



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHARLES A. RICHMAN
Commissioner

FINAL DECISION

July 28, 2015 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2014-289

v.

Franklin Township Fire District No. 1 (Somerset)
Custodian of Record

At the July 28, 2015 public meeting, the Government Records Council (“Council”) considered the July 21, 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. The Complainant’s request (with the exception of item No. 4) is invalid because it failed to provide ample identifiers necessary for the Custodian to locate additional responsive records. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011); Ciszewski v. Newton Police Dep’t (Sussex), GRC Complaint No. 2013-90 (October 2013). *See also* Gartner v. Borough of Middlesex (Middlesex), GRC Complaint No. 2014-203 (Interim Order dated February 24, 2015). The Custodian has thus lawfully denied access to any records beyond those he has already provided. N.J.S.A. 47:1A-6.
2. The Complainant has not 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 does not exist 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 Complainant’s OPRA request because same failed to include an adequate time frame for the Custodian to identify responsive records. Additionally, there is no evidence in the record to contradict that the Custodian intended to address the Complainant’s issues during normal business hours on August 11, 2014. 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.



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

Final Decision Rendered by the
Government Records Council
On The 28th Day of July, 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 30, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 28, 2015 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2014-289

v.

**Franklin Township Fire District No. 1 (Somerset)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. All e-mails and/or correspondence between the Franklin Fire District No. 1 (“FFD”) Commissioners and administrative aides related to the hiring of the Custodian’s Counsel and/or his law firm.
2. A copy of meeting minutes on the date that Custodian’s Counsel and/or his law firm was voted on by the Commissioners.
3. A copy of the audio recording for the meeting held on the date Custodian’s Counsel and/or his firm was voted on by the Commissioners.
4. Custodian Counsel’s résumé and/or Curriculum Vitae.

Custodian of Record: Tim Szymborski
Request Received by Custodian: July 30, 2014
Response Made by Custodian: August 8, 2014
GRC Complaint Received: August 12, 2014

Background³

Request and Response:

On July 30, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 8, 2014, the seventh (7th) business day after receipt of the OPRA request, the Custodian responded in writing and provided access to the following records:

1. Resolution 14-10
2. Meeting minutes, dated March 4, 2014.

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

² Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, 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.

3. "Agreement to Provide Legal Services," dated March 4, 2014.
4. New Jersey Business Registration Certification.
5. Certificate of Liability Insurance.
6. "Proposal for Professional Services," dated February 26, 2014.
7. Résumé
8. Unsigned "Professional Services Agreement."
9. Audio recording of the FFD's March 4, 2014, meeting.

Additionally, the Custodian stated that no e-mails responsive to the request existed.

On August 8, 2014, the Complainant e-mailed the Custodian, advising that his response was incomplete. The Complainant stated that should the Custodian disclose the remaining records, he may disregard the e-mail. The Complainant further stated that the Custodian's failure to provide the remaining records by 5:00 p.m. would result in him contacting Complainant's Counsel about filing a complaint.

Denial of Access Complaint:

On August 12, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant stated that, upon disclosure, he listened to the March 4, 2014, audio recording in which two (2) comments were made regarding Custodian Counsel's temporary appointment in 2013. The Complainant stated that, based on those comments and in the spirit of cooperation, he e-mailed the Custodian to advise that his response was incomplete. The Complainant stated that the Custodian provided no further responses.

The Complainant contended that the Custodian failed to disclose records concerning Custodian Counsel's appointment as FFD's attorney in 2013. To further support that the Custodian's Counsel was FFD's attorney in 2013, he included an e-mail from Counsel to the Complainant, dated February 26, 2013, regarding an unrelated OPRA matter.

The Complainant thus requested that the GRC: 1) determine that the Custodian violated OPRA by failing to provide all responsive records within seven (7) business days; 2) order immediate disclosure of all responsive records; 3) determine that the Custodian knowingly and willfully violated OPRA, thus warranting an assessment of the civil penalty; and 4) determine that the Complainant is a prevailing party, thus entitled to an award of reasonable attorney's fees.

Supplemental Response:

On August 15, 2014, the Custodian sent four (4) separate e-mails that included additional records ranging from 2011 to 2014, noting that same was a response to the Complainant's August 11, 2014, e-mail.

Statement of Information:

On September 8, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on July 30, 2014. The Custodian certified that he forwarded the OPRA request to Custodian’s Counsel, discussed what records might be responsive, and determined that it sought records for the current year. The Custodian affirmed that he responded in writing on August 8, 2014, providing access to multiple records for 2014. The Custodian affirmed that, after receiving clarification from the Complainant’s Denial of Access Complaint,⁴ he provided additional records on August 15, 2014.

The Custodian contended that the GRC should dismiss this complaint based on the Custodian’s reasonable interpretation of the Complainant’s OPRA request and the fact that he attempted to comply. Further, the Custodian asserted that OPRA was not meant to penalize public agencies for technicalities when the facts demonstrate a reasonable attempt to comply with the statute.

Specifically, the Custodian certified that he interpreted the Complainant’s OPRA request to seek records for 2014 because the words “the date” were contained within the request. The Custodian also noted he believed that, based on the Complainant’s OPRA experience, he would have identified a date range if he sought records for prior years. The Custodian affirmed that after disclosing records on August 8, 2014, at 3:13 p.m. (a Friday), the Complainant responded at 4:01 p.m. advising that the response was incomplete and that the Custodian had until 5:00 p.m. to disclose “the remaining records.” The Custodian averred that the Complainant did not indicate how the response was incomplete. The Custodian certified that he did not see the message until August 9, 2014 (a Saturday) and was even more surprised to find on August 11, 2014, that the Complainant submitted this complaint to the GRC via e-mail on August 10, 2014 (a Sunday).⁵ Thus, the Custodian argued that the Complainant did not provide adequate time for him to attempt to resolve the issue prior to filing this complaint. However, notwithstanding the Complainant’s filing, the Custodian affirmed that he endeavored to obtain clarification and properly fulfill the request. The Custodian averred that, after several communications between the parties discussing the resolution of this complaint, the Complainant clarified that he sought Custodian Counsel’s hiring records for all relevant years.

The Custodian argued that he clearly intended to comply with the Complainant’s OPRA request but should not be penalized because he might have misinterpreted a vague request. Additionally, the Custodian contended that the Complainant failed to give him adequate time to address the issue and utilized technicalities in the statute to file a complaint before the Custodian had a business day to rectify the issue. The Custodian asserted that he initially responded in a timely manner and ultimately fulfilled the Complainant’s request after receiving clarification. The Custodian thus argued that he did not knowingly and willfully violate OPRA and that the FFD is doing all it can to comply with OPRA under a unique set of circumstances.

The Custodian also argued that the GRC should determine that the Complainant is not a prevailing party entitled to an award of the reasonable attorney’s fees. The Custodian contended

⁴ The GRC notes that the Custodian did not provide these communications as part of the SOI. Thus, it is unclear as to the content of those communications or whether same were memorialized in writing.

⁵ The Complainant sent his complaint to the GRC via e-mail on August 11, 2014. The GRC received same on August 12, 2014.

that the Complainant provided him one (1) hour of time within which he could rectify any issues prior to filing this complaint. The Custodian asserted that he was going to reach out to the Custodian's Counsel on August 11, 2014, regardless of whether the Complainant filed this complaint. The Custodian contended that, because there was no need to file this complaint as access had not been denied, it was not the catalyst for him to seek clarification and provide additional responsive records.

Additional Submissions:

On November 11, 2014, the Complainant's Counsel argued, via letter, that the facts presented show that the Custodian failed to seek clarification, refused to disclose all responsive records, blamed the Complainant for his failure to comply with the request, and deliberately disclosed a quarter of the responsive records at the end of the seventh (7th) business day.

Regarding the failure to seek clarification, the Custodian argued in the SOI that the Complainant's original OPRA request was not specific enough to provide all responsive records for all years, notwithstanding the Custodian's knowledge that Custodian's Counsel was first hired in 2011.⁶ The Complainant's Counsel noted that the Complainant initially believed that Custodian's Counsel was appointed in 2013. The Complainant's Counsel contended that the Custodian had an affirmative responsibility and ample time to seek clarification if he believed the request was invalid. However, the Custodian and Counsel chose to guess what was responsive based on the Complainant's use of "the date." The Complainant's Counsel surmised that the Custodian provided records regarding Custodian's Counsel's reappointment prior to the filing of this complaint, as opposed to when he was initially "appointed" in 2011. Thus, even if the Custodian's guess was correct, he still failed to disclose the responsive records within seven (7) business days.

Regarding the timing of the Custodian's response, the Complainant's Counsel contended that same demonstrated a lack of good faith on the Custodian's part. The Complainant's Counsel contended that, notwithstanding the last minute response and the fact that OPRA did not require him to do so, the Complainant e-mailed the Custodian, knowing that he has a smartphone funded by the FFD. The Complainant's Counsel asserted that he did this to avoid filing a denial of access complaint, which he warned the Custodian he would do if the Custodian failed to provide additional records. The Complainant's Counsel asserted that, although the Custodian received the e-mail on a Saturday, he consciously ignored same.⁷ Factually, although the Complainant could have filed a complaint at 5:01 p.m. on August 8, 2014, he waited for a response at least 48 hours before filing this complaint.

Additionally, the Complainant's Counsel refuted the Custodian's argument that the Complainant is not a prevailing party. The Complainant's Counsel argued that the Custodian's assertion that he planned on handling the issue on August 11, 2014, is a feeble defense of his

⁶ The Complainant's Counsel included an e-mail dated April 17, 2011, identifying that Custodian's Counsel had been hired at that time.

⁷ The GRC stresses that OPRA does not require custodians to respond to OPRA requests during non-business hours. In fact, OPRA only refers to a custodian's obligation in terms of business hours and days. N.J.S.A. 47:1A-5(a); N.J.S.A. 47:1A-5(i).

conduct. Moreover, the Complainant's Counsel argued that the Complainant did not utilize a technicality: the Custodian failed to provide all responsive records in seven (7) business days and ignored the Complainant's August 8, 2014, e-mail. The Complainant's Counsel asserted that the Custodian's actions (or inactions) prior to the filing of this complaint and the disclosure of records thereafter prove that the Complainant is a prevailing party.

Further, the Complainant's Counsel asserted that some of the records disclosed were immediate access records and that the Custodian's failure to disclose same resulted in a violation of N.J.S.A. 47:1A-5(e). The Complainant's Counsel argued that the Custodian disclosed four (4) resolutions on August 15, 2014, that reference the FFD's obligation under the New Jersey Public Contracts Law to award a contract for no bid professional services by resolution. The Complainant's Counsel argued that these "contract-type" records are subject to immediate access. The Complainant's Counsel contended that the Custodian's failure to disclose immediate access records until after the filing of this complaint is further proof that the Complainant is a prevailing party.

Finally, the Complainant's Counsel noted that the Custodian did not provide any correspondence (to include e-mails) responsive to his request; however, the attached April 17, 2011, e-mail proves that at least one (1) e-mail existed.

Analysis

Immediate Access

OPRA provides that "[i]mmediate *access ordinarily shall be granted* to budgets, bills, vouchers, *contracts*, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." N.J.S.A. 47:1A-5(e)(emphasis added).

When construing the meaning of a statute, the court must first consider the plain meaning of the words in the provision. Burns v. Belafsky, 166 N.J. 466, 473, 766 A.2d 1095 (2001)(citing State v. Hoffman, 149 N.J. 564, 578, 695 A.2d 236 (1997)). Unless the legislative intent instructs otherwise, the words and language at issue must be given their plain and ordinary meaning. Ibid. (citing Merin v. Maglaki, 126 N.J. 430, 434-35, 599 A.2d 1256 (1992)). When ". . . the statutory language is clear and unambiguous, and susceptible to only one interpretation, courts should apply the statute as written without resort to extrinsic interpretive aids." State v. Hodde, 181 N.J. 375, 379 (2004)(quoting In re Passaic County Utils. Auth., 164 N.J. 270, 299 (2000)).

OPRA explicitly provides that "immediate access ordinarily shall be granted . . ." to certain specific types of government records. N.J.S.A. 47:1A-5(e). A review of this provision of OPRA reveals that resolutions are not specifically identified as "immediate access" records. Further, the GRC already made such a determination in Scheer v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-341 (December 2011). Moreover, the "resolution" to which the Complainant's Counsel referred references both the authorizing resolution and contract as separate records. For this reason, the GRC is not satisfied that the resolutions are akin to contracts designating them as "immediate access" records.

Therefore, because the language of N.J.S.A. 47:1A-5(e) is clear and unambiguous as to which specific records are classified as “immediate access” records, the GRC declines to determine that resolutions for no bid professional services are “immediate access” records because said records are not specifically identified under OPRA as such.

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 New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.”* N.J.S.A. 47:1A-1.

MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005)(emphasis added).

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

Id. at 549 (emphasis added).

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt In short, OPRA does not countenance open-ended searches of an agency's files.” Id. at 549 (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);⁸ NJ Builders Assoc. v. NJ

⁸ Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

The GRC has established specific criteria deemed necessary under OPRA to request an e-mail communication. See Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). The Council determined that to be valid, such requests must contain: (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. See Elcavage, GRC 2009-07; Sandoval v. NJ State Parole Bd., GRC Complaint No. 2006-167 (Interim Order March 28, 2007). The Council has also applied the criteria set forth in Elcavage to other forms of correspondence, such as letters. See Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). The GRC notes that the Council has routinely determined that requests omitting the specific date or range of dates are invalid. See Tracey-Coll v. Elmwood Park Bd. of Educ. (Bergen), GRC Complaint No. 2009-206 (June 2010); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2013-118 (January 2014).

Additionally, in Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012), the Court held that the defendant “performed a search and was able to locate records responsive . . .” which “. . . belied any assertion that the request was lacking in specificity or was overbroad.” Id. at 177. See also Gannett v. Cnty. of Middlesex, 379 N.J. Super. 205 (App. Div. 2005)(holding that “[s]uch a voluntary disclosure of most of the documents sought . . . constituted a waiver of whatever right the County may have had to deny Gannett's entire OPRA request on the ground that it was improper.” Id. at 213).

Generally, in situations where a request was overly broad on its face but the custodian nonetheless was able to locate records, the Council has followed Burke in determining that the request contained sufficient information for record identification. See Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (Interim Order dated March 29, 2011); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-302 (Interim Order dated January 31, 2012). However, there have been instances where, notwithstanding the custodian's ability to locate certain records, the Council has determined that the request was nevertheless invalid. See Ciszewski v. Newton Police Dep't (Sussex), GRC Complaint No. 2013-90 (October 2013) at 4-5.

Although decided during the pendency of this complaint, the Council's decision in Gartner v. Borough of Middlesex (Middlesex), GRC Complaint No. 2014-203 (Interim Order dated February 24, 2015), provides guidance on the current issue. There, one of the complainant's request items sought communications and identified senders/recipients as well as the subject or content of said communications. After the custodian disclosed records, the complainant responded, advising that he believed additional correspondence existed. However, it was not until he filed the Denial of Access Complaint that he asserted that responsive communications should have dated back to 2011. The Council determined that the complainant's request was invalid because it failed to conform with Elcavage, GRC 2009-07; Armenti, GRC 2009-154, reasoning that:

Similar to the facts in Ciszewski, notwithstanding that the Custodian provided responsive records for 2014, the Complainant's assertion that records exist dating back to 2011 sufficiently proves that the request item was deficient. The GRC is satisfied that the Custodian could not have reasonably assumed that the Complainant's request sought correspondence as far back as 2011 because the Complainant did not indicate this in his initial OPRA request.

Id. at 7.

Here, the Complainant's OPRA request item No. 1 sought e-mails and/or correspondence between several individuals related to a specific subject: the hiring of Custodian's Counsel. However, the request did not include a date or range of dates. Later, the Custodian would argue that he knew that Custodian's Counsel was appointed in at least 2013 due to reviewing records provided and OPRA matters from 2013. Thus, on August 8, 2014, the Complainant e-mailed the Custodian after disclosure of records, asserting that the response was incomplete; however, he did not indicate why. In the Denial of Access Complaint, the Complainant asserted that the Custodian failed to provide records as far back as 2013. On August 11, 2014, the parties determined that responsive records dated back to 2011, which the Custodian provided on August 15, 2014. The Custodian argued in the SOI that the Complainant's OPRA request failed to include a date range, thus forcing him to guess that the request sought only records for the current year.

As was the case in Ciszewski, the Complainant's OPRA request here, with the exception of Custodian Counsel's résumé at item No. 4, the Complainant's Denial of Access Complaint assertion that records exist dating back to at least 2013 sufficiently proves that the request item was deficient. *See also* Gartner, GRC 2014-203. The Complainant's failure to provide the time frame also inextricably affected the Custodian's ability to locate records responsive to item Nos. 2 and 3. Additionally, the Complainant did not clarify this fact in his e-mail to the Custodian on August 8, 2014. Thus, the GRC is satisfied that the Custodian could not have reasonably identified all responsive records to the first three (3) request items prior to 2014 without the Complainant having included a time frame in item No. 1.

Therefore, the Complainant's request (with the exception of item No. 4) is invalid because it failed to provide ample identifiers necessary for the Custodian to locate additionally responsive records. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; NJ Builders, 390 N.J. Super. at 180; Schuler, GRC 2007-151; Elcavage, GRC 2009-07; Armenti, GRC 2009-154; Ciszewski, GRC 2013-90. *See also* Gartner, GRC 2014-203. The Custodian has thus lawfully denied access to any records beyond those he has already provided. N.J.S.A. 47:1A-6.

Finally, the GRC has consistently held that a custodian may respond to an OPRA request by timely granting access, denying access, seeking clarification, or requesting an extension of time to respond. Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). In situations where a custodian is unable to determine exactly what the request is seeking, best practices may dictate that the custodian seek clarification if he believed the request was not clear. However, contrary to Complainant Counsel's November 11, 2014, letter brief argument, a custodian is not required nor obligated to seek clarification in every

instance. However, in accordance with Elcavage, GRC 2009-07 and Armenti, GRC 2009-154, a requestor is required to include the established criteria necessary for a custodian to identify responsive e-mails and correspondence.

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. Klagholtz, 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 Custodian responded to the Complainant on August 8, 2014, a Friday, providing access to records regarding Custodian's Counsel for 2014. At 4:00 p.m. on the same day, the Complainant advised the Custodian that his response was incomplete and demanded disclosure of records by close of business. However, the Complainant did not specifically identify how the response was incomplete. On August 10, 2014, a Sunday, the Complainant filed this complaint with the GRC, requesting a finding that the Custodian violated OPRA and an order requiring disclosure of all outstanding responsive records. Thereafter, the Custodian attempted to gain clarification and was able to provide records dating back to 2011.

Thus, the crux of this issue is whether the instant complaint brought about a change in the Custodian's conduct and whether there was a causal nexus between said filing and the relief achieved. The Custodian argued that this was not the case because he did not receive the Complainant's August 8, 2014, demands until Saturday and that the Complainant filed the complaint before he could even address the issue during normal business hours. The Custodian also argued that he obviously intended to comply with the request but that the Complainant did not provide him with adequate time to address any issues.

Conversely, the Complainant's Counsel argued that the Custodian certified that he saw the Complainant's August 8, 2014, e-mail on August 9, 2014, and failed to act at that time. The Complainant's Counsel argued that the Custodian's assertion that he would handle the request on

August 11, 2014, was a feeble defense of his failure to rectify the situation. The Complainant's Counsel also argued that the Complainant could have filed his complaint at 5:01 p.m. on August 8, 2014 but instead chose to wait forty-hours (48) hours.

Initially, the GRC first notes that it has determined that the Complainant's request (with the exception of item No. 4) was invalid because of a lack of dates or range of dates. To that end, the GRC is not ordering any of the requested relief. However, following the filing of this complaint, the Complainant provided clarification to the Custodian, who provided access to records.

The question remains whether the instant complaint was the catalyst for the Custodian to obtain clarification. On review, the GRC is satisfied that the answer is no. Specifically, all of the Complainant's arguments are predicated on the fact that the Custodian should not have waited until near the end of the seventh (7th) business day to respond and that he failed to address the issue during non-business hours. Neither party disputed that the Custodian received the Complainant's demand e-mail on a Saturday and that the Complainant caused this complaint to be filed on the next day, a Sunday. Factually, the Custodian did not have the benefit of even one (1) business hour to attempt to rectify any issues. Obviously, the Custodian already responded and provided records; thus, there is no evidence in the record to contradict that he intended to address the Complainant's e-mail during normal business hours on August 11, 2014.

Therefore, the Complainant has not 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 does not exist 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 Complainant's OPRA request because same failed to include an adequate time frame for the Custodian to identify responsive records. Additionally, there is no evidence in the record to contradict that the Custodian intended to address the Complainant's issues during normal business hours on August 11, 2014. 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. The Complainant's request (with the exception of item No. 4) is invalid because it failed to provide ample identifiers necessary for the Custodian to locate additional responsive records. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011); Ciszewski v. Newton Police Dep't (Sussex), GRC Complaint No. 2013-90 (October 2013). *See also*

Gartner v. Borough of Middlesex (Middlesex), GRC Complaint No. 2014-203 (Interim Order dated February 24, 2015). The Custodian has thus lawfully denied access to any records beyond those he has already provided. N.J.S.A. 47:1A-6.

2. The Complainant has not 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 does not exist 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 Complainant’s OPRA request because same failed to include an adequate time frame for the Custodian to identify responsive records. Additionally, there is no evidence in the record to contradict that the Custodian intended to address the Complainant’s issues during normal business hours on August 11, 2014. 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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