



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

March 22, 2013 Government Records Council Meeting

Marita L. Cibrian
Complainant

Complaint No. 2012-76

v.

New Jersey Department of Banking & Insurance
Custodian of Record

At the March 22, 2013 public meeting, the Government Records Council (“Council”) considered the March 15, 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. Because the Custodian certified that the Department of Banking & Insurance took no formal disciplinary action against AmeriHealth and such records are not required to be disclosed under OPRA pursuant to N.J.S.A. 47:1A-9(a) and N.J.A.C. 11:17-2.15(b)(6), the Custodian lawfully denied access to the records responsive to the Complainant’s first (1st) and second (2nd) OPRA requests. *See Sallie v. NJ Department of Banking and Insurance*, GRC Complaint No. 2007-226 (April 2009).
2. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), 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. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved because no relief was ordered by the Council. Specifically, the records responsive to the Complainant’s requests are exempt pursuant to N.J.S.A. 47:1A-9(a) and N.J.A.C. 11:17-2.15(b)(6). Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to 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 22nd Day of March, 2013

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

Decision Distribution Date: April 1, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 22, 2013 Council Meeting**

**Marita L. Cibrian¹
Complainant**

GRC Complaint No. 2012-76

v.

**New Jersey Department of Banking and Insurance²
Custodian of Records**

Records Relevant to Complaint:

March 8, 2012: Copies of all documents and correspondence for received from AmeriHealth, including the timeline sheet for the internal appeal process, regarding three (3) items of durable medical equipment for the Complainant's daughter.³

March 9, 2012: Copy of the timeline sheet for the internal appeals process regarding the three (3) items of durable medical equipment items.⁴

Request Made: March 8, 2012 and March 9, 2012⁵

Response Made: March 9, 2012

GRC Complaint Filed: March 20, 2012⁶

Background⁷

The Complainant filed her first (1st) OPRA request with the Department of Banking and Insurance ("DOBI") on March 8, 2012 seeking the records listed above. The Custodian responded on March 9, 2012, the following business day after receipt of such request. The Custodian denies the Complainant access to the records responsive to the request because records maintained by DOBI involving a matter under a pending investigation or in which matter investigation is completed in which no formal disciplinary action was taken are not considered public records pursuant to N.J.S.A. 47:1A-3.

¹ Represented by Marco M. Agostini, Esq., (Hainesport, NJ).

² Gary Vogler, Custodian of Records. Represented by DAG Eleanor Heck, on behalf of the NJ Attorney General.

³ The Complainant references AmeriHealth Managed Care Complaint File No. 91659.

⁴ The Complainant references AmeriHealth Managed Care Complaint File No. 91659.

⁵ Although the Complainant's first (1st) and second (2nd) requests fail to specifically identify a government record, the requests are not invalid under OPRA because the Custodian identified records responsive in the Statement of Information. See Gannet v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005).

⁶ The GRC received the Denial of Access Complaint on said date.

⁷ 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.

The Complainant filed his second (2nd) OPRA request with DOBI on March 9, 2012 seeking the records listed above. The Custodian responded on March 9, 2012, the same business day following after receipt of such request. The Custodian denied the Complainant's second (2nd) OPRA request because it was a duplicate of the first (1st) request.

The Complainant filed her Denial of Access Complaint with the Government Records Council on ("GRC") on March 20, 2012. The Complainant states that the Custodian denied her access to the records responsive to her first (1st) and second (2nd) OPRA requests because no formal disciplinary action was taken by DOBI against AmeriHealth. The Complainant asserts that the timeline sheet responsive to her request is essential to prove that AmeriHealth exceeded the 120 day time restriction imposed by the appeal process..

The Custodian filed his Statement of Information ("SOI") with the GRC on May 18, 2012.⁸ The Custodian certifies that he denied the Complainant's access to the records responsive to the first (1st) and second (2nd) OPRA requests because "the following licensee records are specifically determined to be nonpublic records in accordance with N.J.S.A. 47:1A-1...6. Investigative files in any matter pending investigation, or in any completed investigation in which no formal disciplinary action was taken..." *N.J.A.C.* 11:17-2.15(b). The Custodian certifies that the investigation in question was closed with no formal disciplinary action taken by DOBI. The Custodian also argues that pursuant to *N.J.A.C.* 11:17-2.15(b) records in that file are not subject to disclosure under OPRA.

Analysis⁹

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 also provides that:

"[t]he provisions of this act...shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to...regulation promulgated under the authority of any statute ..."N.J.S.A. 47:1A-9(a)

N.J.A.C. 11:17-2.15(b)(6) provides as follows:

"The following licensee records are specifically determined to be nonpublic records in investigation, or *in any completed investigation in which no formal disciplinary action was taken...*" (Emphasis added.)

⁸ The Custodian requested two (2) extension of time to complete the SOI.

⁹ 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.

In the instant complaint the Complainant filed two (2) OPRA requests for various records received by DOBI from AmeriHealth regarding Managed Care Complaint File No. 91659 including the timeline sheet for the internal appeal process. The Custodian timely responded to both requests stating that the records responsive are exempt from disclosure under OPRA because records involving any matter which is the subject of a pending investigation or any completed matter in which formal disciplinary action was not taken are not considered public records.

The Custodian certifies in the SOI that the investigation in question was closed with no formal disciplinary action taken by DOBI. The Custodian argued that since no formal disciplinary action was taken against AmeriHealth, the records responsive are exempt from disclosure under OPRA pursuant to *N.J.A.C. 11:17-2.15(b)*. Conversely, the Complainant argues in the Denial of Access Complaint that records responsive to his requests, especially the timeline sheet is essential to prove that AmeriHealth exceeded the 120 day time restriction imposed by the appeal process.

Accordingly, because the Custodian certified that DOBI took no formal disciplinary action against AmeriHealth and such records are not required to be disclosed pursuant to *N.J.S.A. 47:1A-9(a)* and *N.J.A.C. 11:17-2.15(b)(6)*, the Custodian lawfully denied access to the records responsive to the Complainant's first (1st) and second (2nd) OPRA requests. *See Sallie v. NJ Department of Banking and Insurance*, GRC Complaint No. 2007-226 (April 2009).

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).”

In the instant complaint, as in Mason, the Complainant’s Denial of Access Complaint was not the catalyst for the release of the requested records, because the Complainant’s request is overly broad and failed to identify specific government records sought.

Pursuant to Teeters, *supra*, 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. Additionally, pursuant to Mason, *supra*, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved because no relief was ordered by the Council. Specifically, the records responsive to the Complainant's requests are exempt pursuant to N.J.S.A. 47:1A-9(a) and *N.J.A.C. 11:17-2.15(b)(6)*. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to 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. Because the Custodian certified that the Department of Banking & Insurance took no formal disciplinary action against AmeriHealth and such records are not required to be disclosed under OPRA pursuant to N.J.S.A. 47:1A-9(a) and *N.J.A.C. 11:17-2.15(b)(6)*, the Custodian lawfully denied access to the records responsive to the Complainant's first (1st) and second (2nd) OPRA requests. See Sallie v. NJ Department of Banking and Insurance, GRC Complaint No. 2007-226 (April 2009).
2. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), 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. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved because no relief was ordered by the Council. Specifically, the records responsive to the Complainant's requests are exempt pursuant to N.J.S.A. 47:1A-9(a) and *N.J.A.C. 11:17-2.15(b)(6)*. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

March 15, 2013