



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

July 23, 2013 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant

Complaint No. 2012-151

v.

Township of Galloway (Atlantic)
Custodian of Record

At the July 23, 2013 public meeting, the Government Records Council (“Council”) considered the July 16, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s May 28, 2013 Interim Order requiring that the Custodian provide (9) copies of the unredacted records; nine (9) copies of the redacted records, a document or redaction index, together with a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, within five (5) business days from receipt of the Council’s Interim Order.
2. The *in camera* examination reveals that the Custodian lawfully denied access to the records and/or redacted portions of the records disclosed to the Complainant for the reasons set forth in the Index.
3. The GRC conducted an *in camera* examination of the records and found that the Custodian lawfully denied access to the records and/or redacted portions of the records disclosed to the Complainant for the reasons set forth in the Index. There was no denial of disclosure, no violation and thus, no knowing and willful violation of the OPRA statutes on the part of the Custodian.
4. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters, supra. Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, supra. Specifically the Council, in its May 28, 2013 Interim Order, reserved decision on the issue of prevailing attorney’s fees pending the outcome of the GRC’s *in camera* examination. The GRC found that the Custodian lawfully denied access to the redacted information. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra.



This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 23 Day of July 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: July 26, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
July 23, 2013 Council Meeting**

**Harry B. Scheeler¹
Complainant**

GRC Complaint No. 2012-151

v.

**Township of Galloway (Atlantic)²
Custodian of Records**

Records Relevant to Complaint:

1. Summary and detailed legal billing for Michael J. Blee, Esq., for April 2012.
2. Summary and detailed legal billing for Russell Lichtenstein, Esq., for April 2012.
3. Summary and detailed legal billing for Roger Steedle, Esq., from January 2012 through April 2012.³

Custodian of Record: Thalia C. Kay

Request Received by Custodian: May 9, 2012

Response Made by Custodian: May 9, 2012

GRC Complaint Received: May 16, 2012

Records Submitted for *In Camera* Examination: Above-listed records Nos. 1-3.

Background

At its May 28, 2013 public meeting, the Government Records Council (the “Council”) considered the May 21, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Complainant’s cause of action was not ripe at the time of the filing of this Denial of Access Complaint; to wit, the Custodian had not denied access to any records responsive to the Complainant’s May 9, 2012 OPRA request because the Custodian properly requested an extension of time until May 18, 2012 to respond to said request. The request for an extension was reasonable. Thus, the instant complaint is materially defective and therefore should be dismissed. *See Sallie v. NJ Department of Banking and Insurance*, GRC Complaint No. 2007-226 (April

¹ Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ).

² Represented by Michael J. Fitzgerald, Esq., of Fitzgerald, McGroarty, Malinsky, P.A. (Linwood, NJ). Counsel at the time of the Custodian’s Statement of Information was Michael J. Blee, Esq., of the Office of Michael J. Blee, Attorney at Law, LLC (Absecon, NJ).

³ The Complainant requested an additional record which is not at issue in this complaint.

2009). However, on June 26, 2012, the Complainant amended his complaint challenging the redactions made to the legal bills the Custodian provided on May 18, 2012. As such, the Council will only consider the arguments made in the Complainant's amended complaint.

2. The GRC must conduct an *in camera* review of the requested records to determine the validity of the Custodian's assertion that the redacted portions of the legal bills constitute attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. See Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005).
3. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #2 above), nine (9) copies of the redacted records, a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁶ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the outcome of the *in camera* review.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the outcome of the *in camera* review.

The Council distributed its Interim Order to all parties on June 3, 2013. On June 7, 2013 the Custodian responded to the Council's Interim Order. The Custodian provided the requisite copies of both the redacted and unredacted minutes together with a redaction index ("Index") and certification of the Custodian.

Analysis⁷

Compliance

The Council's May 28, 2013 Order required the Custodian to provide the GRC with unredacted and redacted records, certification of the Custodian, and the Index within five (5) business days of receipt of its May 28, 2013 Interim Order. The GRC received the above-

⁴ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁵ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁷ There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

referenced documents from the Custodian, in a timely manner, on June 7, 2013.⁸ Thus, the Custodian is in compliance with the Council's May 28, 2013 Order.

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The Custodian certified that the redactions of the invoices and attorney time records were made pursuant to the following exemptions: N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-9 (attorney-client privilege); N.J.S.A. 47:1A-1.1 (information which is a communication between a public agency and its insurance carrier, administrative service organization or risk management office); N.J.S.A. 47:1A-3(a) (information or access to records regarding an on-going investigation); N.J.S.A. 47:1A-1.1 (information generated by or on behalf of a public employers or employees in connection with a grievance filed against such employee); N.J.S.A. 47:1A-10 (personnel records); and N.J.S.A. 47:1A-1 and Burnette v. County of Bergen 198 N.J. 408 (2009) (information whose disclosure would run contrary to the reasonable expectation of privacy of involved parties).

The GRC conducted an *in camera* examination of the certification of the Custodian; the redacted and unredacted invoices, the attorney billing records, and the Index. The GRC determined that the Custodian provided a valid legal basis for each of the redactions.

The *in camera* examination reveals that the Custodian lawfully denied access to the records and/or redacted portions of the records disclosed to the Complainant for the reasons set forth in the Index.

Knowing & Willful

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ..." N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states "... [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]..." N.J.S.A. 47:1A-7(e).

⁸ Although included in the package, the Custodian, through counsel, informed the GRC that due to the passage of time, and the resolution of previously confidential issues the billing invoices of Michael Blee (the "Blee invoices") were no longer considered privileged or confidential. Unredacted Blee invoices were provided to the Complainant in January 2013.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

The GRC conducted an *in camera* examination of the records and found that the Custodian lawfully denied access to the records and/or redacted portions of the records disclosed to the Complainant for the reasons set forth in the Index. There was no denial of disclosure, no violation and thus, no knowing and willful violation of the OPRA statutes on the part of the Custodian.

Prevailing Party Attorney's Fees

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a "prevailing party" if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. Id. at 432. Additionally, the Court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct.

1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties,” *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney’s fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason, *supra*, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, *supra*, 387 N.J. Super. at 429; *see, e.g.*, Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney’s fees than the former RTKL did. 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. Under the prior RTKL, ‘[a] plaintiff in whose favor such an order [requiring access to public records] issues ... may be awarded a reasonable attorney’s fee not to exceed \$500.00.’ N.J.S.A. 47:1A-4 (repealed 2002). The Legislature’s revisions therefore: (1) mandate, rather than permit, an award of attorney’s fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA. (Footnote omitted.)

Mason at 73-76 (2008).

The Court in Mason, *supra*, at 76, held that “requestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (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.’ Singer v. State, 95 N.J. 487, 495, *cert denied* (1984).”

The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters, *supra*. Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, *supra*. Specifically the Council, in its May 28, 2013 Interim Order, reserved decision on the issue of prevailing attorney’s fees pending the outcome of the GRC’s *in camera* examination. The GRC found that the Custodian lawfully denied access

to the redacted information. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's May 28, 2013 Interim Order requiring that the Custodian provide (9) copies of the unredacted records; nine (9) copies of the redacted records, a document or redaction index, together with a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, within five (5) business days from receipt of the Council's Interim Order.
2. The *in camera* examination reveals that the Custodian lawfully denied access to the records and/or redacted portions of the records disclosed to the Complainant for the reasons set forth in the Index.
3. The GRC conducted an *in camera* examination of the records and found that the Custodian lawfully denied access to the records and/or redacted portions of the records disclosed to the Complainant for the reasons set forth in the Index. There was no denial of disclosure, no violation and thus, no knowing and willful violation of the OPRA statutes on the part of the Custodian.
4. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters, *supra*. Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, *supra*. Specifically the Council, in its May 28, 2013 Interim Order, reserved decision on the issue of prevailing attorney's fees pending the outcome of the GRC's *in camera* examination. The GRC found that the Custodian lawfully denied access to the redacted information. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

Prepared By: Dawn R. SanFilippo, Esq.
Senior Attorney

Approved By: Brandon D. Minde, Esq.
Executive Director

July 16, 2013