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CHARLES A. RICHMAN
Commissioner

FINAL DECISION

July 28, 2015 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2014-387

v.

Franklin 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. A plain reading of OPRA supports that text messages are “government records” subject to disclosure so long as the text messages have been “made, maintained or kept on file . . . or . . . received in the course of . . . official business. . . .” N.J.S.A. 47:1A-1.1. The Council stresses that this determination broadly addresses the characterization of text messages as “government records” and notes that exemptions to disclosure may apply on a case-by-case basis. Accordingly, this determination should not be construed to provide for unmitigated access to text messages.
2. The Custodian did not unlawfully deny access to the Complainant’s OPRA request, because the Custodian certified that such records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. See Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. 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 no records existed. 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. 2014-387

v.

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

Records Relevant to Complaint: Electronic copies of text messages between any Franklin Fire District No. 1 (“FFD”) vendors, the Custodian’s Counsel, all FFD Commissioners and any FFD employee from October 2013, to present regarding the FFD’s electronic e-mail archiving system.³

Custodian of Record: Tim Szymborski
Request Received by Custodian: April 7, 2014
Response Made by Custodian: April 8, 2014
GRC Complaint Received: November 19, 2014

Background⁴

Request and Response:

On April 7, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 8, 2014, the Custodian’s Counsel responded in writing on behalf of the Custodian to seek a two (2) week extension to allow the Custodian to reach out to the identified individuals to ascertain the existence of responsive text messages.

On April 10, 2014, the Custodian’s Counsel sent a letter to Verizon Wireless, the FFD’s wireless provider, advising that the FFD recently received an OPRA request for text messages. The Custodian’s Counsel stated that the FFD is required to conduct a search for responsive records; however, many of the OPRA requests seek text messages from a year or years prior. The Custodian’s Counsel stated that the individuals either no longer have the applicable cell phone from those time periods or did not have enough storage on their phones to save messages. The

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 Complainant requested additional records that are not 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.

Custodian's Counsel asked Verizon to provide an explanation as to whether it could retrieve responsive records.

On April 11, 2014, Verizon responded, advising that the following information is retained for the corresponding time periods as follows:

Subscriber information	Three (3) to five (5) years
Call detail reports	One (1) year (rolling)
Text message detail (senders/recipients)	One (1) year (rolling)
Text message contents	Three (3) to five (5) days (requires a search warrant)
Bill copies post paid	Twelve (12) months
Payment history post paid	Three (3) to five (5) years

Verizon stated that a subpoena must specify the information and time period needed and reiterated that text message content requires a search warrant.

On April 28, 2014, the Custodian's Counsel responding in writing, stating that the Custodian reached out to all named individuals for responsive text messages. The Custodian's Counsel stated that, to date, none of the individuals claimed to be in possession of responsive records. The Custodian's Counsel noted that the Custodian also reached out to Verizon and inquired about the process and procedure to obtain text messages with content for a certain time period. The Custodian's Counsel stated that Verizon advised that it only stores content for a small period of time, which can only be accessed by warrant or court order. The Custodian's Counsel averred that he also sent Verizon a letter on April 10, 2014, requesting the same information. The Custodian's Counsel stated that he received a response (that he attached) in which Verizon stated that content is only stored for three (3) to five (5) days, and a search warrant is necessary to obtain same. The Custodian's Counsel stated that unless the individual users stored their text messages on their phones, the FFD would be unable to retrieve same from Verizon.

Denial of Access Complaint:

On November 19, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that text messages fall within the definition of a "government record" under OPRA. N.J.S.A. 47:1A-1.1. The Complainant asserted that the Custodian and FFD Commissioners have been actively conducting official business via text message on their taxpayer-funded cell phones. The Complainant noted that, on October 13, 2013, he advised the Custodian that the FFD was required to preserve text messages going forward. The Complainant argued that the Custodian had an obligation to establish policies and procedures at that time. The Complainant argued that he subsequently submitted the subject OPRA request and was denied access to responsive text messages.

The Complainant asserted that the Custodian appeared to be relying on Verizon's response to the FFD's inquiry about obtaining responsive text messages. The Complainant

argued that the reliance on this response confirmed that the FFD could obtain: 1) call detail reports; 2) text message detail (sender/recipient); and 3) text message details. However, had the FFD established policies and procedures in October 2013, Verizon's response was of no importance here. Further, the Complainant argued that the Custodian and FFD are obligated to obtain responsive records wherever they exist.

The Complainant argued that, by ignoring their obligation to preserve and disclose responsive text messages, the Custodian and FFD Commissioners knowingly shielded their text messages from the public. Additionally, the Complainant asserted that these actions appear deliberate and intentional because the Complainant planned to use these messages as evidence in Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-142 (March 2015). The Complainant requested that the GRC: 1) determine that the Custodian violated OPRA by failing to provide the responsive records within seven (7) business days; 2) order disclosure of all responsive records; 3) determine that the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the responsive record under the totality of the circumstances; 4) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees; and 5) any further relief deemed equitable and just.

Statement of Information:

On December 19, 2014, the Custodian filed a Statement of Information ("SOF"). The Custodian certified that he received the Complainant's OPRA request on April 7, 2014. The Custodian certified that the FFD responded on April 8, 2014, seeking an extension of time to obtain responsive records. The Custodian affirmed that he contacted the individuals identified in the OPRA request and was advised that they were not in possession of any text messages. The Custodian certified that, in order to verify that no records could be provided, Custodian's Counsel contacted Verizon, who advised that text message content was only maintained for three (3) to five (5) days and that a subpoena would be required for any additional information. The Custodian certified that the Custodian's Counsel sent the Complainant a comprehensive response on April 28, 2014.

The Custodian argued that he lawfully denied access to the Complainant's OPRA request on the basis that no records exist. The Custodian noted that he was unable to locate a retention schedule for text messages. Additionally, the Custodian asserted that he is not aware of any text message archiving systems or a requirement that FFD would have to pay for an archiving service to preserve text messages. The Custodian contended that the FFD cannot obtain the responsive records and would not be able to obtain future records without contracting with an archival service (if one exists). The Custodian asserted that he made a reasonable effort to obtain potentially responsive records.

Analysis

Definition of a Government Record

OPRA defines a "government record" as:

[A]ny paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, *information stored or maintained electronically* or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file . . . or that has been received* in the course of his or its official business by any officer[.]

N.J.S.A. 47:1A-1.1. (emphasis added).

The issue of whether text messages fall within the definition of a “government record” under OPRA has not previously been adjudicated by either the GRC or the courts. *See 297 Palisades Avenue Urban Renewal Co., LLC v. Borough of Bogota*, 2014 N.J. Super. Unpub. LEXIS 666, 28 (March 26, 2014)(noting that there is some question as to whether text messages are government records and that prior GRC decisions did not provide a definitive answer). Although the Custodian has not argued against text messages being government records under OPRA, the GRC is compelled to address the issue and provide a definitive holding on same.

New Jersey Courts have provided that “[t]he purpose of OPRA 'is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.’” *Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp.*, 183 N.J. 519, 535 (2005)(quoting *Asbury Park Press v. Ocean Cnty. Prosecutor's Office*, 374 N.J. Super. 312, 329 (Law Div. 2004)). The broad definition of a “government record” strongly supports OPRA’s purpose by casting a wide net to capture as many records as possible. Inclusive of the definition is “information stored or maintained electronically.” N.J.S.A. 47:1A-1.1; *Zahler v. Ocean Cnty. Coll.*, GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014). Thus, a plain reading of OPRA suggests that the definition encompasses records “made, maintained or kept on file . . . or that [have] been received in the course of . . . official business.” To that end, the GRC has held that e-mails pertaining to official business, regardless of location, met the basic definition of a “government record” under OPRA. *Meyers v. Borough of Fair Lawn*, GRC Complaint No. 2005-127 (May 2006). The GRC’s longstanding policy on the disclosability of e-mails also led to development of criteria for disclosability of same. *See Elcavage v. West Milford Twp. (Passaic)*, GRC Complaint No. 2009-07 (April 2010).

Text messages are fundamentally similar to e-mails in that they are electronic communications, except that text messages are typically sent from one cellphone to another whereas e-mails can be sent by cell phone or computer. For this reason, it would be unreasonable to conclude that text messages pertaining to official business would be excluded from disclosure under OPRA. Additionally, were the GRC to conclude that text messages are not “government records,” public officials could easily abrogate OPRA simply by relying only on text messages to communicate about official business.

Therefore, a plain reading of OPRA supports that text messages are “government records” subject to disclosure so long as the text messages have been “made, maintained or kept on file . . . or . . . received in the course of . . . official business. . . .” N.J.S.A. 47:1A-1.1. The Council stresses that this determination broadly addresses the characterization of text messages as “government records” and notes that exemptions to disclosure may apply on a case-by-case

basis. Accordingly, this determination should not be construed to provide for unmitigated access to text messages.

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.

In Pusterhofer v. NJ 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 existed in the record to refute the custodian’s certification, there was no unlawful denial of access to the requested records.

Here, the Complainant’s OPRA request sought text messages between several individuals for a certain time period regarding the FFD’s electronic e-mail system. The Custodian certified in the SOI that he contacted the individuals identified in the OPRA request to determine whether they maintained any responsive records. Further, the Custodian certified that both he and Custodian’s Counsel reached out to Verizon to ascertain whether they could retrieve any text messages and was informed that text message content is maintained for only three (3) to five (5) days. The Custodian certified that he ultimately denied the Complainant’s OPRA request on the basis that no records existed.

As such, the Custodian did not unlawfully deny access to the Complainant’s OPRA request, because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. *See Pusterhofer*, GRC 2005-49.

Finally, the GRC notes that the Complainant asserted that the FFD was obligated to establish policies and procedures to maintain text messages after he demanded they preserve same in an October 13, 2013, e-mail to the Custodian. Conversely, the Custodian argued in the SOI that no retention schedule for text messages currently exists. However, the provisions of OPRA do not address records retention or schedules.⁵ Additionally, the GRC does not have authority over retention schedules. N.J.S.A. 47:1A-7(b); Van Pelt v. Edison Twp. Bd. of Educ. (Middlesex), GRC Complaint No. 2007-179 (January 2008)(the GRC does not have authority over which records a government agency must maintain); Toscano v. NJ Dep’t of Labor, Div. of Vocational Rehabilitation Serv., GRC Complaint No. 2007-296 (March 2008). For this reason, the GRC declines to address those issues.

⁵ Records Management Services is the agency responsible for records retention and schedules.

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.

The Complainant filed this Denial of Access Complaint requesting that the Council determine that the Custodian unlawfully denied access to the responsive records and order disclosure of same. However, the Custodian certified in the SOI that no records exist, and there is no evidence in the record to refute this certification. For this reason, the GRC is not ordering disclosure, and the Complainant has not achieved the relief sought.

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 no records existed. 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. A plain reading of OPRA supports that text messages are “government records” subject to disclosure so long as the text messages have been “made, maintained or kept on file . . . or . . . received in the course of . . . official business. . . .” N.J.S.A. 47:1A-1.1. The Council stresses that this determination broadly addresses the characterization of text messages as “government records” and notes that exemptions

to disclosure may apply on a case-by-case basis. Accordingly, this determination should not be construed to provide for unmitigated access to text messages. Accordingly, this determination should not be construed to provide for unmitigated access to text messages.

2. The Custodian did not unlawfully deny access to the Complainant's OPRA request, because the Custodian certified that such records do not exist, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. *See Pusterhofer v. NJ Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005).
3. 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 no records existed. 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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Approved By: Joseph D. Glover
Executive Director

July 21, 2015