



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

August 27, 2013 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2012-263

v.

Borough of South Bound Brook (Somerset)
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, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The evidence of record reveals that the Custodian did not unlawfully deny access to the records responsive to request items numbered 1, 2, and 4, because he disclosed the records to the Complainant in a timely manner on June 10, 2012. N.J.S.A. 47:1A-6.
2. The Custodian did not unlawfully deny access to request item number 3 because it is not a record that was made, maintained, kept on file, or received by the Borough in the course of its official business, and therefore is not subject to disclosure. N.J.S.A. 47:1A-1.1.
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 evidence of record reveals that the Custodian granted access to the records responsive to request items numbered 1, 2, and 4 in a timely manner and did not unlawfully deny access to request item number 3 because it is not a government record subject to disclosure. 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 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**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2012-263

v.

**Borough of South Bound Brook (Somerset)²
Custodial Agency**

Records Relevant to Complaint: Electronic transmission or, if not available electronically, faxed copies of:

1. "Inv_827_from_Network_Blade_LLC_3040.pdf" as referenced in Joseph Danielsen's April 25, 2012 e-mail.
2. "Inv_837_from_Network_Blade_LLC_4904.pdf" as referenced in Joseph Danielsen's April 24, 2012 e-mail.
3. Credit card receipt Joseph Danielsen used to purchase warranty as referenced in Joseph Danielsen's March 29, 2012 e-mail.
4. "OPRA.pdf" referenced in Joseph Danielsen's March 5, 2012 e-mail.

Custodian of Records: Donald E. Kazar

Request Received by Custodian: June 4, 2012

Response Made by Custodian: June 10, 2012

GRC Complaint Received: September 12, 2012

Background³

Request and Response:

On June 4, 2012, the Complainant submitted his Open Public Record Act ("OPRA") request to the Custodian. On June 10, 2012, the Custodian responded by sending the following four (4) e-mails to the Complainant:

- 1) April 25, 2012 e-mail forwarding an e-mail from Joseph Danielsen to the Custodian titled "Your Invoice #827 from Network Blade Incorporated";

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

² Represented by Robert G. Wilson, Esq., of Kovacs & Wilson (Somerville, 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.

- 2) April 24, 2012 e-mail forwarding an e-mail from Joseph Danielsen to the Custodian titled “Your Invoice #837 from Network Blade Incorporated”;
- 3) March 5, 2012 e-mail forwarding an e-mail from Joseph Danielsen to the Custodian titled “New OPRA Bill”; and
- 4) June 10, 2012 e-mail informing the Complainant that the Custodian did not have the requested credit card receipt.

Denial of Access Complaint:

On September 12, 2012, the Complainant filed his Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant states he provided the request to the Custodian on June 4, 2012 and that the Custodian responded to the request on June 10, 2012. The Complainant attached to his complaint the OPRA request and an e-mail chain between the Custodian and Mr. Danielsen which contained the following e-mail correspondence:

- March 28, 2012: Mr. Danielsen informed the Custodian that he failed to renew a computer warranty and that the Custodian would need to issue a purchase order to renew the warranty.
- March 29, 2012: The Custodian asked Danielsen to tell him what Danielsen needed and the Custodian would put the purchase order in.
- March 29, 2012: Danielsen replied that the warranty would be renewed and that he was putting the purchase on his credit card. Danielsen further advised the Custodian that he would invoice as soon as possible.

The Complainant contends that the Custodian denied him access to the records relevant to the complaint, which consist of four (4) request items. The Complainant asserts that a private citizen, Joseph Danielson, used his personal credit card to purchase a warranty for the Borough of South Bound Brook (“Borough”) on March 29, 2012.⁴ The Complainant states that the Custodian denied the Complainant’s request for the credit card receipt by informing him, “I don’t have any records of a credit card receipt.” The Complainant states that there is clearly a credit card receipt record; therefore, the Custodian’s denial was unlawful. The Complainant further states that the Custodian did not provide any evidence that he tried to obtain the requested credit card receipt from Danielsen. The Complainant asks for the following relief:

1. A finding by the Council that the Custodian violated OPRA by failing to provide the responsive record within seven business days;
2. A finding by the Council that the Custodian knowingly and willfully violated OPRA, knowing that what he did was consciously wrong, and that the Custodian unreasonably denied the Complainant access to the index under the totality of the circumstances warranting the imposition of civil penalties;⁵
3. An Order directing the Custodian to release the responsive record;
4. A finding by the Council that the Complainant is the prevailing party; and

⁴ As evidence of the credit card transaction, the Complainant attached a snapshot copy of Danielsen’s March 29, 2012 e-mail to the Custodian, which reads “Your warranty will be renewed this afternoon. I’m putting it on my credit card. I’ll invoice ASAP and will need a check ASAP since I’m accruing interest. Joe”

⁵ The Complainant, in his June 4, 2012 OPRA request, did not request an “index.”

5. An award of attorney fees and other appropriate relief.

Statement of Information:

On October 22, 2012, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he received the Complainant’s OPRA request on June 4, 2012, and that he responded to the request on June 10, 2012. The Custodian attached to the SOI the Complainant’s request, four (4) responding e-mails dated June 10, 2012, and the same e-mail chain that the Complainant attached to his complaint.

The Custodian certifies that he examined all existing e-mails and invoice receipts relevant to the requested records. The Custodian further certifies that the records responsive to the Complainant’s request are as follows:

- “Inv_827_from_Network_Blade_LLC_3040.pdf” as referenced in Joseph Danielsen’s April 25, 2012 e-mail;
- “Inv_837_from_Network_Blade_LLC_4904.pdf” as referenced in Joseph Danielsen’s April 24, 2012 e-mail; and
- “OPRA.pdf” referenced in Joseph Danielsen’s March 5, 2012 e-mail.

The Custodian certifies that the records responsive to the request were disclosed to the Complainant on June 10, 2012, without redactions. The Custodian also attached to the SOI copies of what he sent the Complainant, which were four (4) e-mails all dated June 10, 2012. Three (3) of the e-mails, which responded to request items numbered 1, 2, and 4, forwarded other e-mails from Joseph Danielsen to the Custodian.⁶ The fourth e-mail informed the Complainant that the Custodian did not have the requested credit card receipt. The Custodian certifies that the credit card receipt, request item number 3, is an internal billing record of a private third party contractor which is not received or kept on file by the Borough and, as such, it is not a government record pursuant to N.J.S.A. 47:1A-1.1.

The Custodian certifies that the Complainant’s reliance on Johnson v. Borough of Oceanport, GRC Complaint No. 2007-107 in support of his argument is misguided because in Johnson, the custodian had a duty to disclose e-mails in the custody of a council member. Here however, the Custodian certifies that he has no duty to retrieve an internal billing record of a private third party contractor.

Additional Information:

On November 16, 2012, the Complainant submitted a certification to the GRC in response to the Custodian’s SOI. The Complainant contends that, contrary to the Custodian’s certification, the requested invoices were never supplied to him. The Complainant also argues that Joseph Danielsen is not a contractor for the Borough, despite the Custodian’s certification that he is a private third party contractor. The Complainant further argues that the credit card receipt is a record that the Custodian, the CFO, or some other Borough official should have

⁶ It is not clear in the Custodian’s SOI whether just the e-mails, or the e-mails with attachments, were sent from the Custodian to the Complainant. The Complainant sought e-mail attachments.

received, maintained and kept on file in the course of official business. The Complainant argues that the credit card receipt must be produced because it is the only evidence which exists that proves Danielsen paid \$539.38 for a warranty renewal; an amount Danielsen's company, Network Blade, subsequently collected from the Borough.

On July 22, 2013, the GRC requested a clarifying certification from the Custodian to confirm whether he disclosed the three (3) attachments to the e-mails or just copies of the e-mails. The Custodian forwarded a certification dated July 24, 2013, stating that he disclosed the records responsive to request items numbered 1, 2, and 4 by sending to the Complainant on June 10, 2012, Network Blade's invoice number 827 dated March 29, 2012, Network Blade's invoice number 837 dated April 21, 2012, and New Jersey Senate Bill No. 1452, respectively.

Analysis⁷

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.

Request items numbered 1, 2, and 4

The Custodian certified that he disclosed to the Complainant on June 10, 2012, the records responsive to request items numbered 1, 2, and 4. The Complainant in his November 16, 2012 response to the SOI certified that, "...Danielsen's invoices were **never** supplied..." (Emphasis in original.) By certification dated July 24, 2013, the Custodian stated that he did disclose the records responsive to request items numbered 1, 2, and 4 by forwarding to the Complainant on June 10, 2012, copies of the e-mails together with their attachments.

Accordingly, the evidence of record reveals that the Custodian did not unlawfully deny access to the records responsive to request items numbered 1, 2, and 4, because he disclosed the records to the Complainant in a timely manner on June 10, 2012. N.J.S.A. 47:1A-6.

Request item number 3

Request item number 3 is a copy of a credit card receipt which was purportedly generated when Joseph Danielsen purchased a warranty. The Complainant stated that the credit card receipt was referenced in Joseph Danielsen's March 29, 2012 e-mail to the Custodian, and as such the document exists and must be disclosed. The Custodian certified in the SOI that the March 29, 2012 e-mail indicated that Mr. Danielsen placed the cost of a Borough warranty renewal on his own credit card and that he would invoice the Borough for it. The Custodian certified that a credit card receipt is an internal billing record of a private third party contractor

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.

and because it is not received or kept on file by the municipality, it is not a government record pursuant to N.J.S.A. 47:1A-1.1. The Custodian also certified that the Complainant provided no legal basis as to why such a document would be maintained, kept on file, or received by the Borough during the course of its official business. The Custodian further certified that the Complainant provided no evidence to contradict the Custodian's statement that he did not have the requested credit card receipt.

On November 16, 2012, the Complainant submitted a certification to the GRC in which he argued that the requested credit card receipt is a record that the Custodian, the CFO, or some other Borough official should have received, maintained and kept on file in the course of official business. The Complainant also argued that the credit card receipt must be produced because it is the only evidence which exists that proves Danielsen paid for a warranty renewal.

The relevant issue here is whether the receipt generated when Danielsen used his personal credit card to purchase a warranty renewal is a government record subject to disclosure. Records in the possession of a person or entity outside the public agency may be subject to disclosure. In Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), the court disagreed with the motion judge's conclusion that the Gloucester County Board of Chosen Freeholders was excused from its obligation to produce records pursuant to a valid OPRA request because the records were not in the Board's possession. However, central to the court's decision was whether the requested records were made by or on behalf of the agency in the course of its official business. Under the facts of Burnett, the court found that the records at issue were made by or on behalf of the Board in the course of its official business, and therefore were subject to disclosure.

Here, the evidence of record reveals that Danielsen informed the Custodian that the Custodian failed to renew a computer warranty and that the Custodian would need to issue a purchase order to renew the warranty. The Custodian told Danielsen to tell him what Danielsen needed and the Custodian would put the purchase order in. Thereafter, Danielsen replied that the warranty would be renewed because he was putting it on his credit card and would invoice as soon as possible. There is nothing in the evidence to indicate that the Custodian or Danielsen had an understanding that the Borough would reimburse the amount of Danielsen's credit card purchase, i.e., the amount Danielsen was paying his supplier for the renewal. Rather, there did appear to be an understanding that an invoice would be presented to the Borough for payment. The invoice sent from the contractor or alleged contractor to the municipality and the purchase requisition or purchase order issued in turn by the municipality are the documents that form the basis of the transaction, and as such are the records made by or on behalf of the public agency in the course of its official business. These documents, therefore, are government records subject to disclosure and were in fact disclosed to the Complainant in response to request items numbered 1 and 2.

Here, the evidence of record reveals that request item number 3, Danielsen's credit card receipt, was not made by or on behalf of the Borough in the course of its official business. Rather, it was made by the contractor or alleged contractor with his supplier in the course of his official business. As such, the Custodian does not have an obligation under OPRA or per the court's holding in Burnett, *supra*, to obtain the credit card receipt from Danielsen in order to

grant access. Moreover, Danielsen's credit card receipt was not maintained, kept on file, or received by the Borough in the course of its official business, so it does not even meet the definition of a government record under OPRA.

Therefore, the Custodian did not unlawfully deny access to request item number 3 because it is not a record that was made, maintained, kept on file, or received by the Borough in the course of its official business, and therefore is not subject to disclosure. 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 did not unlawfully deny access to the records responsive to request items numbered 1, 2, and 4, because he disclosed the records to the Complainant in a timely manner. Moreover, the Custodian did not unlawfully deny access to request item number 3 because it is not a record that was made, maintained, kept on file, or received by the Borough in the course of its official business, and therefore is not subject to disclosure. 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 evidence of record reveals that the Custodian granted access to the records responsive to request items numbered 1, 2, and 4 in a timely manner and did not unlawfully deny access to request item number 3 because it is not a government record subject to disclosure. 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 evidence of record reveals that the Custodian did not unlawfully deny access to the records responsive to request items numbered 1, 2, and 4, because he disclosed the records to the Complainant in a timely manner on June 10, 2012. N.J.S.A. 47:1A-6.
2. The Custodian did not unlawfully deny access to request item number 3 because it is not a record that was made, maintained, kept on file, or received by the Borough in the course of its official business, and therefore is not subject to disclosure. N.J.S.A. 47:1A-1.1.
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 evidence of record reveals that the Custodian granted access to the records responsive to request items numbered 1, 2, and 4 in a timely manner and did not unlawfully deny access to request item number 3 because it is not a government record subject to disclosure. 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: John E. Stewart, Esq.

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

August 20, 2013