous opinion, the court held that the Prosecutor's Office violated OPRA when they denied plaintiff's access to the reports requested to the extent permitted for disclosure under N.J.S.A. 47:1A-3(b), and the requested police dash-camera video and audio recordings. In the October 2, 2014 order, the court required counsel to confer and advise the court on the issue of counsel fees and costs. Plaintiff seeks attorney's fees and costs totaling \$24,153.96. Herein, the court considers the reasonable attorney's fees that Walter M. Luers, Esq. (Luers), counsel for Ganzweig, is entitled pursuant to the court's previous opinion. Counsel waived oral argument and submitted the matter on the papers.

Background

As the court gave a detailed factual background in its earlier opinion, the court does not do so at length in this opinion. Instead, the court will provide a brief summary of the relevant facts.

On March 7, 2014, plaintiff submitted an OPRA request via e-mail to the Township clerk requesting certain documents under OPRA, including the audio and video recordings and all the relevant reports of two traffic stops conducted by police officers Felder and Reina on August 31, 2013, which led to an investigation of Felder's illegal search of a vehicle and falsifying police report to conceal his alleged wrongdoing. The Township forwarded plaintiff's request to the Prosecutor's Office for review and response. The Prosecutor's Office denied plaintiff's request based on "criminal investigatory records" exemption pursuant to N.J.S.A. 47:1A-1.1, "ongoing investigation" exception under N.J.S.A. 47:1A-3(a), and the confidentiality of internal affairs investigations. Subsequently, plaintiff filed a complaint alleging that the Prosecutor's Office violated OPRA by denying the documents requested.

On the return date, because the record lacked sufficient clarity for the court to decide on the propriety of the Prosecutor's Office's denial of plaintiff's request, the court carried the returned date and ordered the Prosecutor's Office to furnish a Vaughn index that itemized each document requested by plaintiff and articulate the specific basis for its denial of each item. The court also allowed the parties to brief the legal question of whether the Lakewood Police Department Policy and Procedures carry the "force of law" which would remove the police dash cam video recording from the definition of "criminal investigatory records" under N.J.S.A. 47:1A-1.1.

Oral argument was entertained on August 20, 2014. On October 2, 2014, the court issued a written opinion entering judgment in favor of plaintiff, found that the Prosecutor's Office improperly denied plaintiff's access to all the relevant reports to the extent permitted for disclosure under N.J.S.A. 47:1A-3(b) and ordered the Prosecutor's Office to release the police dash cam video and audio recordings of the two traffic stops.

On January 29, 2015, plaintiff's attorney, Walter M. Luers, Esq., filed a motion on plaintiff's behalf, for attorney's fees and costs award pursuant to N.J.S.A. 47:1A-6, seeking \$398.46 in court costs and \$14,242.50 in attorney's fees based on 44.9 billable hours at \$315.00 per hour for Mr. Luers's time and 0.6 hours at \$165 per hour for an associate's time, with a contingency enhancement of \$5,638.50. Since then, Mr. Luers spent additional 12.3 hours working on this case and filed an updated Certification of Services on February 25, 2015, in which Mr. Luers seeks attorney's fees and costs totaling \$24,153.96, including \$398.46 in court costs and \$18,117 in attorney's fees based on 57.2 billable hours at \$315.00 per hour for Mr. Luers's time and 0.6 hours at \$165 per hour for the associate's time, with a 50% contingency

enhancement on 35.8 hours of Mr. Luers's time at \$157.50 per hour for a total of \$5,638.50.

Neither party requested oral argument and both stipulated to a disposition on the papers.

Findings

New Jersey courts generally follow the "American Rule," under which each party pays their own legal fees. Mason v. City of Hoboken, 196 N.J. 51, 70 (2008) (citing Rendine v. Pantzer, 141 N.J. 292, 322 (1995)); see R. 4:42-9; see also Litton Industries v. IMO Industries, 200 N.J. 372, 385 (2009). Nevertheless, "a prevailing party can recover those fees if they are expressly provided for by statute, court rule, or contract." Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 440 (2001). The OPRA provides an attorney fee-shifting provision, N.J.S.A. 47:1A-6, which provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." In New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections (NJDPM), the New Jersey Supreme Court explained:

Under the OPRA, it is the declared public policy of this State that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State." N.J.S.A. 47:1A-1. To obtain records that are not made available, "[a] person who is denied access to a government record by the custodian of the record . . . may . . . institute a proceeding to challenge the custodian's decision by filing an action in Superior Court." N.J.S.A. 47:1A-6. If the court determines that the custodian unjustifiably denied access to the record in question, he or she is entitled to a "reasonable attorney's fee." Ibid.

[185 N.J. 137, 153 (2005).]

As such, "[OPRA] mandate[s], rather than permit[s], an award of attorney's fees to a prevailing party." Mason, *supra*, 196 N.J. at 75.

The Court in Rendine v. Pantzer articulated the process a court should employ to determine the appropriate fee under a fee-shifting statute: "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, *supra*, 141 N.J. at 334-35. The award of counsel fees is 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.” Mason, supra, 196 N.J. at 79.

A court “should not accept passively the submissions of counsel to support the lodestar amount,” instead the court should modify the proposed fee if the court finds that the amount is excessive under the circumstances. Rendine, supra, 141 N.J. at 335–36 (citations omitted). To assess the number of hours reasonably expended, the court should exclude hours that are “excessive, redundant, or otherwise unnecessary.” Rendine, supra, 141 N.J. at 335 (citations omitted). As to the assigned hourly rates, “[t]hat determination need not be unnecessarily complex or protracted, but the trial court should satisfy itself that the assigned hourly rates are fair, realistic, and accurate, or should make appropriate adjustments.” Rendine, supra, 141 N.J. at 337. “Generally, a reasonable hourly rate is to be calculated according to the prevailing market rates in the relevant community.” Ibid. “To take into account delay in payment, the hourly rate at which compensation is to be awarded should be based on current rates rather than those in effect when the services were performed.” Ibid. The assigned hourly rates for the participating attorneys should be reasonable and comparable to the hourly rate of those attorneys in the community of “comparable skill, experience, and reputation.” Ibid. (quoting Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990)).

In assessing the reasonableness of an award, the New Jersey Supreme Court has instructed New Jersey courts to consider the factors articulated in RPC 1.5(a):

- (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;
- (8) whether the fee is fixed or contingent.

[Litton, supra, 200 N.J. at 386–87 (quoting RPC 1.5(a)).]

“The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward.” Hensley v. Eckerhart, 461 U.S. 424 (1983). “When a prevailing party has faced a substantial risk of nonpayment in its attempt to secure the release of a government record, enhancement may be appropriate.” NJDPM, supra, 185 N.J. at 157. “Because enhancements are not preordained, trial courts should not enhance fee awards as a matter of course. Every case will depend upon its facts. 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 [U]nusual circumstances occasionally may justify an upward adjustment of the lodestar.” Ibid. A reviewing court should consider “the public importance of the matter, the degree of success, the high risk of nonpayment and any other factors that support the request for enhancement.” NJDPM, supra, 185 N.J. at 143. “The enhancement ‘ordinarily should range between five and fifty-percent of the lodestar fee, with the enhancement in typical contingency cases ranging between twenty and thirty-five percent of the lodestar.’” NJDPM, supra, 185 N.J. at 158.

Hours Reasonably Expended

The Prosecutor’s Office argues that Mr. Luers is not entitled to hours that are excessive and unnecessary. For example, it claims that the amount of hours spent on drafting complaint and performing other relevant work is excessive, provided Mr. Luers’s experience with OPRA litigation, familiarity with leading authorities, and “boilerplate” language in his brief bank.

Additionally, the Prosecutor's Office claims that Mr. Luers's travel expenses should be reduced to a reasonable rate for gas and toll charges, excluding his time spent in his car driving from the court to his office. Moreover, the Prosecutor's Office argues that Mr. Luers should not include the hours he spent on discussing the case with his client and his associate's time spent on preparing for "Attention to service of order on Defendants." Furthermore, the Prosecutor's Office argues that Mr. Luers is not entitled to fees for time he spent after the order granting plaintiff's relief.

Plaintiff contends that the hours spent on drafting complaint and performing other relevant work were reasonable under the circumstances of this case. Moreover, travel time related specifically to this case is compensable. Furthermore, lawyers are under legal and ethical obligations to keep clients reasonably apprised of the progress of clients' cases and to respond to their inquiries. Client communication is a critical component of any legal proceeding.

As to the time accrued after the court's order in favor of plaintiff, plaintiff argues that Mr. Luers spent the time to deal with issues that arose after the order, including negotiating fees with defendants in compliance with the court's direction, and dealing with defendants' request for a stay of these proceedings pending the Prosecutor's Office's notice of appeal to the Appellate Division, motion for in-time relief, and motion for leave to appeal.

Reasonable Rate

Mr. Luers certifies that his rate is \$315. The Prosecutor's Office counters that a rate of \$315 is not reasonable, based on the February 6, 2015 Certification of Arthur F. Leyden, III, who certifies that the appropriate hourly rate charged by an "adequate experienced attorney, possessed of average skill and ordinary competence' in civil practice in Ocean County is \$250 per hour." As such, the Prosecutor's Office submits that Mr. Luer's hourly rate should be set at

\$250. Moreover, the Prosecutor's Office argues that Mr. Luers is not entitled to the same hourly rate for fee applications as for the work on the merits of the case, because work on a fee application is not complex and involves ministerial tasks.

Plaintiff responds that Mr. Leyden's certification is simply a net opinion lack of any information as the basis for his conclusion. Moreover, the Leyden Certification defines the relevant market place as Ocean County, while Mr. Luers claims that his relevant marketplace for OPRA work is state-wide. Furthermore, Mr. Luers argues that he is at least an attorney above average skill, experience, and competence regarding OPRA litigation based on his years of experiences and the type of cases he handled. Additionally, Mr. Luers points out that the Leyden's certification failed to identify his definition of "average experience." Mr. Luers submits that the requested rate of \$315 per hour is commensurate with his skill, experience, and competency. Regarding the time spent preparing and defending the fee application, Mr. Luers argues that the time is fully compensable at his regular hourly rate, because the hours spent are substantive rather than administrative.

Reduction for Limited Success

Defendant Lakewood Township argues that plaintiff did not achieve 100% success because the court denied plaintiff's Count Three for declaratory relief on the issue of whether the Prosecutor's Office could respond on Lakewood's behalf to plaintiff's OPRA request to Lakewood. Plaintiff contends that his description of being "100% successful" was a description of his success regarding access to documents and Mr. Luers is entitled to an award of 100% of the hours sought because this litigation vindicated the purpose of the OPRA and plaintiff was granted access to all the documents he requested.

“The trial court should conduct a qualitative analysis that weighs such factors as the number of documents received versus the number of documents requested, and whether the purpose of the OPRA was vindicated by the litigation.” NJDPM, supra, 185 N.J. at 155. The court is not persuaded that the Township’s argument on this issue would be a basis to reduce the level of success achieved by the litigation.

Contingency Enhancement

Mr. Luers submits a 50% contingency enhancement on 35.8 hours of Mr. Luers’s time at \$157.50 per hour for a total of \$5,638.50. Mr. Luers argues that this case is of public importance and the issue involved is novel as to whether local police force’s official policy and procedures constitute “laws” within the definition of a “criminal investigatory record” under N.J.S.A. 47:1A-1.1. The decision of this case has important ramifications for access to police records that are beyond the “criminal investigatory records” exemption under OPRA. Therefore, this case is important to the public interest and also validated the public purpose of OPRA.

The Prosecutor’s Office responds that the requested contingency enhancement is not warranted because this case is not an extraordinary issue signaling public importance and the economic risk was minimal based on Mr. Luers’s experience with OPRA. Even if a contingency enhancement is warranted, it should be 5% of the reduced lodestar argued above.

Lakewood Jointly and Severally Liable

Defendant Lakewood Township argues that it should not be liable for any fee award because after it received plaintiff’s OPRA requests, it forwarded the requests to the Prosecutor’s Office and deferred to the Prosecutor’s Office during the proceeding. Plaintiff contends that both Lakewood Township and the Prosecutor’s Office should be held jointly and severally liable for

attorney's fees and costs award, because Lakewood embraced the Prosecutor's Office's decision with the denial of access and at no time objected to the Prosecutor's Office's positions.

Award of Attorney's Fees and Costs

The court finds that the plaintiff emerged as the prevailing party in this OPRA litigation as there was a basis in law for the records permitted for disclosure under N.J.S.A.47:1A-3(b) as well as a causal nexus between the OPRA request for the police dash cam recordings and the court's decision that same be produced to the requester. The court's task in the fee-setting process is to first determine the lodestar, which requires a determination of the hours reasonably expended multiplied by a reasonable hourly rate.

At the outset, the court finds that the hourly rate of Mr. Luers of \$315.00 per hour is reasonable. In light of Mr. Luers's experience as a practicing attorney, particularly in OPRA matters, it is the court's view that \$315.00 per hour is in keeping with the prevailing market rates in the legal community and not significantly at variance with the \$250.00 hourly rate put forth by the attorney's certification submitted on behalf of the defendants. Having determined that the \$315.00 per hour rate is reasonable and commensurate with the skill, experience, and competency of plaintiff's counsel, the next task is an assessment of the number of hours reasonably expended in this litigation.

The Prosecutor's Office as well as the Township of Lakewood filed opposition regarding the hours they maintained were unreasonably expended by plaintiff in this case. In its analysis, the court turned to the response by Mr. Luers under his letter memorandum dated February 25, 2015. Plaintiff's counsel comprehensively responds to each area which the defendants maintain represented an unreasonable expenditure of time. Those areas addressed by plaintiff's counsel included time for the preparation of pleadings, briefs and oral argument, communication with the

client, travel as well as hours expended following the court's opinion in order to bring this matter to a conclusion and final judgment. In its consideration of the reasonableness of the hours expended in this matter, the court has considered the novelty of the issue that was presented to the court. The issue of whether the recording of an event by a police dash cam video is a public record appears to be a case of first impression. Neither counsel nor the court were able to rely on any published decision for guidance. The novel issue presented required a thorough and thoughtful analysis of the "criminal investigatory records" exemption, which the court understands will be taken to the Appellate Division for its review. Moreover, plaintiff's counsel was not only responding to submissions from the Prosecutor's Office but to submissions from the Township of Lakewood as well. In sum, the court finds that the 57.2 hours of time at the rate of \$315.00 per hour, for a total of \$18,018.00, to be reasonable as well as .6 hours of time for Mr. Luers' associate calculated at \$165.00 for a total of \$99.00 with costs of \$398.46.

Plaintiff's Request for Contingency Enhancement

Plaintiff's counsel submits for consideration by the court a 50% contingency enhancement on 35.8 hours of time at the rate of \$157.50 per hour for a total of \$5,638.50. Plaintiff argues that this is a case of public importance which involves a novel issue. The Prosecutor's Office disputes the novelty of the issue as well as its public importance and submits that the economic risk to plaintiff's counsel was minimal. "Like all fee-shifting statutes, the OPRA neither prohibits enhancement nor does the Act require them. Because enhancements are not preordained, trial courts should not enhance the awards as a matter of course. Every case would depend upon its facts." NJDPM, supra, 185 N.J. at 157.

With guidance from the Court in NJDPM, the court finds that the Prosecutor's Office vigorously defended its decision not to release the police dash cam recording on the basis that it

was exempt as a “criminal investigatory record” under N.J.S.A. 47:1A-1.1. Therefore, it was an all or nothing proposition for plaintiff’s counsel with a risk of no recovery had the court sustained the position taken by the Prosecutor’s Office and Township. It follows, therefore, that plaintiff, by prevailing on the legal merits of this issue, enjoyed a high degree of success in this case. Moreover, the issue before the court was one of public importance in terms of the public’s right to information regarding the conduct of the law enforcement community during arrests, which are recorded by a police dash cam video during a motor vehicle stop. As noted in the NJDPM case, this is not an example of a “garden variety” OPRA matter. The court has deemed it appropriate to award plaintiff’s counsel the full amount of the requested attorney’s fees and costs. In consideration of the factors found by the court with regard to the fee enhancement, it is the court’s finding that a 30% contingency enhancement on 35.8 hours is reasonable, which translates into \$94.50 per hour for a total of \$3,383.10.

Responsibility for Counsel Fees and Costs

The remaining issue before the court is the allocation, if any, between the Township of Lakewood and the Ocean County Prosecutor’s Office regarding the payment of counsel fees and costs. Plaintiff submits that the Township of Lakewood and Prosecutor’s Office should be jointly and severally liable for the payment of counsel fees and costs. The Township of Lakewood urges that the Prosecutor’s Office should bear the responsibility for the attorney’s fees and costs because they completely deferred to the Prosecutor’s Office on its decision to deny access to the requested records from the onset of the case. The Township of Lakewood has appended to its submissions an email from the Lakewood Police Department Chief Robert C. Lawson to plaintiff advising that an Assistant Prosecutor with the Ocean County Prosecutor’s Office would be reviewing and responding to plaintiff’s OPRA request of March 7, 2014. Subsequently, on

March 21, 2014, the Prosecutor's Office issued the first three-page response to plaintiff's request denying access to the records. Unquestionably, throughout these proceedings, the Prosecutor's Office has been lead counsel who the court also understands will be handling any matters for the Appellate Division. Based on the foregoing, it is the court's finding that the payment of attorney's fees and costs should be borne entirely by the Ocean County Prosecutor's Office.

In sum, the court finds that the Ocean County Prosecutor's Office shall pay reasonable attorney's fees in the amount of \$18,018.00 with an enhancement of \$3,383.10 for a total of \$21,401.10 with \$398.46 in costs. With the trial court's decision of attorney's fees and costs, the matter has now reached final judgement. Mr. Luers is to submit an order.