

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**

**Rotimi Owoh, Esq. (On Behalf of O.R.)¹
Complainant**

**GRC Complaint Nos. 2014-15,
2014-61 and 2014-105²**

v.

**West Windsor-Plainsboro School District (Mercer)³
Custodial Agency**

Records Relevant to Complaint:

December 27, 2013 OPRA request:⁴ Electronic copies via e-mail of records showing name, position, title, date of employment, date of termination and address (for subpoena) of the West Windsor Plainsboro School District (“District”) official that printed the attached discipline reports on March 11, 2007.

January 14, 2014 OPRA request:⁵ Electronic copies of records showing name, position, title, date of hire, date of termination, name of employer and correct address for Dr. Downs, the Custodian, Ms. Donna Gibbs-Nini, current Principal and Assistant Principle at West Windsor-Plainsboro Community Middle School, “Crusen,” Assistant Principle Leroux, “Broome and Marsch,” Dr. Weber and Dr. Thomas A. Smith.

January 16, 2014 OPRA request:⁶ Electronic copies of records showing name, position, title, date of hire, date of termination, name of employer and correct address for District Board President Maranthe, former Board Secretary Larry Shanok, current Board Secretary Katty Mitchel, Mr. Michael Zapichi (sic), Mr. Charles Rudnick, Mr. Dennis Lepold, school counselors from 2002 to 2008, current principal and assistant principal at West Windsor-Plainsboro Community Middle School, Dr. Downs and Dr. Thomas A. Smith.

Custodian of Record: Geraldine Hutner

Request Received by Custodian: January 2, 2014, January 17, 2014 and January 24, 2014

Response Made by Custodian: January 2, 2014, January 21, 2014 and January 27, 2014

GRC Complaint Received: January 13, 2014, January 29, 2014 and March 10, 2014

¹ No legal representation listed on record.

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and/or issues.

³ Represented by Eric Harrison, Esq., of Methfessel & Werbel (Edison, NJ).

⁴ This OPRA request is the subject of GRC Complaint No. 2014-15.

⁵ This OPRA request is the subject of GRC Complaint No. 2014-61.

⁶ This OPRA request is the subject of GRC Complaint No. 2014-105.

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Background⁷

Request and Response:

December 27, 2013 OPRA request

On December 27, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 2, 2014, the Custodian advised the Complainant, in writing, that she was unable to determine which exact employee printed the original reports. The Custodian stated that Custodian’s Counsel, who helped with litigation on related matters, advised that the attached forms were likely printed by either Rick Cave or Robby Varghese. The Custodian provided, in list form, the position, date of employment and home address for each individual.

On January 2, 2014, the Complainant stated that he needed an actual record identifying the individual that printed the forms. The Complainant asked the Custodian to inquire with Mr. Cave, who was still an employee, to see if he was the person that printed the reports on March 11, 2007. On January 7, 2014, the Custodian stated that she conferred with Mr. Cave, who did not remember whether he printed the discipline reports. Further, the Custodian stated that the District has no means of determining whether Mr. Cave or Mr. Varghese printed the reports. On the same day, the Complainant contended that the Custodian failed to provide him with actual records containing the personnel information. On January 8, and 9, 2014, the Complainant reiterated that the Custodian failed to provide him with records containing the personnel information. On January 10, 2014, the Custodian stated that she provided the Complainant with all information requested per N.J.S.A. 47:1A-10, and that no actual records would be provided.

January 14, 2014 OPRA request

On January 14, 2014, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On January 21, 2014, the Custodian responded in writing providing, in list form, the position, date of employment and home address for each individual.

January 16, 2014 OPRA request

On January 16, 2014, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On January 27, 2014, the Custodian responded in writing providing, in list form, the position, date of employment and home address for each individual.

Denial of Access Complaints:

December 27, 2013 OPRA request

On January 13, 2014, the Complainant filed a Denial of Access Complaint with the

⁷ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.
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Government Records Council (“GRC”). The Complainant argued that the Custodian violated OPRA by failing to provide him with redacted records containing the requested personnel information. The Complainant contended that the Custodian was obligated to provide responsive records reflecting the personnel information; to wit, the records from which she obtained the personnel information listed in her January 2, 2014 response.

January 14, 2014 OPRA request

On January 29, 2014, the Complainant filed a Denial of Access Complaint with the GRC reiterating his argument from above.

January 16, 2014 OPRA request

On March 10, 2014, the Complainant filed a Denial of Access Complaint with the GRC reiterating his argument from above.

Statements of Information:

On February 24, 2014, the Custodian filed a Statements of Information (“SOI”) for each complaint.

December 27, 2013 OPRA requests

The Custodian certified that she received the Complainant’s OPRA request on January 2, 2014 and responded on the same day providing the responsive information. The Custodian argued that she provided all personnel information required to be disclosed under N.J.S.A. 47:1A-10. The Custodian contended that OPRA does not require a custodian to provide redacted records containing specific pieces of personnel information.

January 14, 2014 OPRA request

The Custodian certified that she received the Complainant’s OPRA request on January 17, 2014 and responded on January 21, 2014 with the responsive information. The Custodian reiterated her position from above.

January 16, 2014 OPRA request

The Custodian certified that she received the Complainant’s OPRA request on January 24, 2014 and responded on January 27, 2014 with the responsive information. The Custodian reiterated her position from above.

Additional Submissions:

On March 5, 2014, the Complainant contended, by letter, that the Custodian failed to bear her burden of proving a lawful denial of access because she failed to provide redacted records with the responsive information contained therein. The Complainant asserted that the personnel

exceptions in OPRA allows for disclosure of certain information while protecting the individual's reasonable expectation of privacy. McGee v. Twp. of East Amwell, 416 N.J. Super. 602 (App. Div. 2010). To this end, the Complainant argued that if the Custodian were protecting the individuals' expectation of privacy, she would not have listed the responsive information in a letter. The Complainant also asserted that records containing home addresses are required for disclosure because such information is ". . . essential to the performance of official duties of a person duly authorized by this State or the United States." N.J.S.A. 47:1A-10. The Complainant noted that the GRC's "Handbook for Records Custodians" (5th Edition – January 2011) identified what personnel information should be disclosed under OPRA and provided guidance on making redactions. Id. at 10, 17-18.

Further, the Complainant stated that the address for Mr. Varghese which the Custodian provided in response to his December 27, 2013 OPRA request was incorrect because he received certified mail back marked "unclaimed." The Complainant noted that previously, the Custodian's Counsel provided him with a wrong address for the District's former attorney. For this reason, the Complainant specifically requested actual personnel records, with redactions, containing the requested addresses. The Complainant further asserted that in 2012, the Custodian provided him with actual personnel records in response to an OPRA request. The Complainant contended that since OPRA has not been amended since then, the Custodian violated the statute by denying access to actual records here.

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 provides that:

" . . . the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received shall be a government record . . ."

N.J.S.A. 47:1A-10 (emphasis added).

Because OPRA has clearly identified certain types of personnel information that fall under the definition of a government record, requests identifying this type of information are valid OPRA requests. Danis v. Garfield Bd. Of Educ. (Bergen), GRC Complaint No. 2009-156 *et*

seq. (Interim Order dated June 29, 2010); Marinaccio v. Borough of Fanwood (Union), GRC Complaint No. 2012-23 (May 2013).

In Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-156 (February 2008), the Council determined that if information must be disclosed under OPRA, but there is no record which contains such information exclusively, then the custodian could look to a more comprehensive record and tailor it by redaction to fulfill the complainant's request. The Council found that when “. . . *specific . . . information must be disclosed, the Custodian is under no duty to extract and synthesize such information from government records* in order to comply with the provisions of OPRA.” Id. (emphasis added). Rather, the Council directed the custodian to retrieve the most comprehensive record containing the information that was subject to disclosure, and to redact such record so that only the information required to be disclosed was revealed.

The Council subsequently followed its holding in Morgano, GRC 2007-156, in Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012)(holding that a custodian should retrieve the most comprehensive record containing responsive personnel information and provide same). *See also* Barkley v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2012-34 (Interim Order dated April 30, 2013).

Conversely, Wagner v. Twp. of Montclair Police Dep't (Essex), GRC Complaint No. 2013-222 (Interim Order dated March 25, 2014), the custodian responded providing certain personnel information subject to disclosure in list form devoid of any actual records while also denying access to “data” disclosing “. . . conformity with specific experiential, educational or medical qualifications . . .” The Council determined that the custodian's denial of access was unlawful; however, it noted that certain information was already provided and did not order the custodian to provide an actual record disclosing said information. *See also* Guerrero v. Cnty. of Hudson, GRC Complaint No. 2010-216 (December 2011)(holding that the custodian's response providing a personnel information in response to an OPRA request to same resulted only in a timeliness violation).

The Council's decision in Wagner, GRC 2013-222, is distinguishable from Morgano, GRC 2007-156, and Valdes, GRC 2011-64, because the Wagner custodian provided information in list form in her initial response. For this reason, the Council did not order the custodian to disclose records again. In Morgano and Valdes, however, the custodians denied access to the requests as, among other reasons, requests for information or seeking personnel records exempt from disclosure. Thus, keeping in mind that a custodian is not required to “. . . extract and synthesize such information . . .,” the Council ordered disclosure of the most comprehensive record containing the information sought.

Here, the facts are on point with Wagner, GRC 2013-222. Specifically, the Custodian responded providing the Complainant with all relevant information to include home addresses,⁸ at which point the Complainant filed these complaints. The evidence supports that the Custodian

⁸ The GRC notes that although disclosure of home addresses is not at issue here, there is some question as to the Custodian's obligation to disclose same based on the privacy exemption at N.J.S.A. 47:1A-1. The GRC has routinely conducted a balancing test to determine disclosability of same, even in relation to a personnel record. *See* Wolosky v. Twp. of Harding (Morris), GRC Complaint No. 2010-221 (June 2012).

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disclosed the responsive information, irrespective of whether the information was listed in the response letter or part of redacted records.

Thus, because the Custodian disclosed the responsive information in a timely manner, she did not unlawfully deny access. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10; Wagner, GRC 2013-222. Further, the Council should not order disclosure of records including the information sought because Complainant has received same.

Finally, the Complainant noted that the address provided in response to one of his OPRA requests was wrong because mail to that address was returned. However, the Council should not address this issue because it has no authority over the content of the record or information provided. N.J.S.A. 47:1A-7(b); Kwanzaa v. Dep't of Corrections, GRC Complaint No. 2004-167 (March 2005). *See also* Valdes v. Twp. of Belleville (Essex), GRC Complaint No. 2010-258 (March 2012).

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 these matters, the Complainant, who filed these complaints on behalf of his client, disputed that the Custodian appropriately responded to his OPRA requests by providing responsive personnel information in the form of a list. Hence, he requested that the GRC order the Custodian to disclose records containing the personnel information responsive to his requests. However, the Custodian did not unlawfully denied access to the responsive information and no disclosure of actual records has been ordered.

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 timely disclosed all responsive personnel information to the Complainant and thus, no unlawful denial of access occurred. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian disclosed the responsive information in a timely manner, she did not unlawful denial of access. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10; Wagner v. Twp. of Montclair Police Dep't (Essex), GRC Complaint No. 2013-222 (Interim Order dated March 25, 2014). Further, the Council should not order disclosure of records including the information sought because Complainant has received same.
2. 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 timely disclosed all responsive personnel information to the Complainant and thus, no unlawful denial of access occurred. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

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September 23, 2014