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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4533-19**

JOSEPH ROSARIO,

Plaintiff-Respondent,

v.

**THE PORT AUTHORITY OF
NEW YORK AND NEW JERSEY,**

Defendant-Appellant.

Submitted June 7, 2021 – Decided July 21, 2021

Before Judges Currier and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law
Division, Bergen County, Docket No. L-2866-20.

Port Authority Law Department, attorneys for appellant
(Andres J. Castillo, of counsel and on the briefs).

Newman & Denburg, LLC, attorneys for respondent
(Samuel A. Denburg, of counsel and on the brief; David
F. Scheidel II, on the brief).

PER CURIAM

Defendant The Port Authority of New York and New Jersey (Port Authority) appeals from the Law Division's: (1) June 26, 2020 order directing it to produce government records relating to an automobile accident requested by plaintiff Joseph Rosario under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13; (2) July 17, 2020 order directing it to produce additional government records to Rosario; and (3) August 20, 2020 order awarding Rosario \$11,164.70 in attorney's fee and costs as a prevailing party under N.J.S.A. 47:1A-6. We affirm.

I.

The following facts are derived from the record. On March 2, 2020, Rosario was driving a car across the George Washington Bridge when a piece of metal penetrated the windshield and struck him in the head. He suffered a traumatic brain injury and was rendered comatose. Rosario remained unconscious for several weeks, during which he underwent emergency brain surgery. After he regained consciousness, Rosario was transferred to an acute rehabilitation facility. He continues to have cognitive and functional disabilities and suffers partial paralysis as a result of the incident.

On March 10, 2020, at attorney acting on Rosario's behalf sent an OPRA request to Port Authority, which operates the bridge. The request, which was in

the attorney's name, demanded production of government records relating to the incident, including police reports, accident reconstruction reports, photographs, video surveillance recordings, witness statements, and the object that struck Rosario. Two days later, the attorney sent Port Authority a notice of tort claim and a non-spoilation letter, which stated that he had been retained to represent Rosario, who was described as unconscious and a patient at a trauma center.

On April 14, 2020, the Port Authority's records custodian objected to providing the requested records because they were pertinent to an ongoing investigation. See N.J.S.A. 47:1A-3(a).

Having received no response to a subsequent inquiry for an update on the status of the investigation, Rosario's counsel filed a complaint and order to show cause in the Law Division pursuant to N.J.S.A. 47:1A-6, seeking production of the requested records and the award of attorney's fees and costs. Port Authority filed an answer and cross-motion to dismiss, arguing that: (1) release of the requested government records would be against the public interest in having the investigation continue without disruption; and (2) because Rosario's counsel was the originator of the government records request, Rosario did not have standing to seek attorney's fees and costs.

On the original return date, the parties advised the court that they had reached a preliminary agreement regarding production of the requested government records. Counsel for the Port Authority agreed that the only outstanding element of the agency's investigation was an interview of Rosario. He advised the court that once the interview was completed, the agency would produce the government records Rosario demanded.

Counsel addressed two concerns with respect to conducting the interview: (1) Port Authority detectives had been unable to enter the facility at which Rosario was a patient because of restrictions designed to curb the spread of Covid-19; and (2) because of his medical condition, Rosario was unlikely to remember the incident. The court noted the possibility of having the detectives interview Rosario remotely through a computer application. Counsel for Port Authority was amenable to that approach and advised the court that if the interview demonstrated that Rosario could not remember the incident, the investigation would be closed and the agency would produce the requested government records. During the hearing, Rosario's counsel noted that the requested records included documents, video surveillance recordings, dashboard footage, photographs, and the metal object that struck Rosario.

On June 26, 2020, the court entered an order directing Port Authority to produce "the requested documents" no later than July 10, 2020. With the parties' consent, the court reserved on the issue of attorney's fees and costs.

Port Authority thereafter produced three documents: (1) an accident report created immediately after the incident; (2) the report of a closed command investigation; and (3) the report of a closed criminal investigation. The agency did not produce video surveillance recordings, dashboard footage, photographs, or the metal object that struck Rosario.

On July 10, 2020, Rosario's counsel informed the court of Port Authority's failure to comply with the June 26, 2020 order. He requested that the court: (1) hold the agency in contempt, pursuant to Rule 1:10-3; (2) sanction the agency and impose personal penalties against its custodian of records pursuant to N.J.S.A. 47:1A-11(a); and (3) award Rosario attorney's fees and costs.

Port Authority opposed Rosario's application, arguing that the June 26, 2020 order required the agency to produce only "documents" requested by Rosario, not any other materials. The agency advised the court that it was searching for the video surveillance recordings sought by Rosario, which it was willing to produce, but the search was hampered by workplace restrictions related to the Covid-19 pandemic and the need to convert the recordings to a

format that can be viewed on a typical computer. In addition, Port Authority argued that tangible objects in the possession of the agency do not fall within the scope of government records under OPRA. The agency requested that the court reinstate its cross-motion for dismissal.

On July 17, 2020, Judge Bonnie J. Mizdol issued a comprehensive written opinion concluding that Port Authority failed to comply with the June 26, 2020 order and finding Rosario was a prevailing party under N.J.S.A. 47:1A-6. The judge found that the records requested by Rosario fell within OPRA and that Port Authority did not establish they were exempt from disclosure as pertaining to an ongoing investigation. Describing the evidence produced by the agency as "scant" and a "blanket assertion" of the exemption, the judge found that Port Authority "provided no specific justification to the court for requiring nearly four months to complete a traffic accident investigation."

Judge Mizdol also found that the agency "failed to show how disclosure of [the requested] materials would be inimical to the public interest" and that legal precedents had rejected stronger claims, with more detailed justifications, that government records were exempt from disclosure than those raised by Port Authority. See Serrano v. S. Brunswick Twp., 358 N.J. Super. 352 (App. Div. 2003); Courier News v. Hunterdon Cty. Prosecutor's Office, 358 N.J. Super. 373

(App. Div. 2003). In addition, Judge Mizdol concluded that even if Port Authority had made a prima facie showing of a public interest in non-disclosure, Rosario's showing of need for the records was "abundantly clear," and warranted disclosure. As the judge noted, Rosario needed the records to seek redress for his injuries and he was "increasingly prejudiced by each day that these materials are not disclosed."

Judge Mizdol also rejected Port Authority's claim to have complied with the June 26, 2020 order. The judge found that Port Authority should have been aware that the order required it to produce all of the government records requested by Rosario, given the statements made during the June 26, 2020 hearing and the express terms of Rosario's OPRA request. The court declined, however, to find Port Authority in contempt or to impose civil sanctions absent proof of a knowing and willful violation of the court's order.

Finally, Judge Mizdol rejected Port Authority's argument that Rosario was not entitled to attorney's fees and costs because his counsel listed his own name on the OPRA request. The judge found that: (1) it was plain that Rosario's counsel submitted the OPRA request in his capacity as the authorized agent for Rosario, who was physically unable to do so on his own; (2) the request was required to preserve Rosario's rights in connection with the incident; and (3)

Port Authority was aware of counsel's representation of Rosario as a result of its receipt of his notice of tort claim and non-spoliation demand.

On July 17, 2020, the court entered an order: (1) directing Port Authority to produce all outstanding government records requested by Rosario within ten days; (2) finding Rosario is entitled to an award of attorney's fees and costs with respect to both his complaint and his motion to enforce the June 26, 2020 order; and (3) directing Rosario's counsel to submit a certification of services.

On August 20, 2020, Judge Mizdol issued a detailed written opinion awarding Rosario \$11,164.70 in attorney's fees and costs. The judge carefully analyzed the factors set forth in R.P.C. 1.5(a) and Rendine v. Pantzer, 141 N.J. 292 (1995), and concluded that the attorney's fees and costs sought by Rosario were reasonable and adequately reflected the scope of his success. An August 20, 2020 order memorializes the judge's decision.

This appeal follows. Port Authority raises the following arguments.

POINT I

THE INVESTIGATIVE MATERIALS WERE
SUBJECT TO THE ONGOING INVESTIGATIONS
EXEMPTION AT THE TIME OF THE DENIAL.

POINT II

PLAINTIFF WAS NOT ENTITLED TO
ATTORNEYS' FEES PURSUANT TO OPRA AND

CASE LAW REQUIRING THAT THE REVERSAL
OF A DENIAL OF RECORDS HAVE A BASIS IN
LAW.

II.

"The purpose of OPRA is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." O'Shea v. Twp. of W. Milford, 410 N.J. Super. 371, 379 (App. Div. 2009) (quoting Times of Trenton Publ'g Corp. v. Lafayette Yard Community Dev. Corp., 183 N.J. 519, 535 (2005) (internal quotations omitted)). Accordingly, the statute provides that "government records shall be readily accessible for inspection, copying, or examination . . . with certain exceptions, for the protection of the public interest" N.J.S.A. 47:1A-1. A "[g]overnment record" includes

any paper . . . document, drawing, . . . photograph . . . ,
data processed or image processed document, [or]
information stored or maintained electronically . . . that
has been made, maintained or kept on file in the course
of his or its official business by any officer, . . . agency
or authority of the State . . . or that has been received in
the course of his or its official business by such officer,
. . . agency, or authority

[N.J.S.A. 47:1A-1.1.]

N.J.S.A. 47:1A-3 creates an exemption from disclosure for government records that "pertain to an investigation in progress by any public agency" in

specified circumstances. To establish that government records are exempt from disclosure, the public agency must "show that (1) the requested records 'pertain to an investigation in progress by any public agency,' (2) disclosure will 'be inimical to the public interest,' and (3) the records were not available to the public before the investigation began." N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 573 (2017) (quoting N.J.S.A. 47:1A-3). "[A] public agency seeking to restrict the public's right of access to government records must produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality. Absent such a showing, a citizen's right of access is unfettered." Courier News, 358 N.J. Super. at 382-83.

In Lyndhurst, the Court established a balancing test to determine whether release of government records pertaining to an ongoing investigation would "be inimical to the public interest." On the one hand, early disclosure of records pertaining to an ongoing investigation will often be inimical to the public interest because of the potential for revealing preliminary forensic evidence and tainting witness accounts. Id. at 573-74. On the other hand, disclosure of government records that furthers private and public interests without posing a significant risk of witness taint is favored. Id. at 575-78.

This court reviews de novo trial court decisions regarding the applicability of OPRA and whether exceptions to disclosure of government records have been met. O'Shea, 410 N.J. Super. at 379; Asbury Park Press v. Cty. of Monmouth, 406 N.J. Super. 1, 6 (App. Div. 2009); MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 543 (App. Div. 2005).

In addition, the decision to award attorney's fees rests "within the sound discretion of the trial court." Maudsley v. State, 357 N.J. Super. 560, 590 (App. Div. 2003). "[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) (quoting Rendine, 141 N.J. at 317). An abuse of discretion occurs "when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-Sanchez v. Immigration and Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985)).

While New Jersey generally disfavors the shifting of attorney's fees, a prevailing party may recover attorney's fees if expressly provided by statute, court rule, or contract. Collier, 167 N.J. at 440 (citing North Bergen Rex Transp., Inc. v. Trailer Leasing Co., 158 N.J. 561, 569 (1999) and Dep't of Env'tl.

Prot. v. Ventron Corp., 94 N.J. 473, 504 (1983)). Rule 4:42-9(a)(8) allows attorney's fees "[i]n all cases where attorney's fees are permitted by statute."

N.J.S.A. 47:1A-6, a provision of OPRA, provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." The statute "mandate[s] rather than permit[s], an award of attorney's fees to a prevailing party" Mason v. City of Hoboken, 196 N.J. 51, 75 (2008). "The statute does not restrict fee-shifting to instances of willful violations." Smith v. Hudson Cty. Register, 422 N.J. Super. 387, 398 (App. Div. 2011).

A plaintiff is a "prevailing party" if he or she achieves the desired result because the complaint brought about a change in the custodian's conduct. Teeters v. Div. of Youth & Family Servs., 387 N.J. Super. 423, 432 (App. Div. 2006). A requestor of records is entitled to attorney's fees if they can demonstrate: "(1) a factual causal nexus between plaintiffs' litigation and the relief ultimately achieved; and (2) the relief ultimately secured by plaintiffs has a basis in law." Mason, 196 N.J. at 76 (internal quotations omitted).

Having carefully reviewed Port Authority's arguments in light of the record and applicable legal principles, we affirm the orders under appeal for the reasons stated by Judge Mizdol in her thorough and well-reasoned written

opinions. Port Authority has advanced no convincing argument that Judge Mizdol erred in her findings of fact or conclusions of law.

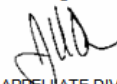
Port Authority did not establish that release of the government records sought by Rosario, which pertained to the investigation of an automobile accident, albeit unusual in nature, would be inimical to the public interest, even before Rosario was interviewed. Rosario was unconscious during the initial stages of the investigation and, once he awoke from a coma, unlikely to remember the incident. Disclosure posed little, if any, threat that his recollection would be influenced by reports or other records possessed by Port Authority.

Moreover, at the July 17, 2020 hearing, Port Authority did not mention the need to interview Rosario, suggesting the interview had taken place or was not feasible in light of Rosario's medical condition. Yet, the agency had not produced the records. In light of Port Authority's failure of proof, and Rosario's strong interest in obtaining the records to initiate legal action, disclosure was mandated by statute.

In addition, Judge Mizdol acted within her discretion when she awarded Rosario attorney's fees and costs. Rosario obtained the records he sought as a result of his filing a complaint and a motion to enforce the June 26, 2020 order.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION