

Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 30th Day of September, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: October 3, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 30, 2014 Council Meeting**

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

**GRC Complaint No. 2014-16
2014-62 and 2014-81²**

v.

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

Records Relevant to Complaint:

January 3, 2014 OPRA request:⁴ Based on two (2) documents attached regarding OR o/b/o OR v. West Windsor Plainsboro Reg'l Sch. Dist., Docket No. MER-L-2038-07 to the request: 1) "Defendant's response to Plaintiff's Request for Admission" ("Response") dated December 26, 2007, and 2) "Transcript of Motion Hearing" ("Transcript") dated June 21, 2007), electronic copies via e-mail of:⁵

Part A

1. Records showing the name, position, title and address of the "one who extracted the data."
2. Records showing the names and addresses of the other "persons" who the Custodian described as "not direct employees" of West Windsor-Plainsboro School District ("District").
3. Records showing how much the District paid the individuals described as "not direct employees of" the District.
4. Records showing names and addresses of the direct employees of each person described as "not direct employees" of the District.

Part B

1. Records showing the name, title, position and address of "the programmer."
2. Records showing how much the District paid "the programmer" for his or her services.
3. Records showing the name and address of the "direct employer of 'the programmer.'"

¹ No legal representation listed on record.

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

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

⁴ This OPRA request is the subject of GRC Complaint No. 2014-16.

⁵ The Complainant requested additional records that are not at issue in this complaint.

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January 5, 2014 OPRA request:⁶ Electronic copies via e-mail of records showing the name, position, title, name of employee and address for the person in charge of Methfessel & Werbel’s (“Firm”) internal filing system on February 6, 2006, the person at the Firm responsible for applying date-stamps on discipline records, the person at the Firm present when the date-stamps were applied to each discipline record and the name and address of the owner(s) of the computer and computer software used to apply the date-stamps on the files.

January 12, 2014 OPRA request:⁷ Electronic copies of records showing name, position, title, date of hire, date of termination, name of employer and correct address for Lisa Catalano, Jennifer Tanzer, the employee at ACE Insurance Company (“ACE”) who destroyed or “discarded” the “electronic images” of checks,” the employee at ACE who maintained “electronic images” of the checks in pdf, and the Bank of America employee that sent the electronic images to ACE.

Custodian of Record: Geraldine Hutner

Request Received by Custodian: January 5, 2014, January 7, 2014 and January 15, 2014

Response Made by Custodian: January 10, 2014 and January 21, 2014

GRC Complaint Received: January 15, 2014, January 04, 2014 and February 20, 2014

Background⁸

Request and Response:

January 3, 2014 OPRA request

On January 3, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

On January 10, 2014, the Custodian responded in writing as follows:

Part A

1. Neither the District nor Custodian’s Counsel maintains records identifying the individual that extracted the data referred to in the Response.
2. Neither the District nor Counsel maintains records identifying the individuals that Counsel referred to in the Response.
3. The District is unable to identify such individuals and is thus unable to provide records regarding payments that may have been made to them by the District or other employer.
4. The District is unable to identify such individuals and is thus unable to provide records identifying any “direct employees” of such individuals.

⁶ This OPRA request is the subject of GRC Complaint No. 2014-81.

⁷ This OPRA request is the subject of GRC Complaint No. 2014-62.

⁸ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

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Part B

1. Neither the District nor Counsel maintains records identifying the “programmer.”
2. See response to item No. 8.
3. See response to item No. 8.

January 5, 2014 OPRA request

On January 5, 2014, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On January 10, 2014, the Custodian responded in writing advising that the District did not possess any records regarding staff assignments at the Firm. Further, the Custodian stated that Counsel advised that to the extent that any records exist, they are not considered public records for purposes of OPRA.

On January 11, 2014, the Complainant contacted the Custodian’s Counsel disputing portions of the Custodian’s response to both requests that certain records did not exist. The Complainant sought clarification of whether the Custodian made an adequate effort to search for responsive records, including contacting Darren M. Maloney, Esq., who made mention of being in contact with the “programmer” in the Transcript. Counsel responded noting that neither the Custodian nor he had any intention of responding further on this matter.

January 12, 2014 OPRA request

On January 12, 2014, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On January 21, 2014, the Custodian responded in writing advising the Complainant stating that the District never employed an individual named Ms. Catalano or Ms. Tanzer. The Custodian further stated that the District possessed no information or public records regarding employees of ACE Insurance Company or Bank of America.

Denial of Access Complaint:

January 3, 2014 OPRA request

On January 15, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant argued that the Custodian violated OPRA by failing to provide records responsive to the relevant request items. The Complainant asserted that Mr. Maloney represented the District during the pendency of OR, Docket No. MER-L-2038-07, and provided in the Response that the individuals extracting data for the case were not “direct employees” of the District. Further, the Complainant asserted that Mr. Maloney commented during a motion hearing that he spoke with the “programmer.”

The Complainant contended that the Custodian had the ability to contact Mr. Maloney to obtain information on who these individuals were, but refused to do so. Thus, the Complainant argued that the Custodian could not deny access to records as non-existent when she intentionally refused to contact Mr. Maloney. The Complainant requested that the GRC order the Custodian to comply with OPRA and award reasonable attorney’s fees.

January 12, 2014 OPRA request

On January 29, 2014, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant first alleged that Ms. Catalano and Ms. Tanzer, who had access to District student records, are employed by Custodian's Counsel. The Complainant argued that because they had access to student records and work for Counsel, the Custodian had an obligation to obtain employment information from Counsel on both individuals. In support of his argument, the Complainant cited to Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010).

The Complainant further alleged that the Custodian had an obligation to obtain information on ACE employees because, 1) ACE is the District's insurance company, 2) the District paid ACE yearly premiums with public funds, 3) ACE was created by statute and is controlled by over 100 school boards in New Jersey and 4) ACE is paying Custodian's Counsel to perform a service for the District. The Complainant thus contended that the Custodian was obligated to obtain responsive records from either ACE or Counsel. In support of his argument, the Complainant cited to Burnett, 415 N.J. Super. 506, and Fair Share Hous. Ctr., Inc. v. League of Municipalities, 207 N.J. 489, 504 (2011).

January 5, 2014 OPRA request

On February 20, 2014, the Complainant filed a Denial of Access with the GRC. The Complainant stated that both the federal Family Education Rights and Privacy Act ("FERPA") and State regulations (N.J.A.C. 6A:32-7.1 through N.J.A.C. 6A:32-7.6) limit student record access to authorized organizations, agencies and persons to include third party agents of a school district. The Complainant further alleged that these laws require the districts to maintain records of the third parties to whom access to student records was granted.

To this end, the Complainant stated that the Custodian's Counsel, the attorney for the District, sent twelve (12) screen shots to the New Jersey Division of Civil Rights in 2006 and filed same in court as part of subsequent proceedings. The Complainant asserted that the Firm, to include the individual(s) handling the reports, performed a function restricted by Federal and State law to authorized parties; thus, the Firm is an agent of the District. For these reasons, the Complainant reiterated from above that the Custodian was obligated to obtain employee records from the Firm.⁹

Statement of Information:

January 3, 2014 OPRA request

On February 24, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on January 5, 2014 and responded on January 10, 2014. The Custodian certified that her search for responsive records

⁹ The Complainant noted that Custodian's Counsel attempted to claim immunity protections for employees at his law firm under the New Jersey Tort Claims Act, which applies to government employees. However, this statement is not confirmed by any evidence on the record and does not include any indication of whether the adjudicatory body handling that issue granted the alleged immunity request.

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was memorialized in her response to the Complainant.

The Custodian certified that no records responsive to the request items exist. The Custodian argued that OPRA only requires her to perform a search for responsive records, which she did. Further, the Custodian asserted that she was not obligated to divulge content of prior attorney-client privileged communications. N.J.S.A. 47:1A-1.1.

January 12, 2014 OPRA request

On February 24, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on January 15, 2014 and responded on January 21, 2014 advising that no responsive records exist. The Custodian certified that she searched District records to confirm whether Ms. Catalano and/or Ms. Tanzer ever worked for the District. After finding no evidence of employment, the Custodian sent the request to Custodian’s Counsel for advice.

The Custodian contended that the Court’s decision in Burnett, did not apply to the facts of this complaint. The Custodian argued that OPRA does not require a private law firm, insurance company or bank to disclose personnel information because same is not considered a government record. Finally, the Custodian noted that Ms. Catalano still works for the Firm, Ms. Tanzer is a former employee and Counsel did not know the identities of the other individuals described in the Complainant’s OPRA request.

January 5, 2014 OPRA request

On March 20, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on January 7, 2014 and responded on January 10, 2014. The Custodian certified that no search was conducted because no records existed.

The Custodian certified that no records responsive to this request exist. The Custodian argued that OPRA does not require a custodian to perform research for government records. Further, the Custodian contended that the definition of a “government record” does not encompass employment information and computer software at a private law firm. Finally, the Custodian asserted that she was not required to disclose any records containing attorney-client privileged communications.

Additional Submissions:

January 3, 2014 OPRA request

On March 8, 2014, the Complainant submitted two (2) cases which he maintained supported his position that the Custodian was required to make a good faith effort to search for the records sought prior to claiming that same did not exist.

The Complainant stated that in Branin v. Borough of Collingswood, 2012 N.J. Super. Unpub. LEXIS 1938 (App. Div. 2012), the Court made it clear that legal files were the property

of the defendant. The Complainant asserted that that holding applies here because Mr. Maloney represented the District and the Custodian and/or Custodian's Counsel should have contacted him regarding this request. The Complainant alleged that the District did not contact Mr. Maloney because they did not want the referenced individuals subpoenaed by the Complainant. The Complainant noted that the Law Division's decision in Paff v. Borough of Cliffside Park, 2014 N.J. Super. Unpub. LEXIS 437 (February 28, 2014) also supports his position.

January 12, 2014 OPRA request

On March 8, 2014, the Complainant submitted additional arguments in support of his position that the Custodian was required to obtain responsive personnel records from Custodian's Counsel, ACE and Bank of America. The Complainant contended that FERPA provides that school districts are required to keep record of third parties accessing student records. 34 C.F.R. 99.32(d). The Complainant asserted that a letter from the Director of the Family Policy Compliance Office, U.S. Department of Education, FERPA FAQ, Housing Research Department publication from November 2000, and State regulations support this position. Further, the Complainant reiterated his contention that the Court's holdings in Branin, 2012 N.J. Super. Unpub. LEXIS 1938, and Paff, 2014 N.J. Super. Unpub. LEXIS 437 supported his position. The Complainant contended that the Custodian denied his request in bad faith because Custodian's Counsel maintains all responsive records.

January 5, 2014 OPRA request

On March 29, 2014, the Complainant submitted additional arguments in support of his position that the Custodian was required to obtain responsive personnel records from the Custodian's Counsel. The Complainant noted that he was not seeking any records that would divulge attorney-client privileged communications. Further, the Complainant argued that names and addresses do not implicate attorney-client privilege and thus the Custodian is relying on this exemption in bad faith.

Regarding the requested Firm personnel records, the Complainant argued that the Firm likely has human resource records showing the names and addresses of individuals employed in the firm's file management system. The Complainant further contended that Counsel's argument that he did not know the names of individuals handling confidential student discipline records lacks credibility. Finally, the Complainant argued that the requested records are required to be disclosed to his client under FERPA and that the Custodian had an obligation to obtain same.

On April 5, 2014, the Complainant submitted to the GRC a copy of a letter from Arne Duncan, U.S. Secretary of Education, to the Honorable Edward J. Markey, U.S. Senator, dated January 13, 2014. The Complainant asserted that the letter further supports his position in this complaint, stating that "the . . . district is responsible for ensuring parental access, even if the education records are held by a third party contractor."

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

OPRA provides that:

Notwithstanding the provisions [OPRA] or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency . . . shall not be considered a government record and shall not be made available for public access . . . except that: an individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be government record;

N.J.S.A. 47:1A-10.

The Complainant’s three (3) OPRA requests at issue here sought personnel information and addresses for individuals employed by third parties who were involved in handling various litigation filed by the Complainant on behalf of O.R. Subsequent to the Custodian’s denial of access, the Complainant filed these complaints essentially arguing that under Branin, 2012 N.J. Super. Unpub. LEXIS 1938, and Paff, 2014 N.J. Super. Unpub. LEXIS 437, the Custodian had an obligation under OPRA to obtain personnel records of employees working for third party vendors and to disclose same. The Complainant also contended that FERPA and State regulations required the District to keep a record of individuals to whom access to student records was granted.

The Custodian conversely argued that OPRA does not require a private law firm, insurance company or bank to disclose personnel information because same is not considered a public record. Accordingly, the Custodian certified that no records responsive to the Complainant’s OPRA request exist.

Thus, the threshold issue here is whether a third party vendor’s personnel records for its own employees are “government records” under OPRA and are thus subject to disclosure pursuant to an OPRA request. The Appellate Division addressed this issue in Paff v. Cmty. Educ. Ctr., 2013 N.J. Super. Unpub. LEXIS 2813 (App. Div. 2013). There, the Education and Health Centers of America, Inc. (“EHCA”) entered into a contract with Essex County in 2011 and utilized Community Education Center (“CEC”) to provide services at Delaney Hall in Newark. Plaintiff, asserting that both EHCA and CEC were public agencies for purposes of OPRA, sought a number of records to include personnel information for three (3) individuals employed by CEC. At that time, CEC denied the request stating that they were not a public agency for

purposes of OPRA. After the trial court determined that CEC was not a “public agency” for purposes of OPRA, plaintiff appealed. The Court affirmed the trial court’s decision, reasoning that for CEC to be considered a public agency under OPRA, “. . . the private entity . . .” must be “. . . either created by government officials or subject to their control. Neither factor is present here.” Id. at 8.

Here, the records at issue are personnel records for Methfessel & Werbel, an unknown programming company, ACE and Bank of America. On their face, each agency is not a “public agency” for purposes of OPRA in that each is a private, for-profit business of which the District has no control over. Specifically, and contrary to the Complainant’s assertion that it was created by New Jersey statute, ACE (NYSE: ACE) is an international insurance company that offers multiple types of insurance for individuals and businesses.¹⁰ The Firm, created in 1972 with offices in three (3) states, provides services for “insurance and managed risk industry.”¹¹ Bank of America (NYSE: BAC) is an international bank with a long history of financial services.¹² Unfortunately, the GRC is unable to identify the programming company because of the lack of evidence on the record. However, it is likely that this company is similar to the others above.

Further, the facts of this complaint are distinguishable to the Appellate Division’s decisions in Branin, 2012 N.J. Super. Unpub. LEXIS 1938, and Paff, 2014 N.J. Super. Unpub. LEXIS 437 because the records at issue in those cases were settlement agreements and pleadings created and maintained “on behalf of” the public agencies. *See* Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 516-517 (May 10, 2010). The Court’s decision in Branin, and Paff, stand for the proposition that a public agency cannot send its own records to a third party vendor or cause same to create records on their behalf. Id.

Branin, and Paff, are inapplicable here because the requested records are of employees of private, for-profit businesses. Thus, this complaint is more closely related to those in Paff, 2013 N.J. Super. Unpub. LEXIS 2813. Specifically, it is obvious that the businesses in question are not public agencies as defined by OPRA and precedential case law. Further, it is clear that these businesses do not make or maintain their own personnel records for or on behalf of the District. As such, the Custodian was under no obligation to obtain and disclose the requested personnel records to the Complainant.

Therefore, the Custodian did not unlawfully deny access to the requested employee information of private, for-profit businesses. N.J.S.A. 47:1A-6; Paff, 2013 N.J. Super. Unpub. LEXIS 2813. Specifically, the Custodian was not obligated to obtain personnel information from those businesses and provide same to the Complainant because that information does not meet the definition of a “government record” under OPRA. N.J.S.A. 47:1A-1.1.

The GRC notes that the Complainant argued that both FERPA (34 C.F.R. 99.32(d)) and State regulations (N.J.A.C. 6A:32-7.1 through N.J.A.C. 6A:32-7.6) required the District to obtain employee information for those individuals accessing student records. Notwithstanding any

¹⁰ <http://www.acegroup.com/About-ACE/About-ACE.html> (accessed September 8, 2014).

¹¹ <http://methwerblaw.com/about-firm/> (accessed September 8, 2014).

¹² <http://about.bankofamerica.com/en-us/our-story.html#fbid=bWV3hTotHaz> (accessed September 8, 2014).

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requirements of these provisions that the District may not have met,¹³ there are no provisions therein that require an educational institution to obtain personnel information from parties contracted with the institution.

Finally, the GRC first notes that certain items contained in the Complainant's OPRA requests sought non-specific "records" of names and addresses of anonymous individuals. These request items, on their face, are invalid in accordance in prior GRC case law. See 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. at 37; Held v. Tewksbury First Aid & Rescue Squad (Hunterdon), GRC Complaint No. 2011-303 (December 2012) at 7; Owoh (On Behalf of O.R.) v. West Windsor-Plainsboro Reg'l Sch. Dist. (Mercer), GRC Complaint No. 2012-91 (Interim Order dated January 29, 2013). However, the GRC has declined to address this issue because the Custodian has adequately proved that no records existed, and that she was under no obligation to obtain such information from private, for-profit businesses not subject to OPRA.

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

¹³ The existence of any possible violation of State regulations and/or federal law is not within the GRC's authority to adjudicate. N.J.S.A. 47:1A-7(b).

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Black's Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties," Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

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

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

Mason at 73-76 (2008).

The Court in Mason, further held that:

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

Id. at 76.

In these matters, the Complainant, who filed these complaints on behalf of his client, contended that the Custodian had an obligation to obtain personnel records of employees working at private, for-profit businesses. Hence, he requested that the GRC order the Custodian to obtain same and to include each individual's home address. The Custodian, however, has not unlawfully denied access to the responsive personnel information from private, for-profit businesses because same are not "government records" under OPRA.

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, personnel records of private, for-profit companies are not "government records" subject to access under OPRA. 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 unlawfully deny access to the requested employee information of private, for-profit businesses. N.J.S.A. 47:1A-6; Paff v. Cmty. Educ. Ctr., 2013 N.J. Super. Unpub. LEXIS 2813 (App. Div. 2013). Specifically, the Custodian was not obligated to obtain personnel information from those businesses and provide same to the Complainant because that information does not meet the definition of a "government record" under OPRA. N.J.S.A. 47:1A-1.1.
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, personnel records of private, for-profit companies are not "government records" subject to access under OPRA. 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: Dawn R. SanFilippo, Esq.
Acting Executive Director

September 23, 2014