



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

August 27, 2013 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2012-262

v.

City of Union City (Hudson)
Custodian of Record

At the August 27, 2013 public meeting, the Government Records Council ("Council") considered the August 20, 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. Since the Custodian's September 4, 2012 written response to the OPRA request failed to specifically state that no settlement agreement existed at that time, the Custodian's response was insufficient under OPRA. N.J.S.A. 47:1A-5(g); Roarty v. Secaucus Board of Education (Hudson), GRC Complaint No. 2009-221 (January 2011); Shanker v. Borough of Cliffside Park (Bergen), GRC Complaint No. 2007-245 (March 2009). Additionally, the Council should decline to order disclosure of the responsive agreement since it was not in existence at the time of the Complainant's OPRA request. *See* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
2. Although the Custodian's response was insufficient, the settlement agreement at issue did not exist at the time of the Complainant's OPRA request. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's insufficient response does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. 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 responsive agreement did not exist at the time of the Complainant's OPRA request. 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*. N.J.S.A. 47:1A-6; Teeters, *supra*; 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 27th Day of August, 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: August 29, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 27, 2013 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2012-262

v.

**City of Union City (Hudson)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail or facsimile of the following records in Diaz v. Union City, et al, Case No. 2:2011-CV-02364 (settled on or about June 6, 2012):

1. The most recently amended civil complaint filed or the original complaint if same was never amended.
2. The settlement agreement.

Custodian of Record: William Senande
Request Received by Custodian: July 31, 2012
Response Made by Custodian: September 4, 2012
GRC Complaint Received: September 12, 2012

Background³

Request and Response:

On July 31, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian. On August 19, 2012, the Complainant requested a response from the Custodian. On September 4, 2012, the Custodian responded in writing providing two (2) records: the civil complaint and a “Civil Cover Sheet.” The Complainant disputed that no settlement agreement was included, at which time the Custodian verbally informed the Complainant that the civil complaint was the only record corporate counsel approved for release.

¹ Previously represented by Dorothy L. Argyros, Esq. (Neptune, NJ). Currently represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Clinton, NJ). On April 30, 2013, Mr. Luers entered his appearance in this complaint.

² Represented by Sheri K. Siegelbaum, Esq., of Scarinci, Hollenbeck (Lyndhurst, NJ).

³ 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.

Denial of Access Complaint:

On September 12, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant argues that although the City of Union City (“City”) may have inquired with corporation counsel about the responsive settlement agreement, the Custodian failed to state whether it existed. The Complainant contends that the Custodian’s verbal statement does not cure his insufficient response. N.J.S.A. 47:1A-5(g). The Complainant requests that the Council: 1) determine that the Custodian violated OPRA by failing to indicate that the responsive agreement exists; 2) order disclosure of the agreement; and 3) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees.

Statement of Information:⁴

On April 24, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he received the Complainant’s OPRA request on July 31, 2012, and did not respond until September 4, 2012. The Custodian certifies that he could not provide the Complainant with the responsive settlement agreement because the City did not possess an agreement at the time of the Complainant’s OPRA request. The agreement was not finalized and executed until November 26, 2012.

Analysis⁵

Insufficient Response

In Roarty v. Secaucus Board of Education (Hudson), GRC Complaint No. 2009-221 (January 2011)(*citing* N.J.S.A. 47:1A-5(g); Shanker v. Borough of Cliffside Park (Bergen), GRC Complaint No. 2007-245 (March 2009)), the Council determined that the custodian’s response to the OPRA request was insufficient because he failed to specifically state that no records responsive to the complainant’s OPRA request existed at the time of his response.

Here, the Custodian failed to state that no settlement agreement existed at the time of his response. It was not until the filing of the SOI that the Custodian certified that the agreement was not finalized and completed until November 26, 2012; thus, no record existed.

Therefore, since the Custodian’s September 4, 2012 written response to the OPRA request failed to specifically state that no settlement agreement existed at that time, the Custodian’s response was insufficient under OPRA. N.J.S.A. 47:1A-5(g); Roarty, supra; Shanker, supra. Additionally, the Council should decline to order disclosure of the responsive agreement since it was not in existence at the time of the Complainant’s OPRA request. *See* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

⁴ On September 24, 2012, this complaint was referred to mediation. On March 18, 2013, the complaint was referred back to the GRC for adjudication. The Complainant did not amend his complaint.

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.

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).

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)).

Although the Custodian’s response was insufficient, the settlement agreement at issue did not exist at the time of the Complainant’s OPRA request. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s insufficient response does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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.

Mason at 73-76 (2008).

The Court in Mason, *supra*, further held that:

[R]equestors 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).

Id. at 76.

Here, the Complainant filed this complaint after not receiving the responsive settlement agreement. Thereafter, the Custodian certified in the SOI that the agreement did not exist at the time of the Complainant's OPRA request. Thus, the Complainant is not a prevailing party entitled to an award of reasonable attorney's fees.

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 responsive agreement did not exist at the time of the Complainant's OPRA request. 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*; Mason, *supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Since the Custodian's September 4, 2012 written response to the OPRA request failed to specifically state that no settlement agreement existed at that time, the Custodian's response was insufficient under OPRA. N.J.S.A. 47:1A-5(g); Roarty v. Secaucus Board of Education (Hudson), GRC Complaint No. 2009-221 (January 2011); Shanker v. Borough of Cliffside Park (Bergen), GRC Complaint No. 2007-245 (March 2009). Additionally, the Council should decline to order disclosure of the responsive agreement since it was not in existence at the time of the Complainant's OPRA request. *See* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
2. Although the Custodian's response was insufficient, the settlement agreement at issue did not exist at the time of the Complainant's OPRA request. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's insufficient response does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. 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 responsive agreement did not exist at the time of the Complainant's OPRA request. 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*. N.J.S.A. 47:1A-6; Teeters, *supra*; Mason, *supra*.

Prepared By: Frank F. Caruso
Senior Case Manager

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

August 20, 2013