

**To: New Jersey Law Revision Commission**  
**From: Oyinkansola Lapite**  
**Re: Open Public Record Act, N.J.S. 47:1A-5(g) (*Grieco v. Borough of Haddon Heights*)**  
**Date: July 09, 2018**

## M E M O R A N D U M

### Executive Summary

In *Grieco v. Borough of Haddon Heights*,<sup>1</sup> the Superior Court of New Jersey considered the issue of whether the plaintiff was a prevailing party, entitled to attorney's fees under the Open Public Records Acts (OPRA) N.J.S. 47:1A-6. The Court determined that plaintiff was not a prevailing party, and therefore was not entitled to attorney's fees under the statute, because the plaintiff was not a catalyst for the release of the records.<sup>2</sup>

### Background

On July 6, 2015, plaintiff submitted an OPRA request seeking the notice sent to two newspapers of record for all council meetings held from November 1, 2014 to April 1, 2015.<sup>3</sup> Within the time period set forth in the statute, a representative of the Borough Clerk's office forwarded to plaintiff the requested documents as to the council meetings held in 2015, but did not include the 2014 meetings.<sup>4</sup> Two weeks later, after receiving the 2015 council meeting documents, plaintiff filed a suit seeking the missing 2014 documents as well as attorney's fees under OPRA.<sup>5</sup>

The defendants were not notified about the missing documents until they received the suit filed by the plaintiff, and once it was received, a representative of the Borough Clerk's office sent the missing documents within three days.<sup>6</sup> However, plaintiff alleged that defendants violated OPRA by not providing copies of the requested documents, which she received after filing her lawsuit.<sup>7</sup>

The language of N.J.S. 47:1A-6 is as follows:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

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<sup>1</sup> *Grieco v. Borough of Haddon Heights*, 449 N.J Super. 513 (L. Div. 2015).

<sup>2</sup> *Id.* at 525.

<sup>3</sup> *Id.* at 516.

<sup>4</sup> *Id.* at 517.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 518.

institute a proceeding to challenge the custodian's decision by filing an action in Superior Court which shall be heard in the vicinage where it is filed by a Superior Court Judge who has been designated to hear such cases because of that judge's knowledge and expertise in matters relating to access to government records; or

in lieu of filing an action in Superior Court, file a complaint with the Government Records Council established pursuant to section 8 of P.L.2001, c. 404 (C.47:1A-7).

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.<sup>8</sup>

The Court noted that the “purpose of OPRA's fee-shifting scheme is to protect the public's right to certain government records, as without the provision ‘the ordinary citizen would be waging a quixotic battle against a public entity vested with almost inexhaustible resources.’...The Legislature intended to level the field through the fee-shifting provision.”<sup>9</sup>

Generally, to qualify for counsel fees, a plaintiff must be a prevailing party in a suit brought to obtain access to government records.<sup>10</sup> The Court explained that when a government agency voluntarily discloses the requested records after a lawsuit is filed under the OPRA, it can be more challenging to determine if the plaintiff qualifies as a prevailing party that is entitled to attorney's fees.<sup>11</sup> To qualify as a prevailing party under those circumstances, the plaintiff must prove that by taking legal action, it provided a ‘catalyst’ to induce the defendant's compliance with the law.<sup>12</sup> To prove that the bringing of the action was a catalyst, the plaintiff must demonstrate that there is “(1) a factual causal nexus between plaintiff's litigation and the relief ultimately achieved; and (2) that the relief ultimately secured by plaintiffs had a basis in law.”<sup>13</sup>

The Court concluded that it was clear from the record that the plaintiff (the requesting party) made no attempt to cooperate or work with defendants in order to acquire the 2014 records.<sup>14</sup> Plaintiff, without communicating with defendants to make them aware of what the Court

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<sup>8</sup> N.J.S. 47:1A-6.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 519.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 521.

determined to be an error or oversight, filed a suit two weeks after the defendant's sent the 2015 documents.<sup>15</sup> Therefore, the plaintiff's lawsuit was not the catalyst for the release of the records and thus plaintiff is not a prevailing party entitled to attorney's fees.<sup>16</sup> The Court reasoned that the defendants inadvertently failed to forward the 2014 meeting documents and, once they were notified through the service of the complaint, they immediately provided the documents.<sup>17</sup> The Court said that it was clear that the defendant neglected to turn over the documents through simple human error due to turning over the task from one employee of the Borough Clerk's office to another, and awarding attorney fees to the plaintiff would not serve the purpose of OPRA.<sup>18</sup>

OPRA was designed to promote access to government records and to encourage requestors and agencies to work together toward that end by accommodating one another.<sup>19</sup> The Court suggested that awarding attorney's fees under circumstances like the ones in this case would incentivize requestors to remain silent in the face of simple, unintentional errors by custodians of records, and would discourage entities from voluntarily providing documents to requestors after suit was filed.<sup>20</sup> The legislative intent was to make government records readily accessible to the state's citizens.<sup>21</sup> The Court, however, suggested that common sense precludes the assumption that Legislature intended to permit the denial of an OPRA request but prohibit a reasonable solution that involves brief delay.<sup>22</sup> The Court said that even though courts have not yet addressed this issue specifically, "the cooperative spirit of OPRA seems to require some form of a follow-up request, in the form of a phone call, letter, or e-mail to notify the municipality that a mistake was made".<sup>23</sup>

### Conclusion

Staff seeks authorization to conduct additional research and outreach regarding this issue in order to determine whether modifying N.J.S. 47:1A-6 in some way could clarify the catalyst theory regarding the award of attorney's fees.

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 525.

<sup>17</sup> *Id.* at 520.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 519.

<sup>20</sup> *Id.* at 521-522.

<sup>21</sup> *Id.* at 519.

<sup>22</sup> *Id.* at 524.

<sup>23</sup> *Id.*