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CHARLES A. RICHMAN
Commissioner

FINAL DECISION

September 29, 2015 Government Records Council Meeting

Carol A. Thompson
Complainant

Complaint No. 2014-420

v.

Township of Mansfield (Warren)
Custodian of Record

At the September 29, 2015 public meeting, the Government Records Council (“Council”) considered the September 22, 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 Custodian did not bear her burden of proof that he timely responded to the Complainant’s clarified OPRA request from September 18, 2014. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s clarified OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). *See also* Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-100 (Interim Order dated June 26, 2012).
2. Although the Custodian timely responded in writing to the Complainant’s October 29, 2014, OPRA request, said response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick v. NJ Dep’t of Transp., GRC Complaint No. 2007-164 (February 2008), because she failed to provide a date certain upon which she would respond to the Complainant. *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011); Papiez v. Cnty of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-65 (Interim Order dated April 30, 2013).
3. The Custodian did not unlawfully deny access to the Complainant’s two (2) OPRA requests because she certified in the Statement of Information that an extensive search failed to yield the responsive record, and there is no evidence in the record to refute the Custodian’s certification. *See* Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005); Valdez v. Union City Bd. of Education (Union), GRC Complaint No. 2011-50 (August 2012).
4. The Custodian’s failure to respond to the Complainant’s clarified OPRA request within seven (7) business days resulted in a “deemed” denial, and her response to the Complainant’s October 29, 2014, OPRA request was insufficient because she failed to provide a date certain on which she would respond to the Complainant. However, the

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Custodian did not unlawfully deny access to the Complainant's two (2) OPRA requests because no records could be located. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

5. 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 requests because she could not locate any responsive records. 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 29th Day of September, 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: October 5, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 29, 2015 Council Meeting**

**Carol A. Thompson¹
Complainant**

GRC Complaint No. 2014-420

v.

**Township of Mansfield (Warren)²
Custodial Agency**

Records Relevant to Complaint: Hardcopies via pickup of the first zoning ordinance created by the Township of Mansfield (“Township”).

Custodian of Record: Dena Hrebenak

Request Received by Custodian: September 18, 2014, and October 29, 2014

Response Made by Custodian: September 18, 2014, and October 29, 2014

GRC Complaint Received: December 10, 2014

Background³

Request and Response:

On September 18, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On the same day, the Custodian responded in writing by seeking clarification of the Complainant’s OPRA request. Specifically, the Custodian asked the Complainant whether she was seeking the actual ordinance or the year same was adopted. The Complainant immediately responded via e-mail advising that she sought both the actual ordinance and the year it was “created.” The Custodian confirmed receipt of the Complainant’s e-mail.

On October 29, 2014, the Complainant resubmitted the instant OPRA request to the Custodian for the above-mentioned records, noting that she received no response to her initial OPRA request. On the same day, the Custodian responded to the Complainant in writing, averring that she previously advised the Complainant via telephone that the Township was researching the exact year that the Board adopted its original ordinance. The Complainant responded via e-mail to dispute that the Custodian informed her of the Township’s continued attempts to locate and provide the responsive record.

¹ Represented by Allen Hantman, Esq., of Morris & Hantman (Denville, NJ).

² Represented by Michael Lavery, Esq., of Courter, Kobert & Cohen, P.C. (Hackettstown, 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.

Denial of Access Complaint:

On December 10, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to fulfill her initial OPRA request, so she resubmitted it to no avail. The Complainant contended that, contrary to the Custodian’s e-mail from October 29, 2014, the Custodian had not previously advised her of the Township’s attempts to locate the responsive record.

Statement of Information:

On January 16, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on September 18, 2014. The Custodian certified that, upon receipt, she immediately sought clarification and conducted an extensive search for the original land use ordinance. Her search included reviewing the Township’s ordinance book. The Custodian certified that the ordinance could date back to anywhere between 1965 and 1975. The Custodian affirmed that the Township was unable to locate the responsive record. The Custodian did not address the Complainant’s October 29, 2014, OPRA request.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁴ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-100 (Interim Order dated June 26, 2012), the custodian initially sought clarification of the complainant’s OPRA request. However, after the complainant provided the clarification, the custodian failed to respond within the next seven (7) business days. The Council determined that the custodian’s failure to respond resulted in a “deemed” denial, reasoning that:

[S]hould a requestor amend or clarify an OPRA request, it is reasonable that the time frame for a custodian to respond should begin anew; thus, providing a custodian with the statutorily mandated time frame to respond to the new or altered OPRA request. N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i).

⁴ A custodian’s written response, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

Id. at 6.

Here, the Custodian initially sought clarification of the Complainant's September 18, 2014, OPRA request in a timely manner. The Complainant immediately provided clarification, of which the Custodian acknowledged receipt on the same day. Thus, the Custodian was required to respond to the Complainant's clarified OPRA request by September 29, 2014. However, the Custodian failed to respond thereafter until October 29, 2014, when the Complainant resubmitted her OPRA request.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's September 18, 2014, clarified OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's clarified OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. *See also* Carter, GRC 2011-100.

Sufficiency of Response

OPRA provides that a custodian may have an extension of time to respond to a complainant's OPRA request, but the custodian must provide a date certain. N.J.S.A. 47:1A-5(i). OPRA further provides that should the custodian fail to provide a response on that specific date, "access shall be deemed denied." N.J.S.A. 47:1A-5(i).

In Hardwick v. NJ Dep't of Transp., GRC Complaint No. 2007-164 (February 2008), the custodian provided the complainant with a written response to the complainant's OPRA request. In the response, the custodian requested an extension of time to respond to said request but failed to provide a date certain upon which the requested records would be provided. The Council held that the custodian's request for an extension of time was inadequate under OPRA pursuant to N.J.S.A. 47:1A-5(i).

Here, the Custodian responded in writing to the Complainant's October 29, 2014, OPRA request on the same day, stating that she was still researching when the Township passed its first ordinance. However, the Custodian failed to provide a date certain on which she would respond by either granting access to the responsive records or advising the Complainant that her request was denied.

Therefore, although the Custodian timely responded in writing to the Complainant's October 29, 2014, OPRA request, said response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick, GRC 2007-164, because she failed to provide a date certain upon which she would respond to the Complainant. *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011); Papiez v. Cnty of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-65 (Interim Order dated April 30, 2013).

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. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant’s request for billing records existed, and the complainant submitted no evidence to refute the custodian’s certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed, and no evidence existed in the record to refute the custodian’s certification, there was no unlawful denial of access to the requested records.

In Valdez v. Union City Bd. of Education (Union), GRC Complaint No. 2011-50 (August 2012), the complainant sought news releases pertaining to meetings held by the Union City Board of Education. The custodian certified that he and the Confidential Secretary conducted a search of their files and meeting minutes to locate any relevant news releases. The custodian certified that he could not locate any responsive documents after searching for a half hour. The Council found that the custodian’s certification was sufficient to show that he performed an adequate search for the requested records. Id.; *see also* Pusterhofer, GRC No. 2005-49; Godfrey v. City of Wildwood (Cape May), GRC Complaint No. 2013-275 (July 29, 2014).

In the instant matter, the Custodian certified in the SOI that she was unable to locate a responsive record. However, the Custodian noted that she believed the original ordinance would date back to anywhere between 1965 and 1975. The Custodian certified that her search included reviewing the Township’s ordinance book but that she was simply unable to locate the responsive ordinance. As in Valdes, the GRC is satisfied here that the Custodian took reasonable steps to locate the responsive record without avail.

Accordingly, the Custodian did not unlawfully deny access to the Complainant’s two (2) OPRA requests because she certified in the SOI that an extensive search failed to yield the responsive record, and there is no evidence in the record to refute the Custodian’s certification. *See* Pusterhofer, GRC 2005-49; Valdes, GRC 2011-50.

Knowing & Willful

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . .” N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states “. . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the

circumstances, the council may impose the penalties provided for in [OPRA] . . .” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In this matter, the Custodian’s failure to respond to the Complainant’s clarified OPRA request within seven (7) business days resulted in a “deemed” denial, and her response to the Complainant’s subsequent OPRA request was insufficient because she failed to provide a date certain on which she would respond to the Complainant. However, the Custodian did not unlawfully deny access to the Complainant’s two (2) OPRA requests because no records could be located. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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.

Here, the Complainant disputed the Custodian’s denial of access. However, after conducting an extension search for the responsive records, the Custodian certified in the SOI that she could not locate the responsive ordinance. Thus, the GRC is not ordering any relief as the Custodian did not unlawfully deny access to a record that she could not locate. For this reason, the Complainant is not a prevailing party entitled to an award of reasonable attorney’s fees

Accordingly, 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 requests because she could not locate any responsive records. 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 Custodian did not bear her burden of proof that he timely responded to the Complainant’s clarified OPRA request from September 18, 2014. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s clarified OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). See also Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-100 (Interim Order dated June 26, 2012).
2. Although the Custodian timely responded in writing to the Complainant’s October 29, 2014, OPRA request, said response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick v. NJ Dep’t of Transp., GRC Complaint No. 2007-164 (February 2008), because she failed to provide a date certain upon which she would respond to the Complainant. See also Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011); Papiez v. Cnty of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-65 (Interim Order dated April 30, 2013).
3. The Custodian did not unlawfully deny access to the Complainant’s two (2) OPRA requests because she certified in the Statement of Information that an extensive search failed to yield the responsive record, and there is no evidence in the record to refute

the Custodian's certification. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005); Valdez v. Union City Bd. of Education (Union), GRC Complaint No. 2011-50 (August 2012).

4. The Custodian's failure to respond to the Complainant's clarified OPRA request within seven (7) business days resulted in a "deemed" denial, and her response to the Complainant's October 29, 2014, OPRA request was insufficient because she failed to provide a date certain on which she would respond to the Complainant. However, the Custodian did not unlawfully deny access to the Complainant's two (2) OPRA requests because no records could be located. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
5. 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 requests because she could not locate any responsive records. 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.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

Reviewed By: Joseph D. Glover
Executive Director

September 22, 2015