

**SUPERIOR COURT OF NEW JERSEY
COUNTY OF MIDDLESEX**

Chambers of
FRANK M. CIUFFANI
Judge



Middlesex County Court House
P.O. BOX 964
NEW BRUNSWICK, N.J. 08903-964

May 18, 2011

Letter Opinion

Jamie Epstein, Esq.
1101 Route 70 West
Cherry Hill, New Jersey 08002
Attorney for Plaintiff

Paula M. Castaldo, Esq.
McElroy, Deutsch, Mulvaney & Carpenter LLP
1300 Mount Kemble Avenue
P.O. Box 2075
Morristown, New Jersey 07962
Attorney for Defendant

Re: Pat Doe v. Rutgers, Docket No: MID-L-488-11

Dear Counsel:

Before the Court is the plaintiff's motion for attorney's fees and costs pursuant to the Open Public Records Act ("OPRA") Statute at N.J.S.A. 47:1A-6. Having reviewed the parties' moving and opposition papers, the Court renders this written decision.

I. Factual and Procedural History

Plaintiff is enrolled as a student at Rutgers Law School- Camden and has been charged with cheating and/or plagiarism on a final exam and is potentially facing expulsion. On December 6, 2010 Plaintiff filed an OTSC to compel Rutgers to provide certain records requested pursuant

to OPRA and the common law right of access. After hearing oral arguments on February 16, 2011, this Court denied plaintiff's request for all final take home exams. As to the student disciplinary files requested, Rutgers offered a compromise whereby they would create a summary of the twelve disciplinary actions that have occurred since 2005. Oral arguments were again heard on March 10, 2011 to determine if the summary would satisfy the plaintiff's OPRA request and the plaintiff also filed a motion on short notice seeking any audio or video recordings of the disciplinary hearings, the plaintiff's own disciplinary file, a Vaughn Index, and any documents contained within the disciplinary files that are capable of being redacted. On March 15, 2011 this Court held in a letter opinion that Rutgers has no audio or video recordings of the disciplinary hearings to produce, the plaintiff must sign a FERPA release form prior to obtaining a copy of his own disciplinary file, the plaintiff's request for a Vaughn Index was denied, and the summary Rutgers provided sufficiently satisfied the plaintiff's OPRA request so that no additional documents needed to be produced to the plaintiff. The plaintiff has now filed this motion for an award of attorney's fees and costs as a prevailing party under OPRA.

II. Discussion and Decision

I. PLAINTIFF IS THE PREVAILING PARTY UNDER THE CATALYST THEORY

N.J.S.A. 47:1A-6 provides a fee shifting mandate under OPRA to a requestor. The statute provides in relevant part that

The right to institute any proceeding under this section shall be solely that of the requestor. Any such proceeding shall proceed in a summary or expedited manner. The public agency shall have the burden of proving that the denial of access is authorized by law. If it is determined that access has been improperly denied, the court or agency head shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

The first issue is whether the plaintiff is considered a prevailing party under the OPRA statute. In Mason v. City of Hoboken, 196 N.J. 51, 73 (2008) the court defined prevailing party in the context of OPRA under the catalyst theory where the plaintiff's efforts must be a 'necessary and important factor in obtaining the relief' and the relief ultimately secured by plaintiff has a basis in law. Essentially, the plaintiff is required to establish a causal nexus between the litigation and the production of the requested records.

Here, the plaintiff submitted an OPRA request to Rutgers on October 13, 2010 seeking access to (1) all Rutgers Law School-Camden students' disciplinary records on plagiarism and/or cheating from 2005 to present; and (2) all final take home exams submitted in Professor Nissen's course on Critical Legal Analysis- Summer 2010 with all identifiable information redacted. In a letter dated November 3, 2010 Rutgers denied plaintiff's request entirely. The plaintiff attempted to clarify his OPRA request on November 9, 2010, which Rutgers also completely denied on November 16, 2010. Thereafter the plaintiff filed an OPRA complaint and OTSC on November 19, 2010. This matter was originally venued in Gloucester County and later transferred to Middlesex County where the OTSC was given a February 16, 2010 return date. Rutgers did not offer any compromise to the plaintiff within the three months between the plaintiff's filing of the OTSC to the Feb. 16, 2010 return date. Additionally, Rutgers' November 3, 2010 response was not within seven business days of the plaintiff's initial request as required by N.J.S.A. 47:1A-5(i), which provides in relevant part that

a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is

currently available and not in storage or archived. In the event a custodian fails to respond within seven business days after receiving a request, the failure to respond shall be deemed a denial of the request.

Accordingly, Rutgers 2 week delayed response further demonstrated their unwillingness to compromise until the plaintiff filed an OPRA complaint.

Therefore, the Court finds that the plaintiff is the prevailing party under the catalyst theory where his efforts in filing an OPRA complaint and OTSC to contest Rutgers complete denial of any records requested was a 'necessary and important factor' in having Rutgers offer a compromise of producing a summary of the disciplinary files to end the litigation. The relief secured also had a basis in law as this Court determined that educational records protected under FERPA could be disclosed if meaningfully redacted. The Court found that this disclosure protected Rutgers' interest in maintaining students' privacy and the plaintiff's interest in having access to the files to defend against his own disciplinary charges, which led to the court's determination that the summary satisfied plaintiff's OPRA request.

II. PLAINTIFF IS ENTITLED TO A REASONABLE AMOUNT OF ATTORNEYS FEES & COSTS

Attorney's fee awards under fee shifting statutes like OPRA are calculated by multiplying the number of hours reasonably expended by a reasonable hourly rate. This number represents the "lodestar." NJDPM, 185 N.J. at 153; Rendine, 141 N.J. at 335. However, courts have recognized that this lodestar amount should be reduced in cases where the plaintiff has achieved partial or limited success. Rendine, 141 N.J. at 336. In Rendine, the court held that the

trial court should reduce the award proportionally to reflect the amount of time expended and the actual relief obtained.

Having reviewed the plaintiff's affidavit of services, the court finds that the plaintiff is entitled to attorney's fees and costs for work performed up to February 16, 2011. The court agrees with Rutgers' contention that the plaintiff's motion on short on notice was denied in its entirety and accordingly the award of attorney's fees is reduced consistent with Rendine. The court will also grant attorney's fees for drafting this motion for fees, and the two court appearances on February 16, 2010 and March 10, 2010 reduced to 6.4 hours and 5.5 hours respectively. The Court also finds that \$325 is a reasonable fee according to plaintiff's counsel's experience and the certification provided by Walter M. Luers, Esq. detailing the prevailing rate for OPRA litigation in this state for lawyers with similar experience.

The plaintiff may also be entitled to a fee enhancement given the standard set forth in NJDPM, 185 N.J. at 157-58 where the court held that unusual OPRA matters warrant fee enhancements and found that there was a high risk of failure where the documents sought were alleged to be protected by a blanket privilege, the matter was an issue of public importance, as well as a case of first impression, and the lawyer had taken the case on a pro bono basis. The court finds that the plaintiff is entitled to a fee enhancement of 20% in light of the standard applied in NJDPM. Here, the OPRA issue was a case of first impression in New Jersey as to whether a school must disclose disciplinary records pursuant to OPRA. Rutgers denied plaintiff's request on the assertion that these records were protected by both an OPRA exemption and a privilege under FERPA, and thus the plaintiff faced a high risk of failure to

obtain the records requested. The plaintiff here also took the case on a contingency basis and requests 20% in accordance with the guideline set forth in NJDPM, 185 N.J. at 158 where the court determined that “the enhancement in typical contingency cases [ranges] between twenty and thirty-five percent of the lodestar.”

III. THE CASES RUTGERS CITED TO OPPOSE AN AWARD OF ATTORNEYS FEES & COSTS ARE DISTINGUISHABLE

The cases Rutgers cited to support their proposition that where a public entity provides a reasonable accommodation to the plaintiff, an award of attorney’s fees would be inappropriate can be distinguished from the present matter. In each case, the public entity offered a reasonable accommodation to satisfy the plaintiff’s request prior to the plaintiff filing suit to compel the production of records pursuant to OPRA or the common law right of access.

In Burnett v. County of Bergen, 402 N.J. Super. 319 (App. Div. 2008), *affirmed in part, modified and reversed in part*, 198 N.J. 408 (2009) the government entity agreed to produce approximately 8 million pages of documents upon redaction of social security numbers at the plaintiff’s expense. In denying the plaintiff’s request for attorney’s fees, the court found that the only issue the plaintiff prevailed on was compelling the government agency to disclose the costs of copying, but the plaintiff did not prevail on his primary claim that the social security numbers should not be redacted.

In N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166 (App. Div. 2006) the government agency agreed to satisfy plaintiff’s OPRA request, and the plaintiff agreed to allow the government agency an additional twenty four calendar days to produce the

records given the magnitude and complexity of the request. However, the plaintiff prematurely filed suit before allowing the government agency to produce the documents in the agreed upon timeframe. The court held that the government agency's delayed timeline to complete the request was a "reasonable solution" and that the documents provided after the plaintiff filed suit did not qualify for an award of attorney's fees and costs.

In North Jersey Media Group, Inc. v. N.J. Dep't of Personnel, 389 N.J. Super. 527 (App. Div. 2006) the plaintiff's OPRA request sought a department of police employment application in its entirety. The request was initially denied because such employment applications are protected by statute, administrative regulation, and Executive Order. The plaintiff filed an OPRA complaint, and the court ordered the Department of Police to only release the educational background information from the employment application, which the requestor was ultimately seeking. The court held that the plaintiff is not entitled to attorney's fees because the court granted access to such limited information in contrast to the plaintiff's original OPRA request.

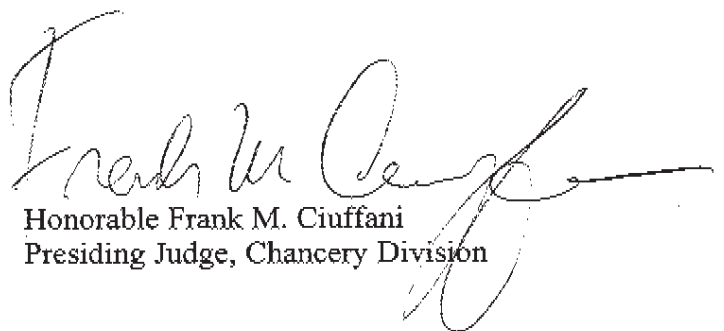
In Papraniku v. Cherry Hill Township, No. L-2871-07, 2009 WL 1045998 (N.J. Super. Ct. App. Div. April 21, 2009) the court deferred to the trial court's reasoning (placed on the record) in affirming the denial of attorney's fees. The facts in this case appear to be similar to Burnett where both plaintiffs contested redaction of the documents, and the documents were produced after the litigation commenced. Whereas here, the plaintiff acknowledged that the disciplinary files would need to be redacted.

In the present matter, the plaintiff's OPRA request sought access to disciplinary files and acknowledged that these files would need to be meaningfully redacted unlike North Jersey Media Group where plaintiff was seeking access to an employment history in its entirety, which was protected. However, Rutgers initially took the position that there was no possibility of meaningful redaction. Subsequently, the plaintiff's reply brief illustrated how the documents could be redacted to provide the necessary information of the nature of the charges, the findings, and the discipline imposed. Although 3,000 documents were sent to this court for *in camera* review and Rutgers created a 6 page summary chart, this litigation prompted Rutgers to change its behavior from a complete denial of plaintiff's OPRA request to a reasonable compromise of a summary chart.

III. Conclusion

For the aforementioned reasons, Rutgers is required to pay plaintiff attorney's fees in the amount of \$17,647.00 plus a 20% fee enhancement of \$3,529.40 and costs in the amount of \$420.30.

Very truly yours,



Honorable Frank M. Ciuffani
Presiding Judge, Chancery Division

FILED

MAY 18 2011

Frank M. Ciuffani, P.J., Ch.

The Honorable Frank Ciuffani
Middlesex County Courthouse
56 Paterson Street
New Brunswick, New Jersey 08903

Pat Doe

Plaintiff

v.

Rutgers University

Defendant

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY
DOCKET NO. L-488-11

FINAL ORDER

This matter having been opened to the Court by Jaime Epstein, attorney for Plaintiff, by way of an Order To Show Cause seeking records from defendant, Rutgers University, pursuant to the Open Public Records Act and the common law right of access, and the Court having reviewed the papers submitted in support of the plaintiff's application and in opposition, heard oral arguments, and issued two letter opinions dated March 15, 2011 and May 18, 2011, and for good cause having been shown;

IT IS ON THIS 18th Day of May, 2011:

ORDERED that plaintiff is denied the right to access any take home exams in Professor Nissen's course on Critical Legal Analysis- Summer 2010; and it is further

ORDERED that plaintiff is denied the right to any audio or video recordings as Rutgers has plainly established that such recordings do not exist; and it is further

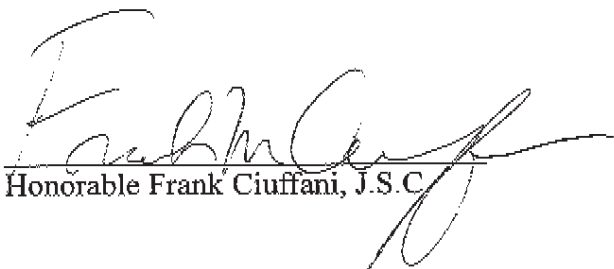
ORDERED that Rutgers is not required to produce plaintiff's own disciplinary file without the required FERPA release form signed by the plaintiff to permit disclosure; and it is further

ORDERED that Rutgers University is not required to produce a Vaughn Index; and it is further

ORDERED that Rutgers' summary of the disciplinary files dating back to 2005 sufficiently satisfies the plaintiff's OPRA request so that no additional documents regarding this request need to be produced; and it is further

ORDERED that Rutgers is required to pay plaintiff's attorney's fees, pursuant to N.J.S.A. 47:1A-6, in the amount of \$17,647.00 plus a 20% fee enhancement of \$3,529.40 and costs in the amount of \$420.30; and it is further

ORDERED that a copy of this order be served within seven (7) days from the date of this order.


Honorable Frank Ciuffani, J.S.C.