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Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1276-15T4¹
A-1277-15T4
A-1638-15T4

MIDDLESEX COUNTY PROSECUTOR'S
OFFICE,

Plaintiff-Appellant,

v.

NJ ADVANCE MEDIA, LLC,

Defendant-Respondent,

and

HOME NEWS TRIBUNE,

Defendant.

NJ ADVANCE MEDIA, LLC,

Plaintiff-Respondent,

v.

MIDDLESEX COUNTY PROSECUTOR'S
OFFICE, and JAMES E. O'NEILL, in
his capacity as Custodian of
Records for the Middlesex County
Prosecutor's Office,

¹ These back-to-back appeals are consolidated for purposes of
this opinion.

Defendants-Appellants.

HOME NEWS TRIBUNE,

Plaintiff-Respondent,

v.

MIDDLESEX COUNTY PROSECUTOR'S
OFFICE,

Defendant-Appellant.

Argued January 23, 2018 - Decided March 2, 2018

Before Judges Reisner, Gilson, and Mayer.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Docket Nos.
L-1217-15, L-1938-15, and L-2022-15.

Christopher K. Harriott argued the cause for
appellant (Florio Kenny Raval, LLP, attorneys;
Christopher K. Harriott, of counsel and on the
briefs; Maxine J. Kutner, on the briefs).

Keith J. Miller and Justin T. Quinn argued the
cause for respondent NJ Advance Media, LLC
(Robinson Miller LLC, attorneys; Keith J.
Miller and Justin T. Quinn, on the briefs).

Thomas J. Cafferty argued the cause for
respondent Home News Tribune (Gibbons PC,
attorneys; Thomas J. Cafferty, on the briefs;
Nomi I. Lowy, of counsel and on the briefs).

PER CURIAM

Appellant Middlesex County Prosecutor's Office (MCPO) appeals
from orders of the Law Division dated November 4, 2015, and

November 6, 2015, awarding attorney's fees to respondents NJ Advance Media, LLC (NJAM) and Home News Tribune (HNT) (collectively, the Newspapers) as prevailing parties in litigation arising from the Newspapers' requests for records pursuant to the Open Public Records Act, N.J.S.A. 47:1A-1 to -13 (OPRA or Act). We affirm.

On January 14, 2015, police responded to a 911 call from a home in Old Bridge. In responding to that call, police shot and killed an Old Bridge man who resided in the home. The next day, NJAM made an OPRA request to the MCPO for any and all 911 recordings related to the Old Bridge shooting. On January 16, 2015, HNT sent a similar OPRA request to the MCPO.

On January 23, 2015, the MCPO advised NJAM that it had a recording of the 911 call, but declined to disclose the recording, citing N.J.S.A. 47:1A-3, which allows non-disclosure of records that "pertain to an investigation in progress," and N.J.S.A. 47:1A-1, which allows non-disclosure of "a citizen's personal information . . . when disclosure thereof would violate the citizen's reasonable expectation of privacy." On February 17, 2015, the MCPO denied HNT's request for the 911 call for the same reasons.

On February 18, 2015, NJAM wrote to the MCPO disputing that the 911 call was subject to the active investigation exception.

NJAM also argued the identity of the 911 caller was public information and, therefore, there was no privacy concern supporting non-disclosure of the 911 call. NJAM warned that if the MCPO declined to reconsider its denial of the requested information, NJAM would litigate the matter, seek to recover attorney's fees and costs under N.J.S.A. 47:1A-6, and request sanctions under N.J.S.A. 47:1A-11.

On February 19, 2015, HNT sent a similar letter to the MCPO. In addition to the arguments presented by NJAM, HNT argued the expectation of privacy exemption applied only to personal information entrusted to the agency, and was not applicable to the 911 call. HNT noted that if there was information that needed protection, the correct course of action under OPRA was redaction of the protected information and prompt disclosure of the remaining portion of the 911 call, even in redacted form.

Despite the Newspapers' renewed requests, the MCPO refused to release the 911 call.

On March 3, 2015, knowing the Newspapers would file OPRA litigation based on its refusal to provide the 911 call, the MCPO filed a motion for a protective order under Rule 4:10-3. The MCPO requested the court to "evaluate the entire 911 call in camera and make a determination that it should not be provided." Since there was no pending litigation when the MCPO filed its motion, the

matter was captioned "IN RE THE REQUEST FOR THE DISCLOSURE OF 911 CALL OF JANUARY 14, 2015 TO OLD BRIDGE POLICE."

In its motion, the MCPO argued the 911 call, made by a family member of the deceased, "reveal[ed] a highly charged emotional situation," and the MCPO believed it "should not provide the 911 recordings where a victim or family member has a reasonable expectation of privacy in the call or the conversation." The MCPO further argued releasing the 911 call would discourage citizens from calling 911 in an emergency.

Upon receipt of the MCPO's motion, NJAM responded by sending a Rule 1:4-8 letter. NJAM asserted the MCPO's "pre-complaint motion" was "procedurally improper and utterly lack[ed] a legal basis." NJAM advised that only a requesting party is allowed to initiate litigation under OPRA. NJAM demanded that the MCPO withdraw its motion or else NJAM would move for sanctions, costs, and attorney's fees incurred in opposing the motion.

HNT also sent a Rule 1:4-8 letter to the MCPO. HNT claimed the MCPO's application was frivolous and improper because: (1) Rule 4:10-3 is a discovery rule, and there was no pending litigation; (2) there was no justiciable controversy, because the MCPO had already denied HNT's request for the 911 call; and (3) the MCPO had no legal authority to initiate OPRA litigation.

In response, counsel for the MCPO "categorically den[ied]" its motion was improper. The MCPO proposed a stipulation in which the Newspapers could seek reasonable attorney's fees in the event that: (1) the MCPO's motion was denied; and (2) the court ordered complete disclosure of the 911 call.

HNT responded to the proposed stipulation by insisting the MCPO withdraw its motion. HNT repeated its intent to file an OPRA complaint and suggested the MCPO could assert all applicable defenses in the OPRA litigation rather than circumvent OPRA by way of an improper motion for a protective order. The MCPO declined to withdraw its motion.

On April 1, 2015, HNT filed a verified complaint and order to show cause (OTSC) against the MCPO seeking disclosure of the 911 call, as well as costs and attorney's fees. HNT sent a courtesy copy of the complaint and OTSC to the MCPO's attorney by overnight courier.

On April 7, 2015, the judge signed HNT's OTSC. That same day, the MCPO sent a disc containing a redacted version of the 911 call to NJAM and HNT. The disc was received by NJAM on April 9, 2015, and by HNT on April 10, 2015.

Because the MCPO was providing only a redacted copy of the 911 call, the Newspapers requested a Vaughn² index in support of the MCPO's redactions. HNT specifically asked the MCPO to "advise how long the total unredacted recording is and how many seconds/minutes were redacted and whether the redactions were made in one place or multiple places," as well as "the legal basis for all redactions." The MCPO responded it would not produce a Vaughn index unless the judge required an index as part of the protective order motion.

On April 8, 2015, one day before receiving the redacted 911 disc, NJAM filed a verified complaint against the MCPO and its records custodian seeking disclosure of the 911 call, as well as costs and attorney's fees.

The MCPO received HNT's filed complaint and signed OTSC on April 10, 2015. On April 13, 2015, the MCPO received a copy of NJAM's complaint.

The MCPO filed answers to the Newspapers' complaints. As an affirmative defense to the Newspapers' legal actions, the MCPO claimed non-disclosure of portions of the 911 call was justified

² Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973). "A Vaughn index is comprised of affidavits containing a 'relatively detailed' justification for the claim of privilege being asserted for each document." Paff v. Div. of Law, 412 N.J. Super. 140, 161 n.9 (App. Div. 2010).

based upon the privacy interests of the caller and others on the recording.

The judge heard argument on the MCPO's motion for a protective order and HNT's OTSC. Without a Vaughn index, the Newspapers argued they lacked an ability to respond to the MCPO's privilege claims. The judge was persuaded by the Newspapers' argument, and ordered the MCPO to provide a Vaughn index. The parties were advised that they would return to court for substantive argument on the pending applications after receipt of the Vaughn index. Before concluding the hearing, the judge asked the MCPO's counsel whether, "[i]n light of what we have done today, are you withdrawing [the motion for a protective order]?" The MCPO responded it would not withdraw the motion.

Two days after the court proceeding, the MCPO mailed a Vaughn index to the Newspapers. While the Vaughn index listed the length of time for each redaction and described the redacted portions of the 911 call, it did not identify the parties on the recording (i.e., police, victim, wife, or other family member). According to the MCPO, the reason for all redactions was the protection of the "privacy rights" of the caller and other family members.

On June 10, 2015, the parties returned to court on the motion for a protective order. The Newspapers argued the Vaughn index was inadequate because it failed to identify the people on the

call, the precise nature of the privacy rights being protected, and whose specific rights were being protected. According to the Newspapers, since the victim was killed by the police, the entire call concerned a matter of public interest implicated under OPRA.

The MCPO argued the motion for a protective order was filed proactively to obtain a legal determination from the court balancing the public's right to the 911 call versus the privacy interests of the caller and family members. The MCPO also contended that N.J.S.A. 47:1A-6 did not preclude its legal action.

In denying the motion for a protective order, the judge found:

With regard to the motion for a protective order, the [c]ourt finds that . . . [OPRA] does not in any way provide or even suggest that such a proceeding would be appropriate with respect to protecting information that the governmental entity or the public entity believes should not be provided to the requestor based on a privacy interest. The statute and all of the associated case law creates a procedure for protecting . . . information that the entity might consider to be private by . . . the provi[sion] of a Vaughn index with an explanation . . . of why the information should not be provided.

. . . .

The [c]ourt finds no basis to depart from the clear language of the statute. The option of where to institute the action, the [Government Records Council] or the Superior Court, and the option of whether to go to court at all are exclusively that of the requestor. The public entity cannot call individuals into

court based on their own denial and then require those parties to expend legal fees in order to respond.³

The motion for a protective order is procedurally deficient pursuant to Rule 4:10-3, which is . . . a Rule utilized in the context of pretrial discovery

The judge told counsel he would listen to the unredacted 911 call with the Vaughn index, and issue a separate ruling on the propriety of the MCPO's redactions.

On June 12, 2015, the judge ruled the MCPO's redaction of the 911 call was proper in light of the "incredibly private, passionate, heart-wrenching" statements made during the call, which revealed "[a] horrific tragedy that this [c]ourt could not imagine before hearing the tape."

By order dated June 24, 2015, the judge denied the MCPO's motion for a protective order and the Newspapers' complaints to the extent the Newspapers sought an unredacted copy of the 911 call.

Based on the judge's ruling, HNT filed a motion for costs and attorney's fees incurred in opposing the MCPO's improper motion for a protective order and sanctions under Rule 1:4-8 and N.J.S.A.

³ The judge's ruling preceded the Court's decision in Carter v. Doe (In re N.J. Firemen's Ass'n Obligation), 230 N.J. 258, 278 (2017) (holding "OPRA clearly and unambiguously confers the right to initiate a suit after a public agency's denial of access only upon the requestor.")

2A:15-59.1. HNT filed a separate motion for attorney's fees incurred in its OPRA lawsuit against the MCPO. The next day, NJAM filed a motion for costs, attorney's fees, and sanctions under Rule 4:10-3 and OPRA.

In opposition to the fee motions with respect to the protective order, the MCPO argued: (1) its motion for a protective order was justified as an "innovative and creative" approach to protecting the privacy rights of the people on the 911 call; (2) since the court held Rule 4:10-3 was inapplicable to the MCPO's motion, it would be illogical for the court to impose fees under that Rule; and (3) if the court had ruled on the substantive issues in the OPRA cases first, the protective order would have been rendered moot, as the substantive reasons advanced by the MCPO in support of its motion were affirmed by the judge's ruling on June 12, 2015. In opposition to the fee motions with respect to the Newspapers' OPRA complaints, the MCPO argued the Newspapers were not prevailing parties under OPRA because the court deemed the MCPO's redaction of the 911 call to be proper.

During argument on the fee motions, the MCPO insisted the redacted 911 call was not mailed to the Newspapers as a result of their OPRA lawsuits. The MCPO maintained the redacted 911 call was sent to the Newspapers as part of its motion for a protective order. However, the MCPO's counsel stated that "there was no

doubt in this case, after [the MCPO] denied the OPRA request[s] for the 911 call, . . . that counsel were going to bring OPRA actions against the prosecutor's office," and further admitted to the judge that the Newspapers "filed their complaints before my effort to, in fact . . . get[] [them] the redacted disc."

The MCPO did not dispute the hourly rates charged or the time expended by counsel for the Newspapers, but it did object to fees for any legal work done after it provided the redacted 911 call.

On September 11, 2015, the judge issued a decision on the Newspapers' fee motions. The judge determined the Newspapers were prevailing parties under OPRA. The judge found there was a causal nexus between the Newspapers' lawsuits and the MCPO's release of the redacted 911 call. The judge expressly found:

[T]he filing of the verified complaints and orders to show cause were indeed the catalysts for the production of the 911 recording. After a blanket denial . . . for the 911 recording and refusal to even reconsider the denial in February [20]15, the filing of the lawsuits caused . . . a subsequent disclosure

. . . .

The filing of the two lawsuits was a necessary and important factor in obtaining the relief, because, up to that point, the prosecutor's office remained steadfast in its denial of the requests for access

The judge also ruled there was a basis in law for the disclosure of the 911 call because "[t]he requested 911 recording [was] a public government record and hence subject to disclosure under OPRA."

The judge also rejected the MCPO's claim that the Newspapers should not recover fees for legal work after disclosure of the redacted 911 call. The judge found that even after the disclosure of the redacted 911 call, the Newspapers "incurred attorney's fees by continuing to litigate the issue of the prosecutor's failure to provide a Vaughn index and by defending against the motion for a protective order filed by the prosecutor's office, which was procedurally infirm."

The judge further rejected the MCPO's claim that the Newspapers achieved limited success because their complaints sought the unredacted 911 call. The judge found the Newspapers requested "access [to] any recording relating to the 911 call or call to the police relating to the January 14 shooting" and that the Newspapers' obtaining the redacted 911 call, with the Vaughn index, constituted a "high degree of success" under OPRA.

With respect to the Newspapers' attorney's fees incurred as a result of the MCPO's motion for a protective order, the judge held the Newspapers were entitled to fees under OPRA because the MCPO's motion "was a direct result of the OPRA request[s]." The

judge found there was "no legal authority" for the MCPO's motion, which was "in direct violation of the express language of OPRA," thus there was "no substantial justification to exempt [the MCPO] from paying fees and costs." In light of the numerous opportunities the MCPO had to withdraw its motion, the judge held it was not unjust to award fees to the Newspapers.

By orders dated November 4, 2015, the judge awarded \$71,848.28 in costs and attorney's fees to HNT as a prevailing party in its OPRA case and for opposing the MCPO's motion for a protective order. By order dated November 6, 2015, the judge awarded \$39,583.51 in costs and attorney's fees to NJAM.

The MCPO appealed. On appeal, the MCPO argues: (1) the Newspapers were not prevailing parties under OPRA; and (2) the judge should have reduced the fees awarded to the Newspapers based on their "limited success" in the OPRA litigations.

We review fee determinations for an abuse of discretion. Rendine v. Pantzer, 141 N.J. 292, 317 (1995). "[F]ee determinations by trial courts will be disturbed only on the rarest of occasions, and then only because of a clear abuse of discretion." Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001) (citing Rendine, 141 N.J. 292).

In determining whether a party is entitled to attorney's fees under a fee-shifting statute such as OPRA, courts employ "a two-

fold test to determine whether a litigant qualifies as a prevailing party. [First, a] party must demonstrate that [the] lawsuit was causally related to securing the relief obtained," meaning "plaintiff['s] efforts are a necessary and important factor in obtaining the relief. This determination is factual." Singer v. State, 95 N.J. 487, 494 (1984) (citation omitted). Second, "plaintiff must establish that the relief granted had some basis in law." Ibid. This two-part test is known as the "catalyst" theory. Teeters v. Div. of Youth & Family Servs., 387 N.J. Super. 423, 429-31 (App. Div. 2006). A trial court's evaluation of the causal nexus under the Singer test is a "fact-sensitive inquiry on a case-by-case basis, evaluating the reasonableness of, and motivations for, an agency's decisions." Mason v. City of Hoboken, 196 N.J. 51, 79 (2008). Usually, it is the requestor's burden to prove prevailing party status to recover attorney's fees. Id. at 76-77.

"[A] party can be considered 'prevailing' for the purposes of the . . . Act even though the disposition of the case does not include a final judgment entered in plaintiff's favor" Singer, 95 N.J. at 495. "A plaintiff is considered a prevailing party 'when actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the

plaintiff.'" Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410, 420 (App. Div. 2000) (second alteration in original) (quoting Farrar v. Hobby, 506 U.S. 103, 111-12 (1992)).

The MCPO argues the judge erred in determining the Newspapers were prevailing parties under OPRA. The MCPO contends the Newspapers sought only the unredacted 911 call and, therefore, did not prevail because the judge determined that producing the redacted 911 call was proper. The MCPO also argues the Newspapers' lawsuits could not have been the catalyst for disclosure of the 911 call, because the MCPO voluntarily released the 911 call as part of its motion for a protective order.

We agree with the motion judge that the Newspapers' lawsuits were a catalyst for the disclosure of the 911 call. As early as February 2015, the MCPO knew the Newspapers intended to file OPRA lawsuits if the 911 call was not released. Knowing the Newspapers planned to file litigation, the MCPO filed its "procedurally deficient" motion for a protective order. It was not until after HNT filed suit -- nearly two months after the MCPO first denied disclosure of the 911 call and nearly one month after the MCPO filed its motion -- that the MCPO released the redacted 911 call, which then required the Newspapers to seek a Vaughn index. The MCPO's repeated refusal to disclose any portion of the 911 call for three months after the Newspapers' OPRA requests provides

substantial credible evidence that the Newspapers' OPRA litigations were a catalyst for the MCPO's disclosure of the call. Based on the record, the judge correctly held the Newspapers were prevailing parties entitled to fees pursuant to OPRA.

We reject the MCPO's argument that the judge should have reduced the fee award in light of the Newspapers' limited success in obtaining only a redacted copy of the 911 call. As our Supreme Court held in New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Correction:

[w]e reject "'a mathematical approach comparing the total number of issues in the case with those actually prevailed upon' because '[s]uch a ratio provides little aid in determining what is a reasonable fee in light of all the relevant factors.'" Stated differently, "the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit."

[New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't of Corr., 185 N.J. 137, 154-55 (2005) (citations omitted).]

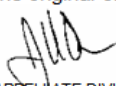
The MCPO separately appeals from an order awarding fees to NJAM incurred in defending against the motion for a protective order. The MCPO claims the judge erred in awarding fees to NJAM pursuant to Rule 4:10-3. We find the MCPO's argument misunderstands the basis for the judge's fee award. The judge expressly awarded fees to NJAM as a prevailing party under OPRA,

not pursuant to Rule 4:10-3. Section 6 of OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. We concur with the judge's findings that the MCPO's motion for a protective order was "any proceeding," thus entitling NJAM to attorney's fees under OPRA.

There is ample support in the record for the judge's determination that the Newspapers were prevailing parties under OPRA and, thus, entitled to recover legal fees and costs.⁴ We discern no basis to disturb the amount of the fees awarded by the judge as the MCPO did not object to the amount awarded.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION

⁴ Based on the certifications filed by the Newspapers in support of their requested fee awards, the judge assessed the legal tasks performed by counsel and the time expended in determining the proper fee award, ultimately awarding approximately forty percent less to NJAM than he awarded to HNT, based on the efforts of each Newspaper relative to obtaining the 911 call.