



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**FINAL DECISION**

**June 30, 2015 Government Records Council Meeting**

David J. Marck, Esq.  
(On behalf of SAS Stressteel, Inc.)  
Complainant

Complaint No. 2014-285

v.  
NJ Division of Consumer Affairs  
Custodian of Record

At the June 30, 2015 public meeting, the Government Records Council (“Council”) considered the June 23, 2015 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. Because the requested records are not government records subject to access under OPRA pursuant to N.J.A.C. 13:1E-3.2(a)(1), and because exemptions from disclosure provided by regulations promulgated under the authority of a statute apply to OPRA pursuant to N.J.S.A. 47:1A-9(a), the Custodian did not unlawfully deny the Complainant access to the requested licensing application and renewal records. Therefore, the Custodian has met his statutory burden of proving that the denial of access to the requested records was lawful. N.J.S.A. 47:1A-6. See also Heimlich v. NJ Dep’t of Law & Public Safety, Div. of Consumer Affairs, GRC Complaint No. 2011-274 (December 2012).
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 requested licensing records are not government records subject to disclosure. 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. 423, and Mason, 196 N.J. 51.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.



Final Decision Rendered by the  
Government Records Council  
On The 30<sup>th</sup> 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**

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

**David J. Marck, Esq.**  
**(On behalf of SAS Stressteel, Inc.)<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2014-285**

v.

**New Jersey Division of Consumer Affairs<sup>2</sup>**  
**Custodial Agency**

**Records Relevant to Complaint:** Electronic copies of initial application submitted to the Board of Professional Engineers along with biennial license renewal form for Felix E. Ferrer license number 24GE04616800.<sup>3</sup>

**Custodian of Record:** Robert J. Campanelli  
**Request Received by Custodian:** July 16, 2014  
**Response Made by Custodian:** July 25, 2014  
**GRC Complaint Received:** August 8, 2014

**Background<sup>4</sup>**

**Request and Response:**

On July 16, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 25, 2014, the seventh (7<sup>th</sup>) business day following receipt of said request, the Custodian responded in writing, informing the Complainant that access to the requested records is denied because applications and renewal applications are protected pursuant to OPRA and N.J.A.C. 13:1E-3.2(a)(2), which provides confidentiality to “records concerning background investigations or evaluations for public employment and appointment to public office or licensing, whether open, closed, or inactive.”

---

<sup>1</sup> SAS Stressteel, Inc. is represented by Complainant, David J. Marck, Esq., of Sills Cummis & Gross (Newark, NJ).

<sup>2</sup> Represented by Deputy Attorney General Steven Flanzman.

<sup>3</sup> There was a more comprehensive request submitted, which sought records that are not relevant to this complaint.

<sup>4</sup> 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.

David J. Marck, Esq. (On behalf of SAS Stressteel, Inc.) v. New Jersey Division of Consumer Affairs, 2014-285 – Findings and Recommendations of the Executive Director

### Denial of Access Complaint:

On August 8, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant states that he filed his OPRA request on July 16, 2014, and that the Custodian responded to the request on July 25, 2014.

The Complainant asserts that the Custodian denied his request based on N.J.A.C. 13:1E-3.2(a)(1), which exempts “records concerning background investigations or evaluations for public employment, appointment to public office or licensing...” (sic). The Complainant argues that because the requested document does not concern any investigation or evaluation of the applicant, the denial does not comport with the law; therefore, the license application should be provided. The Complainant contends that the “...regulation necessarily implies the existence of a governmental investigation or evaluation – such as a criminal background check or administrative investigation – in order to deny a record.”

The Complainant further states that with respect to personnel records, N.J.S.A. 47:1A-10 makes public data contained in information which discloses conformity with specific experiential, educational, or medical qualifications required for public employment. The Complainant argues that to afford more protection to a professional licensee than to the personnel file of a public employee makes no sense under OPRA.

### Statement of Information:

On September 5, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on July 16, 2014 and that he responded in writing on July 25, 2014.

The Custodian certifies that a search of the records maintained by the Board of Professional Engineers revealed that the only records responsive to the request were an initial application and supporting documentation for a license issued to Felix E. Ferrer on March 17, 2006, and biennial applications for renewal of said license filed by Mr. Ferrer in 2008, 2010, 2012, and 2014.

The Custodian certifies that N.J.S.A. 47:1A-1 provides that government records shall be subject to public access unless exempt from access by, among other items, “regulation promulgated under the authority of any statute or Executive Order of the Governor.” (Emphasis in SOI). The Custodian certifies that N.J.A.C. 13:1E-3.2(a)(1) is such a regulation and that it provides that “records concerning background investigations or evaluations for public employment, appointment to public office, or licensing, whether open, closed, or inactive” shall not be considered government records under OPRA. (Emphasis in SOI). The Custodian contends that the policy underlying the regulation is evident, as it necessarily protects the privacy interests of applicants. The Custodian concludes that the requested records are denied in their entirety pursuant to N.J.S.A. 47:1A-1 and N.J.A.C. 13:1E-3.2(a)(1).

## 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 further provides that its provisions “...shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to...regulation promulgated under the authority of any statute...” N.J.S.A. 47:1A-9(a).

Here, the Custodian asserted that Mr. Ferrer’s application for licensure and biennial license renewal is not subject to disclosure under OPRA pursuant to N.J.A.C. 13:1E-3.2(a)(1), because this regulation exempts from disclosure licensing applications. However, the Complainant asserted that the cited regulation exempts records concerning background investigations or evaluations for public employment, appointment to public office, or licensing. The Complainant argued that since the requested records do not concern an investigation or evaluation of the applicant, the denial was unlawful and the records should be provided.

The Complainant’s argument that the denial is unlawful because the requested records do not concern any investigation or evaluation of the applicant is not persuasive. N.J.A.C. 13:1E-3.2(a) provides in relevant part “...the following records shall not be considered government records subject to public access pursuant to [OPRA], as amended and supplemented: 1. Records concerning background investigations or evaluations for public employment, appointment to public office, or licensing, whether open, closed, or inactive...”

The regulation in section (a), subsection (1), therefore exempts three (3) categories of records, each set off by a comma. The categories in that subsection are records concerning:

1. background investigations or evaluations for public employment
2. appointment to public office
3. licensing

The Complainant requested records that fall into the third category; to wit, licensing. Contrary to the Complainant’s assertion, the regulation does not “necessaril[y] the existence of a governmental investigation or evaluation...in order to deny a record.” Rather, the regulation exempts records concerning licensing from the definition of a government record under OPRA.

In a case with a similar fact pattern, Heimlich v. NJ Dep’t of Law & Public Safety, Div. of Consumer Affairs, GRC Complaint No. 2011-274 (December 2012), the custodian determined the complainant was seeking, *inter alia*, an initial application submitted to the Board of Medical

Examiners along with biennial license renewal for a medical doctor. The Council found that the custodian lawfully denied access to said records pursuant to N.J.A.C. 13:1E-3.2(a)(2), as applicable to OPRA under § 9(a).

Accordingly, because the requested records are not government records that are subject to access under OPRA pursuant to N.J.A.C. 13:1E-3.2(a)(1), and because exemptions from disclosure provided by regulations promulgated under the authority of a statute apply to OPRA pursuant to N.J.S.A. 47:1A-9(a), the Custodian did not unlawfully deny the Complainant access to the requested licensing application and renewal records. Therefore, the Custodian has met his statutory burden of proving that the denial of access to the requested records was lawful. N.J.S.A. 47:1A-6. *See also* Heimlich, GRC 2011-274.

The GRC need not address the Complainant's argument which drew the analogy between records concerning licensing and records (subject to disclosure under N.J.S.A. 47:1A-10) that reveal specific qualifications required for public employment, because personnel records of a public employee are not at issue in this complaint.

### **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 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties," Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, 387 N.J. Super. at 429; *see, e.g.*, Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). "But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes." 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues ... may be awarded a reasonable attorney's fee not to exceed \$500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

Mason at 73-76 (2008).

The Court in Mason, further held that:

[R]equestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) 'a factual causal nexus between plaintiff's litigation and the relief ultimately achieved'; and (2) 'that the relief ultimately secured by plaintiffs had a basis in law.' Singer v. State, 95 N.J. 487, 495, *cert denied* (1984).

Id. at 76.

Here, the Complainant requested access to licensing application and renewal records. Said records, however, are not government records subject to access under OPRA pursuant to N.J.A.C. 13:1E-3.2(a)(1), applicable to OPRA by operation of N.J.S.A. 47:1A-9(a). Therefore, the Custodian did not unlawfully deny the Complainant access to the requested records.

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 requested licensing records are not government records subject to disclosure. 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 requested records are not government records subject to access under OPRA pursuant to N.J.A.C. 13:1E-3.2(a)(1), and because exemptions from disclosure provided by regulations promulgated under the authority of a statute apply to OPRA pursuant to N.J.S.A. 47:1A-9(a), the Custodian did not unlawfully deny the Complainant access to the requested licensing application and renewal records. Therefore, the Custodian has met his statutory burden of proving that the denial of access to the requested records was lawful. N.J.S.A. 47:1A-6. *See also* Heimlich v. NJ Dep't of Law & Public Safety, Div. of Consumer Affairs, GRC Complaint No. 2011-274 (December 2012).
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 requested licensing records are not government records subject to disclosure. 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. 423, and Mason, 196 N.J. 51.

Prepared By: John E. Stewart

Reviewed By: Joseph D. Glover  
Executive Director

June 23, 2015