



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

June 30, 2015 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2013-195

v.

City of Union City (Hudson)
Custodian of Record

At the June 30, 2015 public meeting, the Government Records Council (“Council”) considered the June 23, 2015 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. The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel’s fee application conforms with the requirements of N.J.A.C. 1:105-2.13(b) and provides the Council with detailed information from which to conduct its analysis. The Council finds that 3.8 hours at \$300 per hour is reasonable for the work performed by Counsel in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Mr. Luers, Counsel to the Complainant, for the full amount of \$1,140.00, representing 3.8 hours of service at \$300 per hour.**
2. Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

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 30th Day of June, 2015

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: July 2, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**AMENDED
Supplemental Findings and Recommendations of the Executive Director
June 30, 2015 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2013-195

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

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

Custodian of Record: William Senande
Request Received by Custodian: June 17, 2013
Response Made by Custodian: June 25, 2013
GRC Complaint Received: July 3, 2013

Background

January 28, 2014 Council Meeting:

At its January 28, 2014, public meeting, the Council considered the January 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, found that:

1. The Custodian unlawfully denied access to the responsive settlement agreement. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-6; Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010) at 512-13; Darata v. Monmouth Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2009-312 (February 2011). However, the GRC declines to order disclosure of the agreement because the Custodian's Counsel disclosed same to the Complainant on August 29, 2013.
2. Although the Custodian unlawfully denied access to the responsive agreement, same was disclosed to the Complainant on August 29, 2013. Further, the evidence supports that the Custodian's Counsel responded on behalf of the Custodian throughout the pendency of this action. Thus, the Custodian was relying on Counsel's advice and

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

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

responses. See Elcavage v. West Milford Twp., GRC Complaint No. 2006-55 (July 2008)(citing In re Zisa, 385 N.J. Super. 188 (App. Div. 2006)). 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 an unreasonable denial of access under the totality of the circumstances.

3. The Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a 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 City disclosed the responsive agreement to the Complainant on August 29, 2013, nearly two (2) months after the filing of this complaint. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is 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. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney’s fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney’s fees to object to the attorney’s fees requested. N.J.A.C. 5:105-2.13(d).**

Procedural History:

On January 29, 2014, the Council distributed its January 28, 2014, Interim Order (“Interim Order”) to all parties.

Compliance:

On February 26, 2014, Walter M. Luers, Esq., Counsel for the Complainant (“Counsel”) filed his fee application in accordance with N.J.A.C. 5:105.2.13(b)³. The fee application and Certification of Services (“Certification”) of counsel set forth the following:

- (1) The Complainant’s name and number: John Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195.
- (2) Counsel’s law firm affiliation: Law Offices of Walter M Luers, Jr., LLC.

³ N.J.A.C. 5:105-2.13(b) sets forth the requirements of a fee application, providing in relevant part: (b) . . . [t]he [fee] application must include a certification from the attorney(s) representing the complainant that includes: 1. The Council’s complaint reference name and number; 2. Law firm affiliation; 3. A statement of client representation; 4. The hourly rates of all attorneys and support staff involved in the complaint; 5. Copies of weekly time sheets for each professional involved in the complaint, which includes detailed descriptions of all activities attributable to the project in 0.1 hour (six-minute) increments; 6. Evidence that the rates charged are in accordance with prevailing market rates in the relevant community. Such evidence shall include: (i) Years of related or similar experience; (ii) Skill level; and (iii) Reputation; and 7. A detailed listing of any expense reimbursements with supporting documentation for such costs.

- (3) A statement of client representation: Counsel certified to his services, including preparing documents for filing with the GRC; reviewing of e-mail correspondence to and/or from the GRC, the records custodian, and Ms. Siegelbaum, counsel for the custodian; reviewing of interim decision and order; and preparing fee application.
- (4) The hourly rate of all attorneys and support staff involved in the complaint: Mr. Luers, the sole professional who worked on the file, certified that he charged \$300 per hour.
- (5) Copies of time sheets for each professional involved in the complaint: Counsel supplied a copy of his time sheets from July 3, 2013, through February 25, 2014 (the "Fee Period"). During the Fee Period, counsel billed a total of 3.8 hours for a total fee of \$1,140.
- (6) Evidence that the rates charged are in accordance with prevailing rates in the relevant community, including years of experience, skill level and reputation: Counsel certified that he charges "\$300 per hour to clients for work in OPRA matters." Certification of Walter M. Luers, Esq., (hereinafter, "Luers Certif.") at ¶ 3. Counsel certified his education, years of legal experience, and representation of clients in OPRA cases before the New Jersey Supreme and Superior Courts, as well as before the GRC where he represents clients in "approximately 30 cases." Mr. Luers further certified that he has represented Mr. Paff in "dozens of matters" both before the GRC and the New Jersey Courts. Luers Certif. ¶ 3. Finally, Mr. Luers certifies to OPRA cases where counsel for the prevailing party were awarded fees in excess of \$300 per hour. *Citing, O'Boyle v. Borough of Longport*, ATL-L-002294-09 (approving an hourly rate of \$325) and *Pat Doe v. Rutgers Univ.*, MID-L-488-11 (finding \$325 is a reasonable fee in an OPRA matter).
- (7) Detailed documentation of expenses: Counsel is not seeking reimbursements for expenses.

Accordingly, Counsel filed a timely fee application with the Government Records Council ("GRC").

On March 3, 2014, the Custodian's Counsel filed a timely objection to Complainant's application for fees.⁴ The Custodian certified that the impetus for the Custodian to disclose the Settlement Agreement was the filing of the Complainant's first complaint, *Paff v. City of Union City* (Complaint No. 2012-262), rather than the within matter.

Analysis

In its January 28, 2014, Interim Order, the Council found the Complainant was a prevailing party and thus was entitled to submit an application for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-

⁴ The Council's order date April 29, 2014, incorrectly stated that the Custodian did not file an objection to the Complaint's fee application. The objection, however, was received and considered prior to the Council rendering its April 29, 2014, decision.

2.13(b). Counsel timely filed and served⁵ his Certification of Services, seeking a fee award of \$1,140.00, in the time period provided pursuant to the Court's Interim Order.

The Council's Interim Order further provided the Custodian ten (10) business days, from the date of service of the application for attorney's fees, to object to Counsel's fee request. N.J.A.C. 5:105-2.13(d). On March, 3, 2014, the Custodian's Counsel filed a timely objection to the Complainant's application for fees.

Prevailing Party Attorney Fee Award

"Under the American Rule, adhered to by the . . . courts of this state, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser." New Jerseyans for a Death Penalty Moratorium v. New Jersey Dep't. of Corr., ("NJMDP") 185 N.J. 137, 152 (2005) (quoting, Rendine v. Pantzer, 141 N.J. 292, 322 (1995) (internal quotation marks omitted)). However, this principle is not without exception. NJDPM, 185 N.J. at 152. Some statutes, such as OPRA, incorporate a "fee-shifting measure: to ensure 'that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in cases involving statutory rights, . . . and to ensure justice for all citizens.'" NJDPM, 185 N.J. at 153 (quoting Coleman v. Fiore Bros., 113 N.J. 594, 598, (1989)).

New Jersey public policy, as codified in OPRA, is that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State." NJDPM, 185 N.J. at 153 (citing N.J.S.A. 47:1A-1). 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. See generally, NJDPM, 185 N.J. 137. "By making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the Legislature intended to even the fight." Id. at 153. (quoting, Courier News v. Hunterdon Cnty. Prosecutor's Office, 378 N.J. Super. 539, 546 (App. Div. 2005)).

Counsel for the Custodian argues in her opposition to the fee award that the impetus for disclosing the requested records to the Complainant was the filing of Paff v. City of Union City (Union) GRC Complaint 2012-262 (Paff One), not the instant case, Paff v. City of Union City (Union) GRC Complaint 2013-195 (Paff Two).

⁵ N.J.A.C. 5:105-2.13(c) provides in relevant part: (c) The complainant, or his or her attorney, must serve all parties with the application for attorney's fees and all attachments thereto.

Although disclosure was made contemporaneously with the service of the Council's August 27, 2013 Interim Order in Paff One, it followed the filing of the Paff Two. The Council in Paff Two held that the Complainant achieved "the desired result because the complaint brought about a change in the custodian's conduct" and that a factual causal nexus existed between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 73. Accordingly, the Council ruled that the Complainant was a prevailing party in Paff Two and entitled to an award of a reasonable attorney's fee and was directed to file an application for attorney's fees.

A. Standards for Fee Award

The starting "point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate,' a calculation known as the lodestar." NJDPM, 185 N.J. at 153. (quoting Rendine, 141 N.J. at 324 (quoting, Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)). Hours, however, are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. Hensley, 461 U.S. at 434. When determining the reasonableness of the hourly rate charged, the GRC should consider rates for similar services by lawyers of reasonably comparable experience, skill, and reputation in the same geographical area. Walker v. Giuffre, 415 N.J. Super. 597, 606 (App. Div. 2010) (quoting Rendine, 141 N.J. at 337). The fee-shifting statutes do not contemplate that the losing party must pay for the learning experience of attorneys for the prevailing party. HIP (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc., 291 N.J. Super. 144, 160 (citing Council Enter., Inc. v. Atlantic City, 200 N.J. Super. 431, 441-42 (Law Div. 1984)).

Once the reasonable number of hours has been ascertained, the court should adjust the lodestar in light of the success of the prevailing party in relation to the relief sought. Walker, 415 N.J. Super. at 606 (citing Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 22 (2004)). The lodestar amount may be adjusted, either upward or downward, depending on the degree of success achieved. See NJDPM, 185 N.J. at 153-55. OPRA neither mandates nor prohibits enhancements. Rivera v. Office of the Cnty. Prosecutor, 2012 N.J. Super. Unpub. LEXIS 2752 *1, * 10 (Law Div. Dec. 2012) (citing NJDPM, 185 N.J. at 157 (applying Rendine, 141 N.J. at 292 to OPRA)). However, "[b]ecause enhancements are not preordained . . . enhancements should not be made as a matter of course." NJDPM, 185 N.J. at 157.

"[T]he critical factor in adjusting the lodestar is the degree of success obtained." Id. at 154 (quoting Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 556 (App. Div. 1993) (quoting, Hensley, 461 U.S. at 435)). If "a plaintiff has achieved only partial or limited success. . . the product of hours reasonably expended on the litigation . . . times a reasonable hourly rate may be an excessive amount." NJDPM, 185 N.J. at 153 (quoting Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (internal quotation marks omitted)). Conversely, "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." NJDPM, 185 N.J. at 154 (quoting, Hensley, 461 U.S. at 435). Notwithstanding that position, the NJDPM court cautioned that "unusual circumstances may occasionally justify and upward adjustment of the lodestar," but determined that "[o]rdinarily[] the facts of an OPRA case will not warrant an enhancement of the lodestar amount because the economic risk in securing access to a particular

government record will be minimal. For example, in a ‘garden variety’ OPRA matter . . . enhancement will likely be inappropriate.” Id. at 157.

Moreover, in all cases, an attorney’s fee must be reasonable when interpreted in light of the Rules of Professional Conduct. Rivera, 2012 N.J. Super. Unpub. LEXIS 2752, at *10-11 (citing Furst, 182 N.J. 1, 21-22 (2004) (applying RPC § 1.5(a))).

To verify the reasonableness of a fee, courts must address: 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and 8) whether the fee is fixed or contingent.

Rivera, 2012 LEXIS 2752 at *11 (citing R.P.C. 1.5(a)).

In addition, N.J.A.C. 5:105-2.13 sets forth the information which counsel must provide in his or her application seeking fees in an OPRA matter. Providing the requisite information required by that Code section permits the reviewing tribunal to analyze the reasonableness of the requested fee.

Finally, the appellate court has noted that “[i]n fixing fees against a governmental entity, the judge must appreciate the fact that ‘the cost is ultimately borne by the public’ and that ‘the Legislature . . . intended that the fees awarded serve the public interest as it pertains to those individuals who require redress in the context of a recognition that limited public funds are available for such purposes.’” HIP, 291 N.J. Super. at 167 (quoting Furey v. Cnty. of Ocean, 287 N.J. Super. 42, 46 (1996)).

B. Evaluation of Fee Application

1. Lodestar Analysis

a. Hourly Rate

In the instant matter, Counsel is seeking a fee award of \$1,140.00, representing 3.8 hours at \$300 per hour. In support of this hourly rate, Counsel submits legal precedent of comparable rates for attorneys that were ruled as reasonable. Citing, O’Boyle v. Borough of Longport, ATL-L-002294-09 (approving an hourly rate of \$325); Pat Doe v. Rutgers, MID-L-488-11 (finding \$325 is a reasonable fee in an OPRA matter).

With respect to Counsel’s request for a \$300 hourly rate, he cites to his experience representing clients in OPRA matters at the Supreme and Superior Courts of New Jersey, as well as before the GRC. Luers Certif. at ¶ 9. The Council also takes notice of the thirty plus published

and unpublished decisions of the Supreme Court, Appellate and Law Divisions, and the numerous GRC cases wherein Mr. Luers appeared.

Based on the information in the record, the Council finds the \$300 rate reasonable for a practitioner in this geographical area with Mr. Luers' experience and skill level.

b. Time Expended

In support of his request for fees, Counsel submitted a log of his time. For the period from "May 26, 2012 to June 17, 2012," Counsel billed a total of 3.8 hours for work on the file. This included preparing documents for filing, all communication, reviewing the order, and preparing the fee application.

Further, in accordance with the mandates of N.J.A.C. 105-2.13(b), Counsel's time-sheets provide detailed descriptions of the exact work performed in the required tenths of an hour. N.J.A.C. 105-2.13(b)(5). Most entries are broken into time increments of one or two tenths of an hour with an accompanying description of the work performed. All exchanges identify the entity or individual with whom Mr. Luers communicated.

The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel's fee application conforms with the requirements of N.J.A.C. 1:105-2.13(b) and provides the Council with detailed information from which to conduct its analysis. The Council finds that 3.8 hours at \$300 per hour is reasonable for the work performed by Counsel in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Mr. Luers, Counsel to the Complainant, for the full amount of \$1,140.00, representing 3.8 hours of service at \$300 per hour.**

2. Enhancement Analysis

Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel's fee application conforms with the requirements of N.J.A.C. 1:105-2.13(b) and provides the Council with detailed information from which to conduct its analysis. The Council finds that 3.8 hours at \$300 per hour is reasonable for the work performed by Counsel in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Mr. Luers, Counsel to the Complainant, for the full amount of \$1,140.00, representing 3.8 hours of service at \$300 per hour.**
2. Since Counsel did not request a lodestar adjustment, no enhancement should be awarded.

Prepared by: Dawn R. SanFilippo, Esq.
Deputy Executive Director

Reviewed by: Joseph D. Glover
Executive Director

June 23, 2014



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
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RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

January 28, 2014 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2013-195

v.

City of Union City (Hudson)
Custodian of Record

At the January 28, 2014 public meeting, the Government Records Council (“Council”) considered the January 21, 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 unlawfully denied access to the responsive settlement agreement. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-6; Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010) at 512-13; Darata v. Monmouth Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2009-312 (February 2011). However, the GRC declines to order disclosure of the agreement because the Custodian’s Counsel disclosed same to the Complainant on August 29, 2013.
2. Although the Custodian unlawfully denied access to the responsive agreement, same was disclosed to the Complainant on August 29, 2013. Further, the evidence supports that the Custodian’s Counsel responded on behalf of the Custodian throughout the pendency of this action. Thus, the Custodian was relying on Counsel’s advice and responses. See Elcavage v. West Milford Twp., GRC Complaint No. 2006-55 (July 2008)(citing In re Zisa, 385 N.J. Super. 188 (App. Div. 2006)). 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 an unreasonable denial of access under the totality of the circumstances.
3. The Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a 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 City disclosed the responsive agreement to the Complainant on August 29, 2013, nearly two (2) months after the



filing of this complaint. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is 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. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Interim Order Rendered by the
Government Records Council
On The 28th Day of January, 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: January 29, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 28, 2014 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2013-195

v.

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

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

Custodian of Record: William Senande
Request Received by Custodian: June 17, 2013
Response Made by Custodian: June 25, 2013
GRC Complaint Received: July 3, 2013

Background³

Request and Response:

On June 17, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 25, 2013, the Custodian’s Counsel responded in writing on behalf of the Custodian stating that the requested agreement was previously sought in an OPRA request relevant to Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195.⁴ Custodian’s Counsel advised that the City of Union City (“City”) was amicable to disclosing the agreement once it was received; however, the Complainant is maintaining that he is entitled to attorney’s fees. Counsel noted that the City disputes this position and would only disclose the agreement if the Complainant consented to withdraw Paff, GRC 2012-262.

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

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

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

⁴ The Council adjudicated this complaint at its August 27, 2013 meeting.

Denial of Access Complaint:

On July 3, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant acknowledges that he previously sought the same settlement agreement through an OPRA request at issue in Paff, GRC 2012-262. The Complainant notes that there, the Custodian’s Counsel knowingly and willfully did not advise the Complainant that the agreement was finalized on November 26, 2012, after the July 31, 2012 OPRA request at issue in Paff, GRC 2012-262.

The Complainant contends that Counsel’s denial of access here violates OPRA because Paff, GRC 2012-262, has no bearing on whether his June 17, 2013 OPRA request should have been fulfilled.⁵ The Complainant requests that the Council: 1) order disclosure of the agreement; 2) determine whether the Custodian and Counsel knowingly and willfully violated OPRA under the totality of the circumstances; and 3) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees.

Statement of Information:

On August 2, 2013, the GRC sent a request for a Statement of Information (“SOI”) to the Custodian and received no response within the five (5) business day time frame.

Additional Submissions:

On August 22, 2013, the Custodian’s Counsel advised the GRC that the City was in receipt of this complaint challenging a denial of the Complainant’s June 17, 2013 OPRA request which sought the same record at issue in Paff, and that the City had already presented its position to the GRC in Paff. Counsel stated that she does not believe the City needs to also respond to this complaint and that the Custodian would not be filing an SOI.

On August 22, 2013, the Complainant’s Counsel disputed that this complaint is similar to Paff, because the OPRA requests triggering each complaint were submitted on different dates. Counsel further noted that this complaint was filed because the City refused to provide the agreement unless the Complainant withdrew Paff. Counsel requested that the Custodian be found to have knowingly and willfully violated OPRA, be subjected to the civil penalty and be required to pay attorney’s fees if he refuses to file an SOI.

On August 23, 2013, the Custodian’s Counsel reiterated the City’s position. In turn, Complainant’s Counsel reiterated that the City’s refusal to provide an SOI should result in a finding that the Custodian knowingly and willfully violated OPRA. The GRC responded to all parties advising that per its regulations, a custodian’s failure to submit an SOI “... may result in the Council’s issuing a decision in favor of the complainant.” N.J.A.C. 5:105-2.4(g).

⁵ The Complainant further contended that Counsel’s response was unethical and violates a directive of the Supreme Court holding that defendants may not demand a fee waiver as a condition of settlement in fee-shifting cases involving equitable relief. Pinto v. Spectrum Chemicals & Laboratory Prods., 200 N.J. 580, 599 (2010)(reversing in part Coleman v. Fiore Bros., Inc., 109 N.J. 503 (1987)). However, the GRC has no authority to adjudicate ethics issues. N.J.S.A. 47:1A-7(b).

On August 29, 2013, the Custodian's Counsel disclosed the responsive agreement to the Complainant and reiterated the City's position that the Complainant was not entitled to attorney's fees. Thereafter, on the same day, the Custodian filed an SOI certifying that the City did not initially disclose the agreement because the Complainant insisted that he was entitled to an award of attorney's fees.

Analysis

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 mandates that "government records *shall be readily accessible for inspection, copying, or examination* by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] . . . shall be *construed in favor of the public's right of access.*" N.J.S.A. 47:1A-1 (emphasis added). Additionally, precedential case law provides that settlement agreements are public records subject to disclosure. *See Burnett v. Cnty. of Gloucester*, 415 N.J. Super. 506 (App. Div. 2010) at 512-13; *Paff v. Barrington Sch. Dist. (Camden)*, GRC Complaint No. 2009-55 (Interim Order dated February 23, 2010). Finally, pending litigation is not a lawful basis for denying access to the responsive record. *Darata v. Monmouth Cnty. Bd. of Chosen Freeholders*, GRC Complaint No. 2009-312 (February 2011).

Moreover, pursuant to N.J.A.C. 1:1-15.2(a) and (b), official notice may be taken of judicially noticeable facts (as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence), as well as of generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. *See Sanders v. Div. of Motor Vehicles*, 131 N.J. Super. 95 (App. Div. 1974). The Council's decision here must take into account the facts presented in *Paff*, GRC 2012-262, because of their direct relevance to this complaint.

There, the Custodian certified in his SOI that the settlement agreement at issue in both *Paff*, and the instant matter was not finalized and executed until November 26, 2012 (nearly four (4) months after submission of the OPRA request and over two (2) months after the filing of that complaint). The Council held that although the Custodian's response was insufficient, the Custodian was not obligated to provide the record because it ". . . was not in existence at the time of the Complainant's OPRA request." *Id.* at 2.

In the instant matter, it is clear that the responsive record existed at the time of the Complainant's June 17, 2013 OPRA request. *See Paff*, GRC 2012-262 at 2. It is also clear that settlement agreements are subject to disclosure under OPRA. *Burnett*, 415 N.J. Super. at 512-13. Thus, it follows that disclosure of the agreement was warranted at the time of the request regardless of its relevance to *Paff*.

Therefore, the Custodian unlawfully denied access to the responsive settlement agreement. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-6; Burnett, 415 N.J. Super. at 512-13; Darata, GRC 2009-312. However, the GRC declines to order disclosure of the agreement because the Custodian's Counsel disclosed same to the Complainant on August 29, 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 (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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 unlawfully denied access to the responsive agreement, same was disclosed to the Complainant on August 29, 2013. Further, the evidence supports that the Custodian's Counsel responded on behalf of the Custodian throughout the pendency of this action. Thus, the Custodian was relying on Counsel's advice and responses. *See* Elcavage v. West Milford Twp., GRC Complaint No. 2006-55 (July 2008)(*citing* In re Zisa, 385 N.J. Super. 188 (App. Div. 2006)). 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 an 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 City did not disclose the settlement agreement to the Complainant arguing that disclosure would result in a finding in favor of prevailing party attorney’s fees in Paff, GRC 2012-262. However, the Council has previously addressed a situation where a complainant was not awarded attorney’s fees because the record was disclosed in response to an unrelated OPRA request. *See* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-86 (October 2011) at 8. Thus, disclosure of the agreement prior to the filing of this complaint would not have resulted in an award of attorney’s fees in Paff.

However, because the City provided the Complainant the agreement responsive to his June 17, 2013 OPRA request as a result of the filing of this complaint, the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees.

Therefore, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. 432. Additionally, a 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 City disclosed the responsive agreement to the Complainant on August 29, 2013, nearly two (2) months after the filing of this complaint. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is 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. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney’s fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney’s fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian unlawfully denied access to the responsive settlement agreement. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-6; Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010) at 512-13; Darata v. Monmouth Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2009-312 (February 2011). However, the GRC declines to order disclosure of the agreement because the Custodian's Counsel disclosed same to the Complainant on August 29, 2013.
2. Although the Custodian unlawfully denied access to the responsive agreement, same was disclosed to the Complainant on August 29, 2013. Further, the evidence supports that the Custodian's Counsel responded on behalf of the Custodian throughout the pendency of this action. Thus, the Custodian was relying on Counsel's advice and responses. *See* Elcavage v. West Milford Twp., GRC Complaint No. 2006-55 (July 2008)(*citing* In re Zisa, 385 N.J. Super. 188 (App. Div. 2006)). 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 an unreasonable denial of access under the totality of the circumstances.
3. The Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a 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 City disclosed the responsive agreement to the Complainant on August 29, 2013, nearly two (2) months after the filing of this complaint. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is 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. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d).**

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