



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

June 24, 2014 Government Records Council Meeting

Kevin Lawrence Conley
Complainant

Complaint No. 2013-138

v.

New Jersey Department of Corrections
Custodian of Record

At the June 24, 2014 public meeting, the Government Records Council (“Council”) considered the May 20, 2014 Supplemental 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 the Complainant has failed to establish that the complaint should be reconsidered based on a mistake or fraud. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. *See D'Atria v. D'Atria*, 242 N.J. Super. 392 (Ch. Div. 1990). Thus, the Custodian’s request for reconsideration should be denied. *Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996); *D'Atria v. D'Atria*, 242 N.J. Super. 392 (Ch. Div. 1990); *In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J.*, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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 24th Day of June, 2014

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: June 26, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***Reconsideration*
Supplemental Findings and Recommendations of the Executive Director
June 24, 2014 Council Meeting**

**Kevin Lawrence Conley¹
Complainant**

GRC Complaint No. 2013-138

v.

**New Jersey Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: Copies via mail of all documents made, maintained or kept on file or received in the regular course of government business included in, or relevant to, the request for proposal (“RFP”) document and New Jersey specification documents for all vendors filing RFPs to provide cable, satellite, or other television service to the New Jersey State Prison, including names and dates for all New Jersey Department of Corrections officials the RFPs were sent to for review/consideration.

Custodian of Record: John Falvey
Request Received by Custodian: December 6, 2012
Response Made by Custodian: December 20, 2012
GRC Complaint Received: May 12, 2013

Background

March 25, 2014 Council Meeting:

At its March 25, 2014 public meeting, the Government Records Council (“Council”) considered the March 18, 2014 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 Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

¹ No legal representation listed on record; Complainant stated he is acting *pro se*.

² No legal representation listed on record.

2. Although the Custodian responded in writing to the Complainant's OPRA request, said response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick v. NJ Dep't of Transp., GRC Complaint No. 2007-164 (February 2008), because the Custodian failed to provide a date certain upon which he would respond to the Complainant providing any responsive records. *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).
3. The Custodian did not unlawfully deny access to the requested records because the Custodian certified that he disclosed to the Complainant the records responsive to the request on April 19, 2013.
4. Although the Custodian failed to respond in writing to the Complainant's OPRA request within the statutorily mandated time frame which resulted in a "deemed denial," and although the Custodian's response when provided was insufficient, the Custodian did disclose the records responsive to the Complainant's request. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
5. The Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. 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, no nexus exists because the complaint was filed after the records were disclosed; moreover, the Complainant affirmatively stated in his complaint that he was acting *pro se*. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Procedural History:

On March 27, 2014, the Council distributed its Interim Order to all parties. The Complainant stated that he received the Council's March 25, 2014 Final Decision on April 1, 2014. On April 4, 2014, the Complainant filed a request for reconsideration of the Council's Final Decision based on mistake and fraud. On April 8, 2014, the GRC e-mailed a copy of the Complainant's request for reconsideration to the Custodian. On April 9, 2014, the Custodian filed an objection to the Complainant's request for reconsideration.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's March 25, 2014 Final Decision on April 4, 2014, eight (8) business days from the issuance of the Council's Decision. The Custodian filed an objection to the Complainant's request for reconsideration on April 9, 2014, one (1) business day following receipt of the request for reconsideration.

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: that 1) the Council's decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings*, 295 N.J. Super. at 384.

The Complainant's “Point One” is that the Council made a mistake by finding that the Custodian's delivery of records to the Complainant by means other than the United States Postal Service (“USPS”) constituted proof of delivery on the alleged date of mailing. The Complainant asserts that the allegation that the liaison mailed the records on April 19, 2013 was supported only by a copy of a letter sent by the liaison. The Complainant contends that the Custodian's certification stating that the records were mailed on April 19, 2013 was flawed because the Custodian had no first-hand knowledge of the mailing. The Complainant further states that the

Council erred by finding that there was no competent, credible evidence to refute the Custodian's certification. The Complainant states that he provided three certifications establishing sole delivery of the records on May 16, 2013. The balance of Complainant's "Point One" refers to the Council making a mistake by countenancing delivery of the records by means other than the USPS.

With respect to the Complainant's "Point One," the Custodian certified on May 23, 2013, in relevant part, "I...make the following statements within my knowledge...[o]n April 19, 2013, my office informed the OPRA liaison of Mr. Conley's payment and the records were mailed." The Council held in paragraph 3 of its Final Decision that "...the Custodian certified that he disclosed to the Complainant the records responsive to the request on April 19, 2013." The Complainant's several certifications did not refute the Custodian's averment that the records were mailed, but rather that the Complainant had not received the records as of the date of his certification. The Complainant's arguments that the Council made a mistake in its analysis of the evidence are therefore not persuasive. Regarding the agency's means of delivery, the Complainant is an inmate in the New Jersey State Prison. The GRC acknowledges that numerous procedures are in place within a prison to ensure the safe and secure operation of the facility, which includes the delivery of items such as documents to the inmates. The GRC has no authority to intrude upon said procedures; therefore, the Complainant's allegations that the Council's erred by countenancing delivery of the records by means other than the USPS are without merit.

The Complainant's "Point Two" is that the Council erred in not finding a third "deemed denial" of records. In paragraph 1 of the Council's Final Decision, the Council found that the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request which resulted in a "deemed" denial of the Complainant's OPRA request. There is no basis in law for a third "deemed denial" of records.

Accordingly, the Complainant has failed to establish that the complaint should be reconsidered based on a mistake or fraud. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria, 242 N.J. Super. at 401. Thus, the Custodian's request for reconsideration should be denied. See Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Complainant has failed to establish that the complaint should be reconsidered based on a mistake or fraud. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990). Thus, the Custodian's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: John E. Stewart, Esq.

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

May 20, 2013³

³ This matter was not heard at the May 27, 2014 Council meeting because the meeting was canceled due to lack of a quorum.
Kevin Lawrence Conley v. New Jersey Department of Corrections, 2013-138 – Supplemental Findings and Recommendations of the Executive Director



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FINAL DECISION

March 25, 2014 Government Records Council Meeting

Kevin Lawrence Conley
Complainant

Complaint No. 2013-138

v.

New Jersey Department of Corrections
Custodian of Record

At the March 25, 2014 public meeting, the Government Records Council (“Council”) considered the March 18, 2014 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 did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Although the Custodian responded in writing to the Complainant’s OPRA request, said response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick v. NJ Dep’t of Transp., GRC Complaint No. 2007-164 (February 2008), because the Custodian failed to provide a date certain upon which he would respond to the Complainant providing any responsive records. *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).
3. The Custodian did not unlawfully deny access to the requested records because the Custodian certified that he disclosed to the Complainant the records responsive to the request on April 19, 2013.
4. Although the Custodian failed to respond in writing to the Complainant’s OPRA request within the statutorily mandated time frame which resulted in a “deemed denial,” and although the Custodian’s response when provided was insufficient, the Custodian did disclose the records responsive to the Complainant’s request.



Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

5. The Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. 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, no nexus exists because the complaint was filed after the records were disclosed; moreover, the Complainant affirmatively stated in his complaint that he was acting *pro se*. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

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 25th Day of March, 2014

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: March 27, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 25, 2014 Council Meeting**

**Kevin Lawrence Conley¹
Complainant**

GRC Complaint No. 2013-138

v.

**New Jersey Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: Copies via mail of all documents made, maintained or kept on file or received in the regular course of government business included in, or relevant to, the request for proposal (“RFP”) document and New Jersey specification documents for all vendors filing RFPs to provide cable, satellite, or other television service to the New Jersey State Prison, including names and dates for all New Jersey Department of Corrections officials the RFPs were sent to for review/consideration.

Custodian of Record: John Falvey
Request Received by Custodian: December 6, 2012
Response Made by Custodian: December 20, 2012
GRC Complaint Received: May 12, 2013

Background³

Request and Response:

On December 6, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 20, 2012, the tenth (10th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that the Department of Corrections (“DOC”) was “requesting additional time in which to respond to [Complainant’s] request for copies...”

Denial of Access Complaint:

On May 12, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he is an inmate at the New Jersey State Prison and his OPRA request was delivered to the Custodian on December 6, 2012.

¹ No legal representation listed on record; Complainant stated he is acting *pro se*.

² No legal representation listed on record.

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.

The Complainant states that he received a letter dated January 30, 2013 from Administrator Charles Warren charging him \$.20 in copying fees for the requested records. A form for authorization of payment from the Complainant's account was enclosed with the letter.⁴ The Complainant states that he properly submitted the payment paperwork, and the copying fees were deducted from his account on March 13, 2013, but he never received the requested records.

The Complainant states he wants the following relief:

1. A determination by the GRC that the requested records have been unlawfully denied.
2. An Order compelling disclosure of the requested records.
3. An award of "appropriate expenses" and attorney and/or paralegal fees.

Statement of Information:

On May 22, 2013, the Custodian filed a Statement of Information ("SOI").⁵ The Custodian certifies that he has personal knowledge of the statements made in his SOI. The Custodian certifies that the Complainant's request was received by the agency December 6, 2012, and the agency's OPRA liaison, Charles Warren ("liaison"), responded in writing to the Complainant on December 20, 2012, requesting additional time to comply.

The Custodian certifies that the records determined to be responsive to the Complainant's request consisted of four (4) pages of Direct TV vendor records. The Custodian further certifies that on January 30, 2013, the liaison informed the Complainant that he had incurred a copying fee in the amount of \$.20 for said records. The Custodian certifies that he received correspondence from the Complainant dated April 16, 2013, wherein the Complainant informed the Custodian that the copying fee was deducted from his inmate account on March 13, 2013, but he never received the records.

The Custodian certifies that he investigated the situation and discovered that the liaison was unaware that the Complainant's copying fees had been paid, so he did not disclose the records. The Custodian certifies that on April 19, 2013, he informed the liaison that payment had been made and that the liaison mailed the requested records to the Complainant. The Custodian further certifies that said records were also personally delivered to the Complainant on May 16, 2013. The Custodian attached to the SOI a receipt for the records signed by the Complainant.

⁴ The Custodian certified in his Statement of Information that specific procedures must be followed for funds to be docked from an inmate account. The procedures are in place pursuant to N.J.A.C. 10A:2-1 et seq. for security reasons and accessing the account can therefore be a time consuming process. The Complainant is referring to such an account when he mentions payment authorization and its attendant paperwork.

⁵ The Custodian's SOI addresses two (2) requests submitted by the Complainant: DOC's OPRA #8823 and OPRA #9023. The records relevant to this complaint are encompassed within DOC's OPRA #8823.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁶ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Here, there is no dispute between the parties that the request was received by the agency on December 6, 2012. The evidence of record reveals that the agency's OPRA liaison, on behalf of the Custodian, responded in writing to the request on December 20, 2012, the tenth (10th) business day following receipt of said request.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

Sufficiency of the Custodian's Response

OPRA provides that a custodian may have an extension of time to respond to a complainant's OPRA request, but the custodian must provide a date certain. N.J.S.A. 47:1A-5(i). OPRA further provides that should the custodian fail to provide a response on that specific date, "access shall be deemed denied." N.J.S.A. 47:1A-5(i).

In Hardwick v. NJ Dep't of Transp., GRC Complaint No. 2007-164 (February 2008), the custodian provided the complainant with a written response to the complainant's OPRA request. In the response, the custodian requested an extension of time to respond to said request but failed to provide a date certain upon which the requested records would be provided. The Council held that the custodian's request for an extension of time was inadequate under OPRA pursuant to N.J.S.A. 47:1A-5(i).

Here the agency's OPRA liaison, on behalf of the Custodian, responded in writing to the Complainant's OPRA request on December 20, 2012, by stating that the DOC was "requesting additional time in which to respond to [Complainant's] request for copies..." The DOC failed to

⁶ A custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

provide a date certain on which they would respond to the Complainant providing access to the responsive records.

Therefore, although the Custodian responded in writing to the Complainant's OPRA request, said response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick, GRC 2007-164, because the Custodian failed to provide a date certain upon which he would respond to the Complainant providing any responsive records. *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).

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.

Notwithstanding the Custodian's "deemed denial," the Custodian certified that on April 19, 2013, the records responsive to the request were disclosed to the Complainant. Further, the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification.

As such, the Custodian did not unlawfully deny access to the requested records because the Custodian certified that he disclosed to the Complainant the records responsive to the request on April 19, 2013.

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 failed to respond in writing to the Complainant's OPRA request within the statutorily mandated time frame which resulted in a "deemed denial," and although the Custodian's response when provided was insufficient, the Custodian did disclose the records responsive to the Complainant's request. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions did 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 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, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res., 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, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, 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, 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 is seeking prevailing party attorney fees; however, the evidence of record reveals that on April 19, 2013, the records responsive to the request were disclosed to the Complainant. Subsequently, on May 12, 2013, the Complainant filed a Denial of Access Complaint with the GRC. Accordingly, the Complainant filed the complaint after the records responsive to his request were disclosed. Moreover, there is nothing in the evidence of record to indicate that the Complainant was represented by legal counsel; to the contrary, the Complainant affirmatively stated in his complaint that he was acting *pro se*.

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, 387 N.J.

Super. 432. Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, no nexus exists because the complaint was filed after the records were disclosed; moreover, the Complainant affirmatively stated in his complaint that he was acting *pro se*. 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, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Although the Custodian responded in writing to the Complainant's OPRA request, said response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick v. NJ Dep't of Transp., GRC Complaint No. 2007-164 (February 2008), because the Custodian failed to provide a date certain upon which he would respond to the Complainant providing any responsive records. *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).
3. The Custodian did not unlawfully deny access to the requested records because the Custodian certified that he disclosed to the Complainant the records responsive to the request on April 19, 2013.
4. Although the Custodian failed to respond in writing to the Complainant's OPRA request within the statutorily mandated time frame which resulted in a "deemed denial," and although the Custodian's response when provided was insufficient, the Custodian did disclose the records responsive to the Complainant's request. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
5. The Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. 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, no nexus exists because the complaint was filed after the records were disclosed; moreover, the Complainant affirmatively stated in his complaint that he was acting *pro se*. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

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