

2018-2019 UPDATE ON OPEN PUBLIC RECORDS ACT CASES

NEW JERSEY STATE LEAGUE OF MUNICIPALITIES

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**With appreciation to the New Jersey Institute of Local Government Attorneys and its
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The past year plus has been particularly busy in the New Jersey Courts for cases under the Open Public Records Act and its analog, the Common Law Right of Access. This presentation will highlight the most significant issues litigated, with pertinent summaries of the decisions, both reported and unreported.

1. INTERNAL AFFAIRS FILES; DISCIPLINARY HISTORY; RECORDS NOT MAINTAINED BY PUBLIC AGENCY

***Simmons v. City of Newark* (Unpub. App. Div. Oct. 19, 2018)**

https://scholar.google.com/scholar_case?case=2420812046999404763

Simmons requested the internal affairs records of a Newark police officer involved in his arrest as well as audio recordings of a probable cause hearing related to Simmons in Newark municipal court. The city denied access to the officer's internal affairs records because they were exempt under the Open Public Records Act (OPRA), *N.J.S.A. 47:1A-1 to -13*, and informed the requestor that the city was not responsible for audio recordings of municipal court proceedings and that these recording, if they did exist, would be made and maintained by the judiciary. The Government Records Council ruled that even though Newark's responses might have been untimely, it lawfully denied the requests and did not willfully violate OPRA. The Appellate Division affirmed.

***Gannett Satellite Information Network, LLC d/b/a Asbury Park Press v. Tp. of Neptune* (Docket No. MON-L-2612-17); on appeal as Docket No. A-004006-18**

The Asbury Park Press sought the Internal Affairs Files for Neptune Police Officer Philip Seidle after he killed his ex-wife by deliberately smashing into her car and then shooting her. The request was made under OPRA and the common law. The request was denied in timely fashion based on the confidentiality requirement of the Attorney General's Internal Affairs Policies and Procedures. Prior to the request, the Monmouth County Prosecutor's Office had published a report, in response to public outcry, that referenced information gleaned from some of Seidle's Internal Affairs Files. The trial court determined that the Internal Affairs Files were exempt from disclosure under OPRA, but then ruled that they were releasable under the common law right of access. The court rejected a motion for reconsideration and included in its ruling that the files were releasable because the confidentiality of the Files was waived due to the MCPO's public report and a newspaper article published by the Asbury Park Press seven months

after the request was denied that contained the results of its independent investigation which included deposition testimony in a federal wrongful death suit brought by the children, and a letter from Seidle which allegedly waived his right to the confidentiality of the Internal Affairs Files. The court then awarded counsel fees under *Mason v. Hoboken* in the amount of \$85,000 to the Asbury Park Press. This case is on appeal.

***Libertarians for Transparent Government v. New Jersey State Police* (Unpub. App. Div. May 20, 2019)**

https://scholar.google.com/scholar_case?case=15023584658171219126

The Office of Professional Standards of the State Police prepares and submits an annual report to the Legislature detailing, among other things, the disciplinary proceedings that have been completed against employees during the year, but the report does not contain the name or rank of the person involved. The office's 2015 report contained a reference to a state trooper who was terminated for having questionable associations, engaging in racially offensive behavior, and publicly discussing police patrol procedures. Plaintiff filed a request under the Open Public Records Act (OPRA), *N.J.S.A. 47:1A-1 to -13* for the "name, title, date of separation and reasons therefor" of that trooper pursuant to an exception to the personnel records exemption of *N.J.S.A. 47:1A-10* (Section 10). Judge Jacobson upheld the denial of the request, and the Appellate Division affirmed her reasoning and analysis. The court said that "under the unusual circumstances of this case, disclosure of the trooper's name pursuant to the narrow exception to the personnel records' exemption in section 10, would violate both the letter and the spirit of the exemption itself"

2. FAILURE TO FILE OPRA REQUEST

***Moawad v. City of Bayonne Police Dep't.* (Unpub. App. Div. Nov. 13, 2018)**

https://scholar.google.com/scholar_case?case=1753495364212177208

The same plaintiff as in *Moawad v. Jersey City Police Dep't Records* (Unpub. App. Div. Nov. 14, 2018), *infra*, appealed to the Government Records Council (GRC) to require the Bayonne Police Department to produce records relating to alleged charges of her shoplifting. She had not filed a request with Bayonne but instead had filed it with the Hudson County Prosecutor's Office. The Appellate Division affirmed the ruling of the GRC that the local police department is distinct from the county prosecutor's office and, because no request had been made to Bayonne, the GRC could grant no relief.

***Moawad v. Jersey City Police Dep't Records* (Unpub. App. Div. Nov. 14, 2018)**

https://scholar.google.com/scholar_case?case=4268925250814208110

In a federal court suit against an employer, plaintiff issued a subpoena to the Jersey City Police Department (JCPD) seeking records to support her claim that her employer had falsely accused her of shoplifting. The JCPD advised her that it had found no records responsive to the subpoena. She filed an action in the Law Division ostensibly seeking a common law right of access at what she alleged was the recommendation of the Government Records Council. The

Appellate Division affirmed a trial court dismissal of the matter for failure to state a claim under New Jersey law because the state courts have no power to enforce federal subpoenas. Plaintiff did not seek production of records by JCPD under the Open Public Records Act (OPRA), *N.J.S.A. 47:1A-1 to -13*, although she did make an OPRA request of the Hudson County Prosecutor for such records and was told that there were none.

***Moretti v. Bergen County Prosecutor's Office* (Unpub. App. Div. Jan. 9, 2019)**
https://scholar.google.com/scholar_case?case=15635388714972077325

Plaintiff filed two separate record requests with the Bergen County Prosecutor's Office under the Open Public Records Act (OPRA), *N.J.S.A 47:1A-1 to -13*, and the common law right of access, seeking "hardcopies via U.S. mail of records the Prosecutor had which would be helpful in continuing to live in Bergen County" and for "records for supporting materials so [he] does not become a victim of a municipal property seizure." The records custodian for the prosecutor certified in a timely fashion that access was denied because no specific government records were identified, and the custodian did not have to aid a requester in articulating a proper OPRA request. The Appellate Division affirmed the Government Records Council's dismissal of plaintiff's complaint. The requests were vague, generic, and failed to specifically identify the records sought.

3. GOVERNMENT RECORDS: PERSONAL EMAILS ON PUBLIC SERVER

***Carter v. Franklin Fire Dist. No. 1* (Unpub. App. Div. Oct. 3, 2018)**
https://scholar.google.com/scholar_case?case=11074235840564658428

The Appellate Division affirmed a ruling of the Government Records Council that it was proper for the Franklin Fire District No. 1 to deny access to emails on its server related to political action committee (PAC) activities. Those emails were not "government records" under the Open Public Records Act (OPRA), *N.J.S.A. 47:1A-1 to -13*, because they were not made, maintained or received by the public entity in the course of its official business. A policy resolution adopted by the district directing its employees and officers to use its server for work related e-mails did not convert the PAC emails into "government records."

4. CRIMINAL INVESTIGATORY RECORDS; DASH CAM VIDEOS: COMMON LAW RIGHT OF ACCESS

***Ganzweig v. Township of Lakewood* (Unpub. App. Div. Jan. 29, 2018)**
https://scholar.google.com/scholar_case?case=18175403745187869879

On remand from the Supreme Court, the Appellate Division remanded to the Law Division for consideration of the common law right of access for dash-cam videos that are exempt under the Open Public Records Act (OPRA), *N.J.S.A 47:1A-1 to -13*, as criminal investigatory records. The videos in question concerned two traffic stops of the same car within minutes of each other and the recordings were part of an investigation in progress. The

calculation of attorney's fees was also remanded for subtraction of time spent to obtain records that the court found not required to be disclosed under OPRA.

***Garcia v. Bergen County Prosecutor's Office* (Unpub. App. Div. May 17, 2019)**
https://scholar.google.com/scholar_case?case=10754173487983190727

Plaintiff was convicted of murdering his ex-girlfriend. After four denials of post-conviction relief, he sought to obtain records from the Bergen County Prosecutor's Office, the Attorney General's Office and the Ridgefield Police Department under the Open Public Records Act (OPRA), *N.J.S.A. 47:1A-1 to -13*, and the common law right of access. The trial court denied his request for relief and granted a motion by the prosecutor's office to preclude plaintiff from making future OPRA and common law requests relating to the murder conviction. The Appellate Division affirmed the orders for the reasons set forth in the opinion by the trial judge. The court agreed that some of the requested materials had already been provided during his prosecution and that there was no basis under OPRA or the common law to support plaintiff's other requests.

5. ATTORNEY'S FEES

***280 Erie Street, LLC v. City of Jersey City* (Unpub. App. Div. May 16, 2019)**
https://scholar.google.com/scholar_case?case=5803433998612634355

The Appellate Division affirmed an order requiring Atlantic City to pay plaintiff \$42,037.50 in attorney's fees in a case brought under the Open Public Records Act (OPRA), *N.J.S.A. 47:1A-1 to -13*. Plaintiff filed a request with the city under OPRA that, in a former action, resulted in an award in plaintiff's favor. Plaintiff then filed a new application requesting twenty-four categories of records from the city. When the city still had not responded to the request forty-five days after it was made, plaintiff filed a complaint to compel compliance with OPRA and the prior court order. The trial court ultimately found for the plaintiff and ordered payment of attorney's fees in the amount of \$42,037.50. In affirming the award, the Appellate Division found that plaintiff was successful on the merits and that the city itself had prolonged the litigation.

***Gannett Satellite Information Network, LLC d/b/a Asbury Park Press v. Tp. of Neptune* (Docket No. MON-L-2612-17); on appeal as Docket No. A-004006-18**

This case, discussed above, raises the significant issue of whether under *Mason v. Hoboken* a court is required to award counsel fees to a party who prevails on a request for documents under the common law, especially when the request is properly denied under OPRA. New Jersey follows the American Rule that, except in limited circumstances, litigating parties bear their own costs and fees. OPRA contains a fee-shifting provision that awards attorneys' fees to a prevailing party on a request. *Mason* contains language suggesting that the analysis of a "prevailing party", utilizing the "catalyst theory", absent an apparent, theoretical basis for different treatment, should apply to common law claims as well. This has led to a number of

differing interpretations of what the Supreme Court actually meant. Since *Mason* did not state that the American Rule was being overturned, this case will likely provide further clarity.

***Feld v. City of Orange Township* (Unpub. App. Div. Apr. 18, 2019)**
https://scholar.google.com/scholar_case?case=14874892454899727276

The Appellate Division upheld the decision of a trial court denying attorney’s fees to an attorney who was a *pro se* litigant in a case under the Open Public Records Act (OPRA), *N.J.S.A. 47:1A- 1 to -13*. The court held that “it is . . . well-settled that an attorney who represents himself or herself is not entitled to recover counsel fees. *Segal v. Lynch*, 211 *N.J.* 230, 258-64 (2012). This bar applies even in cases involving fee-shifting statutes.”

***Port Authority PBA, Inc. v. Port Authority of N.Y. and N.J.* (Unpub. App. Div. Dec. 20, 2018)**
https://scholar.google.com/scholar_case?case=5642273702214487821

Plaintiff made fifty-eight requests to the Port Authority under the Open Public Records Act (OPRA), *N.J.S.A. 47:1A-1 to -13*. The Port Authority granted six, requested more time to provide fourteen, and denied thirty-eight as overbroad because they failed to identify the records requested with reasonable clarity. The trial court ordered production of the delayed fourteen, rejected the thirty-eight as overbroad and awarded attorney’s fees to the plaintiff. The court reduced the lodestar by using the percentage of successful requests compared to the total requests made. After an exhaustive analysis of each request, the Appellate Division ordered production of seven of the denied thirty-eight. As to those requests rejected, the court found that they were indeed overbroad because they asked the Port Authority to do research, rather than to simply search to identify records that might be responsive to the request. The court upheld the trial court’s proportional methodology for awarding attorney’s fees but remanded for a readjustment based on the appellate finding that an additional seven requests should have been granted.

***Golden v. New Jersey Inst. of Tech.*, 934 *F.3d* 302 (3rd Cir. 2019)**
https://scholar.google.com/scholar_case?case=16079014357829590622

The Third Circuit awarded counsel fees under the Open Public Records Act (OPRA), *N.J.S.A. 47:1A-1 to -13*, to a journalist who sought public records from the New Jersey Institute of Technology (NJIT) in connection with research on the interaction between public universities and the Federal Bureau of Investigation (FBI). Many of the requested NJIT documents originated with the FBI, and the FBI directed NJIT to withhold them. NJIT complied with the FBI’s order, claiming that the documents were exempt from disclosure. After the OPRA complaint was filed and removed to the federal District Court, the FBI allowed NJIT to produce thousands of pages of documents, some redacted, and the journalist waived any claim to the small number of pages that were not produced. In allowing the claim for legal fees—which the District Court had denied—the Third Circuit determined that the journalist’s lawsuit was the catalyst for the release of records. The fact that the FBI ordered NJIT to withhold the records did not afford NJIT a basis

to abdicate its role as the records custodian. NJIT alone bore the burden of producing or not producing the requested records even though the FBI objected. NJIT was solely responsible for the payment of attorney's fees.

6. SPECIAL SERVICE CHARGE; PRODUCTION OF RECORDS IN DIGITAL FORMAT

***Carter v. Franklin Fire District No. 1* (Unpub. App. Div. March 15, 2019)**
https://scholar.google.com/scholar_case?case=2747443037988442278

Plaintiff submitted two separate requests under the Open Public Records Act (OPRA), *N.J.S.A. 47:1A-1 to -13*, for e-mails exchanged among various members of the Franklin Fire District No. 1 about a specific subject during a limited period of time. He asked for them to be provided in digital format. The Government Records Council (GRC) rejected the district's attempt to impose a special service charge because of its need to employ IT personnel to fulfill the request. The district provided responsive e-mails in .pdf format, but plaintiff said that he wanted the e-mails produced in their native format. The Appellate Division upheld the ruling of the GRC that the .pdf format complied with OPRA because plaintiff had requested a digital format, and not any specific digital format. Nothing in OPRA, the court said, suggests that a specific digital format is required. The court, however, remanded the matter to the GRC for findings as to the adequacy of the district's search for responsive records. The custodian's certification was insufficient, because it was not made with personal knowledge as to the efforts of the IT personnel to locate all potentially responsive emails.

7. REDACTIONS: POLICE SOP MANUALS AND PUPIL RECORDS

***Rivera v. Borough of Fort Lee* (Unpub. App. Div. May 3, 2019)**
https://scholar.google.com/scholar_case?case=17075179182021171943

In a case brought under the Open Public Records Act (OPRA), *N.J.S.A. 47:1A-1 to -13*, the Appellate Division reversed a Law Division ruling granting security exemptions to heavy redactions made by the custodian when responding to a request for the police department's Standard Operating Procedures (SOPs). The court ordered the trial court to conduct an *in camera* review of the documents instead of relying on the custodian's Vaughn Index. The redactions dealt with things such as active-shooter response, bomb threats, body armor, and weapons and ammunition. The Appellate Division held that under the security exception, the custodian had to demonstrate that the document contained emergency or security information and that disclosure would pose a risk to persons, building, or facility. The brief and non-descriptive Vaughn Index did not contain enough information to meet that burden.

***Port Authority PBA, Inc. v. Port Authority of N.Y. and N.J.* (Unpub. App. Div. Dec. 20, 2018)**
https://scholar.google.com/scholar_case?case=5642273702214487821

Plaintiff made fifty-eight requests to the Port Authority under the Open Public Records Act (OPRA), *N.J.S.A. 47:1A-1 to -13*. The Port Authority granted six, requested more time to provide fourteen, and denied thirty-eight as overbroad because they failed to identify the records requested with reasonable clarity. The trial court ordered production of the delayed fourteen, rejected the thirty-eight as overbroad and awarded attorney's fees to the plaintiff. The court reduced the lodestar by using the percentage of successful requests compared to the total requests made. After an exhaustive analysis of each request, the Appellate Division ordered production of seven of the denied thirty-eight. As to those requests rejected, the court found that they were indeed overbroad because they asked the Port Authority to do research, rather than to simply search to identify records that might be responsive to the request. The court upheld the trial court's proportional methodology for awarding attorney's fees but remanded for a readjustment based on the appellate finding that an additional seven requests should have been granted.

8. TIMELINESS OF RESPONSE; SPECIFICITY OF REQUEST

Gordon v. City of Orange Township (Unpub. App. Div. Apr. 22, 2019)

https://scholar.google.com/scholar_case?case=2237936445448033546

Plaintiff made a request under the Open Public Records Act (OPRA), *N.J.S.A. 47:1A-1 to -13*, for a copy of the "last invoice" for the city's purchase of CDs. The clerk forwarded the request to the purchasing department, but was later informed that the finance department would supply the records. After the requestor filed a denial of access complaint with the Government Records Council (GRC), the municipality supplied two invoices, one for the purchase of CD sleeves and one for CDs purchased after the date of the request. The GRC ordered the municipality to produce an invoice prior to the date of the request and the municipality complied. The GRC found a technical violation of OPRA but found that the municipality did not willfully or purposefully deny the request because of the efforts to locate the responsive documents. The Appellate Division affirmed the GRC.

9. RELEASE OF EXPUNGED RECORDS; NOTICE OF TORT CLAIM

K.S. v. Verrecchio (Unpub. App. Div. May 17, 2019)

https://scholar.google.com/scholar_case?case=4962991209011837818

The Appellate Division affirmed the dismissal of plaintiff's suit against the Monmouth County Prosecutor's Office for compensatory and punitive damages for the wrongful release of his expunged criminal record. The prosecutor moved to dismiss for failure to provide notice under the New Jersey Tort Claims Act (TCA), *N.J.S.A. 59:1-1 et seq.* Plaintiff argued that the count against the prosecutor was not based on the TCA but rather on the expungement statute, and therefore no notice of tort claim was required. The Appellate Division held that TCA notice was required and that the expungement statute, *N.J.S.A. 2C:52-30*, does not authorize a private cause of action to recover civil damages but provides enforcement only by a disorderly persons offense.

10. ABUSE OF OPRA; INJUNCTION; ATTORNEY'S FEES

***Township of Teaneck v. Jones* (Unpub. App. Div. July 12, 2019)**
https://scholar.google.com/scholar_case?case=117902782916962074

Teaneck appealed the denial of its application for a preliminary injunction, grant of partial summary judgment in its favor and the award of attorney's fees in its action for declaratory relief under the Open Public Records Act (OPRA), *N.J.S.A. 47:1A-1 to -13*. The Appellate Division found that all aspects of the appeal other than the fee award were moot but affirmed the award of attorney's fees. Defendant Jones submitted 380 OPRA requests between November 2016 and January 2017. Instead of seeking a reasonable accommodation or denying his requests, Teaneck applied for an injunction, contending that the requests were an abuse of the OPRA process that entitled Teaneck to an order prohibiting defendant from submitting any further requests. Jones dropped a number of his requests and of the thirty-one remaining, the parties resolved twenty-six of them and summary judgment against Jones was granted on four of the contested items, with one other being settled. Teaneck argued that Jones was not a "prevailing party" because Teaneck had filed for an injunction instead of denying the request. The Appellate Division agreed with the trial judge that defendant was a prevailing party entitled to counsel fees.

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