

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-13468

SUFFOLK, SS.

2024

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ERIC B. MACK,

*Plaintiff-Appellee*

v.

OFFICE OF THE DISTRICT ATTORNEY OF THE BRISTOL DISTRICT,

*Defendant-Appellant.*

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On Appeal from an Order of Summary Judgment of the Suffolk  
Superior Court

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**PLAINTIFF-APPELLEE ERIC B. MACK'S MOTION FOR RECONSIDERATION  
OF THE PORTION OF THE DECISION DENYING ATTORNEY'S FEES**

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MAY 6, 2024

## I. Introduction

Pursuant to the Rules of Appellate Procedure, Rule 27, Plaintiff-Appellee Eric B. Mack ("Plaintiff") moves for this court to reconsider the portion of its April 26, 2024 decision denying attorney's fees. This court's decision on public records was favorable to Plaintiff and adverse to Defendant-Appellant Office of the District Attorney of the Bristol District ("Defendant"). The court's opinion denied attorney's fees without an explanation.<sup>1</sup>

In *Yorke Management v. Castro*, 406 Mass 17, 19 (1989), this court found attorney's fees on appeal are required under fee statutes unless appellate fees are explicitly prohibited, saying:

The statutory provisions for a "reasonable attorney's fee" would ring hollow if it did not necessarily include a fee for the appeal. The right to appellate attorney's fees under these statutes is beyond dispute.

Appellate fees are not prohibited by G.L. c. 66 §10A (d) (2).<sup>2</sup>

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<sup>1</sup> Docket No. 30, p. 32, n. 16.

<sup>2</sup> In *Fabre v. Walton*, 441 Mass. 9, 10 (2004), this court announced a "new procedure on the award of appellate attorney's fees and costs." Rejecting the prior procedure of referring the matter to a single justice, this court now requires the fee award to be decided by "the Justices who heard and decided the appeal[.]" *Id.* If this court grants Plaintiff's motion for reconsideration, he requests permission to seek attorney's fees consistent with this court's decision in *Fabre*.

Should this court find that attorney's fees are not available on appeal in this case, Plaintiff asks this court to provide an explanation so parties in future public records litigation will know if fees are available for a successful appeal under the public records statute.

## II. ARGUMENT

### A. In 2016, the Legislature amended the public records statute to require that agencies pay attorney's fees to requesters who successfully sued for public records.

An amendment to the public records statute was signed into law by Governor Charlie Baker on June 3, 2016.<sup>3</sup> This was the first substantial overhaul to M.G.L. c. 66, the Massachusetts Public Records Law ("PRL"), since 1974.<sup>4</sup> One of the most significant changes to the PRL was a presumption that attorney's fees would be awarded when requesters successfully sued agencies who improperly withheld public records. Before the 2016 amendments, the PRL was criticized for its ineffectiveness.<sup>5</sup> In

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<sup>3</sup> St. 2016, c. 121, "An Act to Improve Public Records," available at:

<https://malegislature.gov/Laws/SessionLaws/Acts/2016/Chapter121>.

<sup>4</sup> Shira Schoenberg, *Massachusetts House passes public records reforms*, *masslive.com*, Nov. 18, 2015, <https://www.masslive.com/politics/2015/11/massachusetts-house-passes-pub.html>.

<sup>5</sup> Over multiple years, the Center for Public Integrity awarded Massachusetts an F for public access to information. Kyle Scott Clauss, *Massachusetts Receives an 'F' for Public Records Access*, *Boston Magazine*, Nov. 9, 2015, <https://www.bostonmagazine.com/news/2015/11/09/massachusetts->

2015, Massachusetts was one of three states that did not allow judges to award attorney's fees when people successfully filed suit to obtain public records.<sup>6</sup>

G.L. c. 66 §10A (d) (2) states that the superior court may award reasonable attorney's fees and costs in any case in which a requester obtains relief through a judicial order. The statute says there is a presumption in favor of an award of fees and costs, unless the agency or municipality establishes one of five factors.<sup>7</sup> None of those factors exist here.

**B. The public records statute requires an award of fees and costs on appeal.**

- i. This Court has repeatedly recognized that attorney's fees statutes require fees for appellate work.*

In *Yorke*, this court recognized that when a statute authorizes reasonable attorney's fees, the right to appellate

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[public-records-grade/](https://www.commoncause.org/massachusetts/democracy-wire/ma-state-integrity-f-2015/); *Massachusetts receives another F for public access to information*, commoncause.org, Nov. 9, 2015, <https://www.commoncause.org/massachusetts/democracy-wire/ma-state-integrity-f-2015/>.

<sup>6</sup> CBS Boston, *Gov. Charlie Baker Signs Bill Overhauling Mass. Public Records Law*, CBSNews.com, June 3, 2016, <https://www.cbsnews.com/boston/news/charlie-baker-massachusetts-public-records-bill/>.

<sup>7</sup> In response to Plaintiff's motion for attorney's fees and costs in the superior court, Defendant argued that it "reasonably relied upon a published opinion of an appellate court of the commonwealth based on substantially similar facts," without providing a citation to any case with substantially similar facts. The superior court issued an opinion awarding attorney's fees to plaintiff. The parties agreed to stay the order pending the appeal.

fees is "beyond dispute," specifically finding that appellate fees are available under G.L. c. 186 §§14, 18 and G.L. c. 93A. Following *Yorke*, in *McLarnon v. Jokisch*, 431 Mass. 343 (2000), abrogated on other grounds, *Bristol Asphalt, Co. v. Rochester Bituminous Prod., Inc.*, 493 Mass. 539 (2024), this court held that appellate fees are available under G.L. c. 231 §59H. After *McLarnon*, this court reversed a decision of the Appeals Court denying fees in an action under G.L. c. 184 §15 (c) in *DeCicco v. 180 Grant Street, LLC*, 484 Mass 1037 (2020). None of these statutes mention fees and costs on appeal. The PRL's presumption in favor of an award of attorney fees to plaintiffs who succeed in public records cases on appeal applies here.

The policy behind the amendment to the PRL supports an award of fees and costs. A precedent that no attorney's fees can be awarded on appeal of a superior court decision on public records would encourage defendants to appeal without fear of the added cost of paying fees for the work of counsel for plaintiff. This would also discourage counsel from taking cases for plaintiffs seeking public records, which is contrary to the intent of the amendment to the statute.

**C. If the court denies fees, an explanation should be provided.**

Without an explanation of the reason Plaintiff's request for fees was denied, requesters and attorneys will be deterred

from bringing cases or seeking an appeal of an unfavorable incorrect opinion because of the possibility there will be no fee award. Defendants may file appeals expecting to wear down plaintiffs and their counsel.

The PRL requires the superior court to specify any reasons for denying fees: "If the superior court determines that an award of reasonable attorney fees or costs is not warranted, the judge shall issue written findings specifying the reasons for the denial." G.L. c. 66 §10A (d) (2). This provision should also apply to a denial of fees and costs on an appeal.

### **III. Conclusion**

The 2016 amendment to the PRL added an attorney's fees section so that people like Plaintiff Eric Mack, who have to file suit in order to obtain improperly withheld public records, can obtain attorney's fees. This encourages attorneys to take these cases. It also provides an incentive for agencies to comply with the PRL and ensures that access to public records is not limited to those with the funds to pursue them in court. Plaintiff moves that this court reconsider the portion of the decision denying attorney's fees. Alternatively, Plaintiff requests an explanation for the denial.

Respectfully submitted,

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/s/ Howard Friedman

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DATED: May 6, 2024

**CERTIFICATE OF COMPLIANCE**  
**Pursuant to Rule 16(k) of the**  
**Massachusetts Rules of Appellate Procedure**

I, Howard Friedman, hereby certify that the foregoing motion complies with the rules of court including, but not limited to: Mass. R.A.P. 16 (k); Mass. R.A.P. 20 (form and length of briefs, appendices, and other documents); Mass. R.A.P. 27; and Mass. R.A.P. 21 (redaction).

The foregoing motion complies with the applicable length limitation in Mass. R.A.P. 27 because it is produced in the proportional font Courier New of 12 point and contains no more than 2,000 words.

/s/ Howard Friedman  
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DATED: May 6, 2024



**CERTIFICATE OF SERVICE**

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on May 6, 2024, I have made service of this motion upon the below counsel of record for Defendant-Appellant, via email:

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