



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

October 28, 2014 Government Records Council Meeting

Darian Vitello
Complainant

Complaint No. 2013-177

v.

Borough of Belmar Police Department (Monmouth)
Custodian of Record

At the October 28, 2014 public meeting, the Government Records Council ("Council") considered the October 21, 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:

1. As the moving party, the Custodian's Counsel was required to establish either of the necessary criteria set forth above: 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 v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996). Counsel established that there was a mistake because the Council issued its decision devoid of proper communication between all parties facilitating the proper submission of all evidence and arguments regarding the existence of the requested recording. The Council's December 20, 2013 Interim Order was thus based on an incorrect basis and the Custodian's Counsel has provided adequate evidence that no record responsive to the Complainant's OPRA request existed. Thus, Custodian Counsel's request for reconsideration should be granted. *Cummings*, 295 N.J. Super. at 384; *D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (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).
2. Regarding conclusion No. 2, the Council should amend same as the Custodian could not have unlawfully denied access to a record that did not exist. *Pusterhofer v. N.J. Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005). Further, because the requested record does not exist and thus no order of disclosure is necessary, the Council should rescind conclusion No. 3 requiring compliance. Finally, because compliance is not necessary, the Council amend conclusion Nos. 4 and 5 to address whether the Custodian knowing and



willfully violated OPRA and whether the Complainant was a prevailing party entitled to an award of reasonable attorney's fees.

3. Although the Custodian failed to respond to the OPRA request and further failed to forward same to the Custodian, he did not unlawfully deny access to the requested recording because same did not exist. 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 actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. 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 Custodian did not unlawfully deny access to the requested record because same does not exist. 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. at 432, and Mason, 196 N.J. at 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 28th Day of October, 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: October 30, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
Supplemental Findings and Recommendations of the Executive Director
October 28, 2014 Council Meeting

Darian Vitello¹
Complainant

GRC Complaint No. 2013-177

v.

Borough of Belmar Police Department (Monmouth)²
Custodial Agency

Records Relevant to Complaint: A mailed copy of “a phone call between Chief Thomas Palmisano and myself from May 20, 2013 at approximately 4:30 p.m. The call [unintelligible] . . . which is a recorded ingoing and outgoing line for the Belmar Police Department [(“BPD”)]. The call was received on my cell phone . . .”

Custodian of Record: Chief Thomas Palmisano³

Request Received by Custodian: May 27, 2013

Response Made by Custodian: None

GRC Complaint Received: June 11, 2013

Background⁴

At its December 20, 2013 public meeting, the Government Records Council (“Council”) considered the December 10, 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, 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),

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

² No legal representation listed on record.

³ The GRC notes that although Chief Palmisano has been identified as the Custodian of Record, the Borough’s actual custodian of record is Ms. April Claudio.

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

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and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. The Custodian has failed to bear his burden of proving that the denial of access to a recording of the requested telephone conversation was authorized by law. N.J.S.A. 47:1A-6. Therefore, unless a lawful exemption applies, the Custodian shall disclose to the Complainant a recording of the requested May 20, 2013 telephone conversation which occurred between the Complainant and the Custodian at approximately 4:30 p.m.
3. **The Custodian shall comply with paragraph #2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On December 23, 2013, the Council distributed its Interim Order to all parties. As such, the date for compliance was December 31, 2013.

On January 2, 2014, the Custodian's Counsel a filed a request for reconsideration of the Council's Final Decision based on a mistake. The Custodian's Counsel stated that, based on recently received decisions in Vitello v. Borough of Belmar Police Dep't (Monmouth), GRC Complaint No. 2012-268 *et seq.* and this complaint, there appeared to be some confusion with respect to the Complainant's Denial of Access Complaint filings.

The Custodian's Counsel stated that the alleged requested record here was a May 20, 2013 telephone call the Complainant alleged was recorded. The Custodian's Counsel stated that the Complainant has been advised multiple times that the phone call was not recorded because it was not on the BPD's recorded line. Further, the Custodian's Counsel affirmed that a copy of the recorded line for the time period 4:00 p.m. to 5:00 p.m. was already provided to one of the Complainant's lawyers in July 2013.⁵

The Custodian's Counsel stated that on September 18, 2013, his office received the Denial of Access Complaint relevant to Vitello v. Borough of Belmar Police Dep't (Monmouth), GRC Complaint 2013-204. The Custodian's Counsel provided that a number of communications

⁵ The OPRA request seeking that record is the subject of Vitello v. Borough of Belmar Police Dep't (Monmouth), GRC Complaint No. 2013-204.

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between the GRC and the parties ensued following that date, including submission of a Statement of Information (“SOI”). During the pendency of Vitello, GRC 2013-204, in October 2013 and unbeknownst to Custodian’s Counsel, the GRC served this complaint on the Custodian. The Custodian’s Counsel asserted that the Custodian believed the SOI request for this complaint was actually a duplicate of the SOI request for Vitello, GRC 2013-204 because the issue in both complaints was the same. The Custodian’s Counsel contended that because he had no prior knowledge of this complaint, the Council’s December 20, 2013 Interim Order came as a surprise considering that the issue here mirrored the issue in Vitello, GRC 2013-204.

The Custodian’s Counsel first expressed confusion that after multiple communications on Vitello, GRC 2013-204, the GRC failed to list or copy him on any correspondence regarding this complaint. The Custodian’s Counsel also asserted that he had no record of Complainant Counsel’s appearance in this complaint. Counsel noted that the only communication he has had with Complainant’s Counsel was a November 11, 2013 letter in which he sought another copy of the recording at issue in Vitello, GRC 2013-204.

The Custodian’s Counsel stated that the Council’s decision here is erroneous because no record responsive exists. The Custodian’s Counsel affirmed that his letter brief attached to the SOI submitted as part of Vitello, GRC 2013-204, clearly stated that no record existed and that the Complainant was advised of this fact several times. Further, the Custodian’s Counsel stated that his letter brief also acknowledged that the record at issue in Vitello, GRC 2013-204, which encompasses the time frame in the Complainant’s request here, was provided to one of the Complainant’s attorneys in July, 2013.

The Custodian’s Counsel contended that, for the above reasons, the Council should reconsider this decision because the Borough could not have unlawfully denied access to a record that does not exist. The Custodian’s Counsel further asserted that the Council should reverse its decision that the Borough appropriately responded to this complaint. The Custodian’s Counsel asserted that failure to reverse its Order will result in him filing an appeal with the Appellate Division.

On January 16, 2014, the Custodian certified that he spoke with the Complainant on May 20, 2013 on his office line and not the dispatcher line. The Custodian certified that the Complainant believed that the call originated from the dispatch line, which is recorded, based on the number showing on his caller ID. The Custodian affirmed that the Complainant persisted in attempting to obtain the alleged recording by filing the OPRA request at issue here, only to be advised that no records existed. Further, the Custodian certified that subsequent to that denial, the Complainant submitted another OPRA request.⁶ The Custodian averred that Custodian’s Counsel provided a copy of the record responsive to that request (a copy of all recordings from the dispatch line between the hours of 4:00 p.m. and 5:00 p.m. on May 20, 2013) to Jennifer Barringer, Esq., previous counsel for the Complainant.

⁶ See Vitello, GRC 2013-204.

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On January 22, 2014, the Complainant's Counsel submitted objections to the request for reconsideration. Initially, the Complainant's Counsel argued that the request for reconsideration should be denied because it was not submitted on the appropriate form.⁷

Further, the Complainant's Counsel contended that the request for reconsideration ignored the substance of the Council's Order. Specifically, the Custodian's Counsel argued in the request for reconsideration that no audio of the conversation existed, but then claimed that he disclosed recordings to Ms. Barringer. The Complainant's Counsel further asserted that no one from the BPD with personal knowledge of these matters has submitted a legal certification regarding this issue.⁸ The Complainant's Counsel stated that it is undisputed that the Complainant received a phone call from the Custodian and the call was listed on the Complainant's cell phone as the number for the recorded line.

Thus, the Complainant's Counsel contended that the crux of this complaint is whether the conversation actually took place on the recorded line, was recorded and whether the recording still exists. The Complainant's Counsel argued that the Complainant asserts that the answer to all three issues is in the affirmative.

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 Custodian's Counsel filed the request for reconsideration of the Council's Interim Order on January 2, 2014, the fifth (5th) business day after receipt of the Order.

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).

⁷ The GRC notes that Custodian's Counsel initially submitted a letter brief on December 30, 2013, but resubmitted same under cover of the GRC's request for reconsideration form on January 2, 2014.

⁸ In fact, the Custodian submitted a legal certification to the GRC on January 16, 2014. However, a review of the submission indicated that Complainant's Counsel was not provided with a copy of same. Thus, on September 17, 2014, the GRC forwarded a copy of same to Complainant's Counsel for his review and review, if necessary.

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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).

Here, the Custodian’s Counsel requested reconsideration of this complaint on the basis of “mistake.” The Custodian’s Counsel contended that a number of issues arose in this complaint concerning the GRC’s notification to him as to the existence of this complaint, the Custodian’s failure to submit an SOI based on his confusion with similar nature of this complaint to Vitello, GRC 2013-204 and any additional submissions or certifications regarding the actual existence of the responsive recording. He essentially argued that the Council’s decision was palpably incorrect and did not consider significant evidence partly because the confusion caused herein resulted in the GRC not being provided with a clear statement that the requested record did not exist.

The Complainant’s Counsel objected to the request for reconsideration, arguing that same wasn’t submitted on a form.⁹ However, notwithstanding that the GRC received a letter brief on December 30, 2013, the Custodian’s Counsel did subsequently resend his letter under cover of the GRC’s request for reconsideration form. Further, the Complainant’s Counsel contended that Custodian’s Counsel failed to provide sufficient evidence warranting reconsideration of this complaint. The Complainant’s Counsel hinged his argument on the BPD’s failure to produce a legal certification from an individual with first-hand knowledge of subject conversation with the Complainant. However, the Complainant’s Counsel, by no fault of his own, was not aware that the GRC had received a legal certification from the Custodian at the time of his objections. This oversight was subsequently corrected on September 17, 2014 with an invite to Complainant’s Counsel to respond; he has not availed himself of this option to date.

Ultimately, the crux of this complaint is whether the conversation between the Complainant and the Custodian was recorded on the BPD’s recorded line and whether the record existed at the time of the request and should have been provided. The Custodian’s Counsel averred that same did not exist and the Custodian subsequently submitted a legal certification to that effect. The Complainant’s Counsel argued that the Complainant’s caller ID identified the BPD number he believed to be the recorded line and pointed to Custodian Counsel’s conflicting statements that no record existed here, but that a recording responsive to the OPRA request in Vitello, GRC 2013-204 was provided to the Complainant (via Ms. Barringer).

⁹ See FN 6.

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First, the GRC is not satisfied that the number on the Complainant's caller ID, which he believed or had some knowledge that it was the recorded line, rises to the level of competent, credible evidence that the call was recorded and a record exists.

Second, the issue of statements about the existence of the requested recording do not conflict. Specifically, the OPRA request here sought the actual record conversation between the Complainant and the Custodian, which the Custodian and his Counsel have advised does not exist. The request at issue in Vitello, GRC 2013-204, more broadly sought "a copy of all calls made from" the recorded line between 4:00 p.m. and 5:00 p.m. on May 20, 2013. That request more generically sought all calls made from the recorded line and was not limited to a specific call between the Complainant and the Custodian. The GRC is satisfied that these requests seek different records. Thus, it is not conflicting that no record may exist here and one existed in Vitello, GRC 2013-204.

Although the Council adjudicated this complaint on the basis that a recording responsive to the request existed, it is now apparent that no recording exists. For this reason, the Council should reconsider its December 20, 2013 decision that the Custodian unlawfully denied access to the recording and that he was required to disclose same.

As the moving party, the Custodian's Counsel was required to establish either of the necessary criteria set forth above: 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. Counsel established that there was a mistake because the Council issued its decision devoid of proper communication between all parties facilitating the proper submission of all evidence and arguments regarding the existence of the requested recording. The Council's December 20, 2013 Interim Order was thus based on an incorrect basis and the Custodian's Counsel has provided adequate evidence that no record responsive to the Complainant's OPRA request existed. Thus, Custodian Counsel's request for reconsideration should be granted. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

Regarding conclusion No. 2, the Council should amend same as the Custodian could not have unlawfully denied access to a record that did not exist. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Further, because the requested record does not exist and thus no order of disclosure is necessary, the Council should rescind conclusion No. 3 requiring compliance. Finally, because compliance is not necessary, the Council amend conclusion Nos. 4 and 5 to address whether the Custodian knowing and willfully violated OPRA and whether the Complainant was a prevailing party entitled to an award of reasonable attorney's fees.

The GRC also notes that Custodian's Counsel disputed that the Custodian failed to respond appropriately to the Complainant's OPRA request. To the extent that this statement was a challenge of conclusion No. 1 of the Council's Order holding that the Complainant's OPRA request was "deemed" denied, the GRC rejects same. Specifically, neither the Custodian or Custodian's Counsel submitted evidence of a written response to the Complainant within seven (7) business days after receipt of his OPRA request.

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 to the OPRA request and further failed to forward same to the Custodian, he did not unlawfully deny access to the requested recording because same did not exist. 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 actions do 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.

In this matter, based on the lack of an SOI and any arguments as to the existence of the responsive record, the Council initially determined that the Custodian unlawfully denied access to the requested record. The Council thus ordered that the Custodian disclose the record to the Complainant and to simultaneously provide certified confirmation of compliance to the GRC. *See* Council's December 20, 2013 Interim Order.

However, subsequent to this decision, the Custodian's Counsel submitted a request for reconsideration stating that no record responsive existed. The Custodian corroborated Counsel's statement in a legal certification to the GRC on January 22, 2014. Based on the information provided in the request for reconsideration and Custodian's certification, it has been recommended that the Council rescind its compliance order. Accordingly, the Complainant could not have prevailed in this complaint and is not entitled to an award of reasonable attorney's fees because of the non-existence of the requested record.

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, the Custodian did not unlawfully deny access to the requested record because same does not exist. 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. at 432, and Mason, 196 N.J. at 51.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. As the moving party, the Custodian's Counsel was required to establish either of the necessary criteria set forth above: 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 v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). Counsel established that there was a mistake because the Council issued its decision devoid of proper communication between all parties facilitating the proper submission of all evidence and arguments regarding the existence of the requested recording. The Council's December 20, 2013 Interim Order was thus based on an incorrect basis and the Custodian's Counsel has provided adequate evidence that no record responsive to the Complainant's OPRA request existed. Thus, Custodian Counsel's request for reconsideration should be granted. Cummings, 295 N.J. Super. at 384; D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (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).

2. Regarding conclusion No. 2, the Council should amend same as the Custodian could not have unlawfully denied access to a record that did not exist. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Further, because the requested record does not exist and thus no order of disclosure is necessary, the Council should rescind conclusion No. 3 requiring compliance. Finally, because compliance is not necessary, the Council amend conclusion Nos. 4 and 5 to address whether the Custodian knowing and willfully violated OPRA and whether the Complainant was a prevailing party entitled to an award of reasonable attorney's fees.
3. Although the Custodian failed to respond to the OPRA request and further failed to forward same to the Custodian, he did not unlawfully deny access to the requested recording because same did not exist. 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 actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. 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 Custodian did not unlawfully deny access to the requested record because same does not exist. 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. at 432, and Mason, 196 N.J. at 51.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

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

October 21, 2014



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

INTERIM ORDER

December 20, 2013 Government Records Council Meeting

Darian Vitello
Complainant

Complaint No. 2013-177

v.

Borough of Belmar Police Department (Monmouth)
Custodian of Record

At the December 20, 2013 public meeting, the Government Records Council ("Council") considered the December 10, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian 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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian has failed to bear his burden of proving that the denial of access to a recording of the requested telephone conversation was authorized by law. N.J.S.A. 47:1A-6. Therefore, unless a lawful exemption applies, the Custodian shall disclose to the Complainant a recording of the requested May 20, 2013 telephone conversation which occurred between the Complainant and the Custodian at approximately 4:30 p.m.
3. **The Custodian shall comply with paragraph #2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 20th Day of December, 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: December 23, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 20, 2013 Council Meeting**

**Darian Vitello¹
Complainant**

GRC Complaint No. 2013-177

v.

**Borough of Belmar Police Department (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: A mailed copy of “a phone call between Chief Thomas Palmisano and myself from May 20, 2013 at approximately 4:30 PM. The call [unintelligible] from 732-661-1700, which is a recorded ingoing and outgoing line for the Belmar Police Department. The call was received on my cell phone, [unintelligible phone number].”

Custodian of Record: Chief Thomas Palmisano
Request Received by Custodian: May 27, 2013
Response Made by Custodian: None
GRC Complaint Received: June 11, 2013

Background³

Request and Response:

On May 27, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. The Custodian did not respond to the Complainant’s request.

Denial of Access Complaint:

On June 11, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that on May 27, 2013, he submitted an OPRA request to the Custodian seeking the records relevant to the complaint. The Complainant further asserts that the Custodian did not respond to the request.

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

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.

Darian Vitello v. Borough of Belmar Police Department (Monmouth), 2013-177 – Findings and Recommendations of the Executive Director

Statement of Information:

The Custodian did not respond to the GRC's October 21, 2013 request for the Statement of Information ("SOF").

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).⁴ 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, the Complainant submitted an OPRA request to the Custodian on May 27, 2013, and the Custodian did not respond to the 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.

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.

The Complainant sought a recording of a telephone conversation between the Complainant and the Custodian which occurred on May 20, 2013 at approximately 4:30 p.m. The call was made from 732-661-1700, which the Complainant stated is a recorded ingoing and outgoing Belmar Police Department line, to the Complainant's cellular telephone.⁵

⁴ 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.

⁵ The Complainant's request also identified the cellular telephone number; however the cellular number on the copy of the request submitted to the GRC was not clear.

The Complainant's request sought a specifically identifiable record and the Custodian failed to provide a legal reason for denying access. Moreover, the Custodian would have had an opportunity to explain the legal reason for denying access if he submitted an SOI as requested by the GRC, but he failed to do so.

Accordingly, the Custodian has failed to bear his burden of proving that the denial of access to a recording of the requested telephone conversation was authorized by law. N.J.S.A. 47:1A-6. Therefore, unless a lawful exemption applies, the Custodian shall disclose to the Complainant a recording of the requested May 20, 2013 telephone conversation which occurred between the Complainant and the Custodian at approximately 4:30 p.m.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian has failed to bear his burden of proving that the denial of access to a recording of the requested telephone conversation was authorized by law. N.J.S.A. 47:1A-6. Therefore, unless a lawful exemption applies, the Custodian shall disclose to the Complainant a recording of the requested May 20, 2013 telephone conversation which occurred between the Complainant and the Custodian at approximately 4:30 p.m.
3. **The Custodian shall comply with paragraph #2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each**

redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁶ to the Executive Director.⁷

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: John E. Stewart, Esq.

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

December 10, 2013

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁷ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Darian Vitello v. Borough of Belmar Police Department (Monmouth), 2013-177 – Findings and Recommendations of the Executive Director