

New Jersey Law Journal

VOL. CLXXXI – NO. 13 – INDEX 1191

SEPTEMBER 26, 2005

ESTABLISHED 1878

Commentary

The Extraction of OPRA's Teeth

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When enacted in 2002, New Jersey's Open Public Records Act was hailed as a sea change in the law of access to government records. Among these changes was that a prevailing requester is entitled to a reasonable attorney's fee, a provision thought to give the law some teeth. However, a recent decision illustrates that the road to OPRA is not necessarily an easy one.

In *New Gold Equities v. City of Jersey City*, HUD-L-5934-04, the purportedly prevailing requester's application for a fee award was denied. The plaintiff had submitted various record requests to the Jersey City clerk's office without response. OPRA requires that a custodian respond within seven business days; failure to do so is deemed a constructive denial. Not until after the suit was filed did the defendant respond by entering into a consent order requiring production.

During the next several months, the defendant produced 5,512 pages of records. Six months after filing suit, the plaintiff moved for attorneys' fees.

The court found no reported decision dealing with the same set of facts, so it turned to the decisions of the Government Records Council, an administrative creature of OPRA designed to facilitate disputes. The

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GRC's opinions, however, are merely advisory and nonprecedential. Also, unlike other government agencies that employ specialized expertise to address issues with significant nonlegal dimensions, OPRA requires no such expertise.

Nonetheless, the trial court deemed the GRC's decisions "a large reservoir of administrative expertise," citing two decisions that concluded "OPRA and relevant case law do not support the award of attorney's fees where the requested record is released after a complaint is filed with the G.R.C. but before a final administrative determination is rendered."

The court also examined case law in other fee-shifting contexts. There it found the decision in *Baer v. Klagholz*, 346 N.J. Super. 79 (App. Div.), cert. denied, 170 N.J. 84 (2001), in which the Appellate Division premised a fee award on "whether the plaintiff (1) obtained relief on the significant claim in litigation, (2) that effected a material alteration in the parties' legal relationship and (3) that is not merely technical or *de minimis* in nature."

The trial court's application of this law to the *New Gold* facts was akin to forcing square pegs into round holes. According to the court, the consent order was considered of no moment. It simply reflected "a reasonable solution" to accommodate "the interests of the requester and the agency" without altering the parties' legal relationship. Thus, the plaintiff "had not obtained 'relief on a significant claim.'" It had

simply agreed to "an alternative time line" so that at the time of the entry of the consent order, access to the records had not been improperly denied. Ergo, no fee award.

Yet, under OPRA the defendant's failure to respond within seven business days clearly constituted a constructive denial. When the defendant did finally respond, it did so through a consent order requiring production of responsive documents. Presumably this consent order was judicially enforceable. But for the order, there is no indication that the defendant would have produced any documents.

Moreover, persuasive authority does exist in analogous federal case law under the Freedom of Information Act. Such decisions consistently recognize that orders requiring agencies to review documents, which ultimately lead to their production, effectively alter the parties' legal relationship. For example, in *AutoAlliance Int'l Inc. v. U.S. Customs Serv.*, 300 F.Supp.2d 509 (E.D. Mich. 2004), the district court found the plaintiff to have "substantially prevailed" when it ordered the government to conduct a review of the withheld documents, which led to their voluntary release.

Likewise, in *Read v. Federal Aviation Admin.*, 252 F.Supp.2d 1108 (W.D. Wash. 2003), the district court issued an order that compelled the government to respond to the FOIA requests by a certain date. The court noted that, although the government

may have voluntarily responded without the order, its entry constituted a “judicial imprimatur’ that alter(ed) the legal relationship of the parties.”

That is precisely the case here. There is no indication on the record that

the defendant would have responded without the consent order. The entry of that order provided the plaintiff with a judicially enforceable mechanism to require a response, accomplishing the plaintiff’s goal in bringing suit.

The *New Gold* decision ignores the mandatory language of OPRA recognizing constructive denials, overlooks persuasive federal decisions, and, worse, extracts OPRA’s teeth. ■