State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

June 25, 2013 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant
v.
County of Atlantic
Custodian of Record

Complaint No. 2012-197

At the June 25, 2013 public meeting, the Government Records Council ("Council") considered the June 18, 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 lawfully denied access to the requested 1,300 e-mail addresses because the Custodian has borne her burden of proving that the disclosure of approximately 1,300 County e-mail addresses at once, in one document, constitutes administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security." N.J.S.A. 47:1A-1.1.

2. 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 v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Complainant did not achieve any relief because the Custodian lawfully denied access to the requested e-mail addresses. 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.

New Jersey is an Equal Opportunity Employer • Printed on Recycled paper and Recyclable

Final Decision Rendered by the
Government Records Council
On The 25th Day of June, 2013

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

Steven Ritardi, Esq., Acting Chair
Government Records Council

Decision Distribution Date: June 27, 2013

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
June 25, 2013 Council Meeting

Harry B. Scheeler, Jr.[1] **GRC Complaint No. 2012-197**
Complainant

v.

County of Atlantic[2]
Custodian of Records

Records Relevant to Complaint: All e-mail addresses associated with Atlantic County, including the names to which the addresses are assigned.

Request Made: May 7, 2012
Response Made: May 16, 2012
GRC Complaint Filed: June 26, 2012[3]

Background[4]

Request and Response:

On May 7, 2012, the Complainant submitted an Open Public Records Act ("OPRA") request seeking the above-listed records. On May 16, 2012, the seventh (7th) business day following receipt of said request, the Custodian provided a list of County employees, however, relying on an OPRA exemption, denied access to the e-mail addresses. The denial of access was based on N.J.S.A. 47:1A-1.1, which provides that a government record shall not include the following information which is deemed to be confidential: "administrative or technical information regarding computer hardware, software and networks, which, if disclosed, would jeopardize computer security." The Custodian also stated that not all employees have associated e-mail addresses.

Denial of Access Complaint:

On June 26, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserts that the denial of access is unreasonable and claims there is no reason why the disclosure of any or all e-mail address would

[1] Represented by Walter M. Luers, Esq., of Walter M. Luers, LLC (Clinton, NJ).
[2] Susan Gross, Custodian of Records. Represented by Donna Taylor, Esq. (Atlantic City, NJ).
[3] The GRC received the Denial of Access Complaint on said date.
[4] The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

jeopardize computer security. The Complainant states the denial of access represents nothing more than the Records Custodian's *ad hoc* judgment that Complainant was not entitled to the information that he sought. Furthermore, the Complainant contends that if the disclosure of e-mail addresses would jeopardize computer security, the Custodian should not be disclosing any e-mail addresses. The Complainant indicates that the Custodian's e-mail address appears on her response to the Complainant's OPRA request, and asserts that using the Custodian's e-mail address one can deduce that Atlantic County e-mail addresses are the employee's last name, followed by an underscore, followed by the employee's first name. The Complainant claims that based on the list of all County employees provided by the Custodian, he can reconstruct any person's County e-mail address anyway, and thus the denial of access is unreasonable.

Further, the Complainant states that no prior GRC decisions prohibit the disclosure of public employee e-mail addresses. The Complainant states that in Mayer v. Borough of Tinton Falls (Monmouth), GRC Complaint No. 2008-245 (April 2010 Interim Order), the Council held that the e-mail addresses of third parties received through an agency's website were public records. As such, the Complainant contends that it is reasonable that public employee e-mail addresses are public records.

Finally, the Complainant requests that the Council order disclosure of the e-mail addresses and award the Complainant prevailing party attorney's fees.

Statement of Information:

On September 28, 2012, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies that on May 16, 2012, she provided the Complainant with a list of all County employees but denied access to the corresponding e-mail addresses because releasing same would jeopardize computer security, a statutory exemption. N.J.S.A. 47:1A-1.1. There are approximately 1,300 County e-mail addresses.

The Custodian certifies that the County Director of Information Technologies confirmed that the list of approximately 1,300 County e-mail addresses is considered "administrative information" related to the County's network communications system (e-mail server). The Director confirmed that by providing a full list of e-mail addresses to an outside entity, the County easily becomes vulnerable to a denial of service spam attack on the County's e-mail server, which happens when an e-mail address or group of e-mail addresses are subjected to a flood of inbound e-mails, sometimes reaching the tens of thousands over a very short period of time. If this were to occur to just a small group of e-mail addresses, the volume of e-mail coming through the County's Internet circuit and into its e-mail server would cause the County's system to crash. This in effect would be breaching the security of the County network and shutting down the County's ability to communicate via e-mail for inbound and outbound traffic. This would severely impact the County's Emergency Management Office, Prosecutor's Office, and Sheriff's Department, which rely heavily on e-mail communications for their central dispatch communications to advise the public and other agencies about critical information regarding the safety and well-being of life and property.

Additionally, the Custodian certifies that there is further concern that once the County has provided a requestor with the entire list of e-mail addresses, the County completely loses control over who has access to the list, which could be marketed. The list could be provided to an e-mail list service or a number of services that would have the ability to send a large volume of e-mails, not just to a small group but to all of the approximately 1,300 County e-mail users, on a continual basis. Even if the list is given to a legitimate requestor, if it is placed with a list service to handle mass e-mailing, the list can be made public and provided to spammers without the knowledge of the requestor. While the County's e-mail server software does have the ability to classify certain types of e-mail as spam and block it from getting to the user's computer, all e-mail is still received through the County's Internet circuit and processed by the e-mail server before it can be classified. Therefore, providing a list of all 1,300 County e-mail addresses, even for legitimate use, is a great concern to the County as a denial of service attack by way of spam on the County's e-mail server would tax the server's resources and in effect crash the server and impact the County's ability to serve the public.

Analysis[5]

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.

OPRA exempts from public access "administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security." N.J.S.A. 47:1A-1.1.

Here, the Custodian provided the Complainant with a list of County employees, but denied access to the approximately 1,300 corresponding County e-mail addresses, claiming that the e-mail addresses are administrative information regarding computer software and networks and the release of said addresses would jeopardize the security of the County's e-mail server.

The denial of access was not based on any privacy interest. The denial of access relies on the County's concern, as indicated by the County Director of Information Technologies, over the security of the County's computer network upon the release of 1,300 e-mail addresses, not any privacy interest implicated with the release of said e-mail addresses. Therefore, the Complainant's reliance on Mayer, *supra*, is misplaced since in that case the Council based its decision to order disclosure of e-mail addresses on whether the owner of the e-mail address had a reasonable expectation of privacy. Again, here, the basis of withholding this information is a security risk in its disclosure – an expressed exemption in OPRA.

---

[5] 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.

As confirmed by the Complainant, the Custodian does not withhold e-mail addresses in all instances since the Custodian's e-mail address appears on her response to the OPRA request. The Complainant notes this by stating that he can construct all other County e-mail addresses following the Custodian's e-mail address structure. That may be the case and the Council has no control over what the Complainant is able to do on his own; however, the security concern at issue arises from the release at one time, in one document, of all 1,300 e-mail addresses. There is a clear difference between the release of one, two, or a dozen e-mail addresses, and a list of 1,300 e-mail addresses. A claim of jeopardizing computer security would certainly raise eyebrows if the OPRA request was for two e-mail addresses. However, this case does not require the Council to determine what number would theoretically be appropriate to release, as the Council will narrowly handle the facts at hand. The issue before the Council is 1,300 e-mail addresses which this Custodian indicates, if released in mass, would jeopardize the County's computer security. The Custodian certified, based on the analysis by the County Director of Information Technologies, that the disclosure of approximately 1,300 County e-mail addresses in one list would jeopardize the County's computer security by placing it at risk for a denial of service spam attack.

The Department of Homeland Security's United States Computer Emergency Readiness Team ("US-CERT") publishes information regarding denial of service attacks.[6] US-CERT states a denial of service attack occurs when

> an attacker attempts to prevent legitimate users from accessing information or services by targeting your computer and its network connection, or the computers and network of the sites you are trying to use, and an attacker may be able to prevent you from accessing email, websites, online accounts (banking, etc.), or other services that rely on the affected computer.
>
> The most common and obvious type of DoS attack occurs when an attacker "floods" a network with information.
>
> An attacker can use spam email messages to launch [an] attack on your email account. Whether you have an email account supplied by your employer or one available through a free service such as Yahoo or Hotmail, you are assigned a specific quota, which limits the amount of data you can have in your account at any given time. By sending many, or large, email messages to the account, an attacker can consume your quota, preventing you from receiving legitimate messages.

Although the Complainant believes "there is no reason why disclosure of any or all email addresses would jeopardize computer security," the Custodian has indicated very specific security concerns regarding the disclosure of a listing of approximately 1,300 County e-mail addresses. Furthermore, the denial of access was clearly not the Custodian's *ad hoc* judgment that the Complainant was not entitled to the information that he sought. To the contrary, the concerns regarding the County's computer security were based on the judgment of the County's Director of Information Technologies. The County, not the Complainant, is in the best position

[6] http://www.us-cert.gov/ncas/tips/ST04-015.

to determine the limitations of the County's computer network. In enacting OPRA, the Legislature envisioned that the release of certain computer information would jeopardize computer security, and thus, a security exemption was included. N.J.S.A. 47:1A-1.1. This case, with a list of approximately 1,300 e-mail addresses and the concerns specific to this County's computer security, rightly triggers the exemption.

Therefore, the Custodian lawfully denied access to the requested 1,300 e-mail addresses because the Custodian has borne her burden of proving that the disclosure of approximately 1,300 County e-mail addresses at once, in one document, constitutes administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security." N.J.S.A. 47:1A-1.1.

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)."

Here, the Custodian lawfully denied access to the requested e-mail addresses because the Custodian has borne her burden of proving that the disclosure of approximately 1,300 County e-mail addresses at once constitutes administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security." N.J.S.A. 47:1A-1.1.

Therefore, 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 Complainant did not achieve any relief because the Custodian lawfully denied access to the requested e-mail addresses. 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 lawfully denied access to the requested 1,300 e-mail addresses because the Custodian has borne her burden of proving that the disclosure of approximately 1,300 County e-mail addresses at once, in one document, constitutes administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security." N.J.S.A. 47:1A-1.1.

2. 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 v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Complainant did not achieve any relief because the Custodian lawfully denied access to the requested e-mail addresses. 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: Dara L. Barry
Communications Manager

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

June 18, 2013