



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

September 30, 2014 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2013-312

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the September 30, 2014 public meeting, the Government Records Council (“Council”) considered the September 23, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s response was proper because he responded in writing to each request item contained in the request individually either providing records or stating that no records responsive existed. Therefore, the Custodian has not violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. The Custodian did not unlawfully deny access to the requested resolution because the Custodian certified in the Statement of Information that such records do not exist and the inclusion of an entry in the August 13, 2013 minutes did not rise to the level of competent, credible evidence to refute the Custodian’s certification. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian did not unlawfully deny access to the August 13, 2013 executive session resolution. 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 30th Day of September, 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 3, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 30, 2014 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2013-312

v.

**Borough of South Bound Brook (Somerset)²
Custodian of Records**

Records Relevant to Complaint: Electronic copies via e-mail of the executive session resolution for the Borough of South Bound Brook's ("Borough") August 13, 2013 Council meeting³

Custodian of Record: Donald Kazar

Request Received by Custodian: August 13, 2013

Response Made by Custodian: August 21, 2013

GRC Complaint Received: October 22, 2013

Background⁴

Request and Response:

On August 13, 2013, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On August 21, 2013, the sixth (6th) business day after receipt of the OPRA request, the Custodian responded in writing stating that no ordinances existed.⁵

Denial of Access Complaint:

On October 22, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant first noted that at the time of the Custodian's response, he made no mention of whether any responsive resolutions existed.⁶

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

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

³ The Complainant requested additional records that are not at issue in this complaint.

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.

⁵ The GRC notes that the Custodian provided the Complainant with at least one (1) resolution.

⁶ The Complainant also argued that his request was "deemed" denied because the Custodian failed to respond in a timely manner; however, the evidence of record indicates that the Custodian timely responded and even provided at least one (1) resolution.

The Complainant stated that on September 23, 2013, in response to an unrelated OPRA request, he received a copy of the Borough's August 13, 2013 public session minutes that stated that the "[Custodian] read executive session Resolution" The Complainant contended that the minutes prove that a resolution existed and the Custodian read same at the meeting on the same day he received the subject OPRA request. The Complainant argued that it is impossible for the Custodian to claim ignorance as to the existence of the resolution; rather, his denial proves that he knowingly and willfully refused to disclose it. The Complainant asserted that was it not for the unrelated OPRA request, he would have continued to be unaware of the existence of a responsive record to which the Custodian unlawfully denied access.⁷ The Complainant noted that this is not the first time the Custodian refused to disclose records that the Complainant discovered because of an unrelated OPRA request. Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2012-143 (Interim Order dated May 28, 2013). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-323 (Interim Order dated February 26, 2013); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-119 (Interim Order dated July 24, 2012); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2012-15 (August 2013); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2013-135 (March 2014).

The Complainant argued that given the Custodian's 24 years of service, attendance at various OPRA trainings, numerous guidance from the GRC and dozens of Denial of Access Complaints, it is assumed that the Custodian is well-versed in OPRA and that this denial of access is knowing and willful. N.J.S.A. 47:1A-11. The Complainant contended that the Custodian's actions here prove, by the preponderance of all credible evidence, that he knowingly and willfully violated OPRA. The Complainant asserted that the Custodian knew he was obligated to provide the responsive resolution and consciously chose to deny access even though he received the request less than two (2) hours before he read the responsive resolution into the meeting record.

The Complainant thus requested the GRC 1) order immediate disclosure of all responsive records; 2) determine that the Custodian knowingly and willfully violated OPRA warranting an assessment of the civil penalty; 3) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees; and 4) order any further relief deemed appropriate.

Statement of Information:

On November 22, 2013, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on August 13, 2013. The Custodian certified that he reviewed the folder of records presented at the August 13, 2013 open session and determined a resolution did not exist. The Custodian thus certified that he responded in writing on August 21, 2013 providing two (2) pages of resolutions.

The Custodian certified that on the night of the meeting, the Council approved a verbal resolution and that he failed to memorialize in the minutes that the resolution was verbal. The Custodian certified that he mistakenly failed to create a resolution and that this mistake was not

⁷ The Complainant theorized that the Custodian refused to disclose the resolution because it involved a personnel matter about two (2) employees that the Custodian supervised.

realized until the Complainant filed this complaint. The Custodian contended that his failure to disclose the resolution was not an unlawful denial of access because same did not exist. Further, the Custodian asserted that his failure to draft a resolution does not change the fact that no resolution exists.

The Custodian reiterated that his failure to address the nonexistence of the resolution was purely a mistake and that he had no reason to purposely withhold it. The Custodian noted that he previously provided the Complainant with many other executive session resolutions containing the same exact language. The Custodian disputed the Complainant's allegation that he knowingly and willfully refused to provide a record that did not exist. Further, the Custodian argued that had the Complainant brought this issue to his attention in September 2013,⁸ then the issue would have been discovered and corrected at that time.

Additional Submissions:

On December 21, 2013, the Complainant's Counsel argued, via letter, that the Custodian's SOI corroborated the Custodian's attempt to deliberately deny access to the resolution notwithstanding clear evidence in the public session minutes that the resolution existed and should have been provided. Counsel noted that as the Borough's Municipal Clerk, the Custodian is required be present at meetings and retain original copies of ". . . all ordinances and resolutions and records . . ." of a meeting. N.J.S.A. 40A:9-133. Counsel states that the Custodian was present at the August 13, 2013 meeting, was responsible for keeping the minutes, and represented same to be accurate and truthful at the time of the approval vote at the Borough's September 10, 2013 meeting. Counsel contended, however, that even though the Council voted on the minutes including the statement confirming the existence of a written resolution, the Custodian certified in the SOI that no resolution existed.

Counsel contended that although the August 13, 2013 approved minutes prove a resolution existed, the Custodian tried to mislead the GRC in his SOI by certifying that no such record existed. Counsel contended that as an alternative, the Custodian included a false entry in the minutes according to the definition provided for in N.J.S.A. 2C:28-7. Counsel argued that both scenarios cannot simultaneously be true. Counsel asserted that this is not the first time the Custodian has provided contradictory evidence to the GRC. *See Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2008-48 (May 2010).⁹ Counsel contended that this complaint is clearly ripe for a hearing at the Office of Administrative Law to resolve the facts. *See J.C. v. Bernards Twp. Sch. Dist. Bd. Of Educ. (Somerset)*, GRC Complaint No. 2008-18 (Interim Order dated June 25, 2008).

⁸ At that time, the Complainant questioned the existence of August executive session minutes in response to the unrelated OPRA request

⁹ Counsel asserted that in *Verry*, GRC 2008-48, an issue arose regarding the content of responsive records, wherein the Custodian was able to convince the GRC that he was appointed as Municipal Administrator on January 1, 2004. However, notwithstanding the fact that the GRC does not have the authority to address the content of a record under N.J.S.A. 47:1A-7(b), the GRC sent this complaint to the Office of Administrative Law based on contested facts.

Analysis

Insufficient Response

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 specifically states that a custodian “. . . shall indicate the specific basis [for denial of access] . . .” N.J.S.A. 47:1A-5(g). Further, in Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that “. . . [t]he Custodian’s response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g)”

Here, the Complainant contended in his Denial of Access Complaint that the Custodian made no mention of whether resolutions existed at the time of the initial response. Thus, the GRC will briefly address the sufficiency of the Custodian’s response.

The Complainant’s OPRA request sought resolutions. In response to the Complainant’s OPRA request, on August 21, 2013, the Custodian provided the Complainant with two (2) pages of resolutions via e-mail. Thus, the Custodian’s initial response on August 21, 2013 clearly addressed resolutions.

Therefore, the Custodian’s response was proper because he responded in writing to each request item contained in the request individually either providing records or stating that no records responsive existed. Therefore, the Custodian has not violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff, GRC 2007-272.

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 Council has previously found that, in light of a custodian’s certification that no records responsive to the request exist, no unlawful denial of access occurred. Specifically, in Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant’s request for billing records existed and the complainant submitted no evidence to refute the custodian’s certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence is present in the record to refute the custodian’s certification, there was no unlawful denial of access to same.

In the matter before the Council, the Complainant argued that the inclusion of language in the August 13, 2013 meeting minutes proved that an executive session resolution responsive to his OPRA request existed. Conversely, the Custodian certified in the SOI that he searched the applicable meeting folder to respond to the request, that no resolution existed and that he

mistakenly failed to memorialize that the executive session resolution was verbal when composing the minutes. The Complainant refuted the Custodian's certification, noting that either a resolution exists and must be provided or that the Custodian included a false entry in the minutes.

Notwithstanding the possibility of any violations outside of the Council's authority, the GRC is satisfied that no record exists. Specifically, the inclusion of an entry memorializing the resolution in the August 13, 2013 minutes did not rise to the level of competent, credible evidence refuting this. Further, in the SOI, the Custodian admitted his mistake of not memorializing the verbal resolution in the minutes.

Accordingly, the Custodian did not unlawfully deny access to the requested resolution because the Custodian certified in the SOI that such records do not exist and the inclusion of an entry in the August 13, 2013 minutes did not rise to the level of competent, credible evidence to refute the Custodian's certification. See Pusterhofer, GRC 2005-49.

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, the Complainant contended that the Custodian failed to provide him with an executive session resolution for the Borough's August 13, 2013 Council meeting that he alleged existed based on the approved minutes for that meeting. Hence, he requested that the GRC order the Custodian to immediately disclose said record. The Custodian, however, has not unlawfully denied access to the responsive resolution because its certification proved that no such resolution exists and its memorialization in the minutes does not rise to the level of competent, credible evidence refuting same.

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 August 13, 2013 executive session resolution. 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. The Custodian's response was proper because he responded in writing to each request item contained in the request individually either providing records or stating that no records responsive existed. Therefore, the Custodian has not violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. The Custodian did not unlawfully deny access to the requested resolution because the Custodian certified in the Statement of Information that such records do not exist and the inclusion of an entry in the August 13, 2013 minutes did not rise to the level of competent, credible evidence to refute the Custodian's certification. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian did not unlawfully deny access to the August 13, 2013 executive session resolution. 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
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Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

September 23, 2014