



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

June 27, 2017 Government Records Council Meeting

John Paff
Complainant

v.

County of Salem
Custodian of Record

Complaint No. 2015-342

At the June 27, 2017 public meeting, the Government Records Council (“Council”) considered the June 20, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the parties failed to reach a fee agreement, and because the Complainant’s Counsel subsequently submitted a timely fee application, the Council should determine the reasonable amount of attorney’s fees to which the Complainant is entitled.
2. The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel’s fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b) and provides the Council with detailed information from which to conduct its analysis. Noting that the Custodian did not object to the fees requested and having reviewed the application, the Council finds that 7.8 hours at \$300 per hour is reasonable for the work performed in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Complainant’s Counsel in the adjusted amount of \$2,310, representing 7.7 hours of service at \$300 per hour, or a decrease of 0.7 hours and \$210.00 from the originally filed fee application.**
3. Counsel declined a lodestar adjustment; thus, no enhancement should be awarded.

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 27th Day of June, 2017

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: June 30, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***Prevailing Party Attorney's Fees*
Supplemental Findings and Recommendations of the Executive Director
June 27, 2017 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2015-342

v.

**County of Salem²
Custodial Agency**

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

1. For Gross v. Pelura, Docket No. SLM-L-179-14, copies of (a) the civil complaint; (b) the order to stay proceeding entered on or about April 10, 2015; and (c) any written decisions by Judge McMaster in this case.
2. For Foreman, Jr. v. Cnty., Docket No. SLM-L-54-14, copies of the (a) complaint filed on or about March 28, 2014 and (b) any settlement agreement that resolved this case.
3. For Coleman v. Cnty., Docket No. SLM-L-116-14, copies of (a) the complaint filed on or about March 28, 2014 and (b) any settlement agreement that resolved this case.
4. For Penns Grove Dem. Comm. v. Salem Clerk, et. al, Docket No. SLM-L-91-15, copies of (a) the complaint filed on or about May 28, 2015 and (b) Roxanne Forman's *pro se* motion to dismiss, together with its supporting affidavit/certification and brief.

Custodian of Record: Curtis W. Harker

Request Received by Custodian: August 25, 2015

Response Made by Custodian: October 16, 2015 and November 10, 2015

GRC Complaint Received: November 5, 2015

Background³

April 25, 2017 Council Meeting:

At its April 25, 2017 public meeting, the Council considered the April 18, 2017 Findings

¹ Represented by Ted M. Rosenberg, Esq. (Moorestown, NJ).

² Represented by Michael M. Mulligan, Esq. (Salem, NJ).

³ The parties may have submitted additional correspondence or made additional statement/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.

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, found that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the 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).
2. Notwithstanding the "deemed" denial, because the Custodian provided to the Complainant all responsive records on October 15, and November 10, 2015, and because there is no competent, credible evidence in the record to refute the Custodian's certification, the Custodian has met his burden of proving that there was no unlawful denial of access. N.J.S.A. 47:1A-6; Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
3. The Custodian failed to respond timely to the Complainant's OPRA request, thus resulting in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian ultimately provided all responsive records on October 15 and November 10, 2015. Further, 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 did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. The Complainant has 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 exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian disclosed responsive records to the Complainant after the filing of this complaint. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is 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. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Procedural History:

On April 27, 2017, the Council distributed its Interim Order to all parties, providing them twenty (20) business days, or until May 25, 2017, to reach a fee agreement.

On May 11, 2017, the Custodian's Counsel submitted a fee application. Therein, Counsel certified that he attempted to contact the Custodian's Counsel, both in writing and telephonically, without success. The GRC received no further correspondence from the parties.

Analysis

Compliance

At its April 25, 2017 meeting, the Council ordered the parties to “confer in an effort to decide the amount of reasonable attorney’s fees” and notify the Government Records Council (“GRC”) of any fee agreement. Further, the Council ordered that, should the parties not reach an agreement, the Complainant’s Counsel “shall submit a fee application . . . in accordance with N.J.A.C. 5:105-2.13.” On April 27, 2017, the Council distributed its Interim Order to all parties, providing the parties twenty (20) business days to reach a fee agreement. Thus, the parties were required to notify the GRC of any agreement by May 25, 2017.

On May 11, 2017, the eleventh (11th) business day after receipt of the Order, the Complainant’s Counsel submitted a fee application. Therein, he certified that he attempted to contact Custodian’s Counsel to resolve the fee issue and that he received no reply. The Complainant’s Counsel also included a fee application (without attachments). The GRC received no further communications from the parties.

Therefore, because the parties failed to reach a fee agreement, and because the Complainant’s Counsel subsequently submitted a timely fee application, the Council should determine the reasonable amount of attorney’s fees to which the Complainant is entitled.

Prevailing Party Attorney Fee Award

“Under the American Rule, adhered to by the . . . courts of this state, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney’s fee from the loser.” Rendine v. Pantzer, 141 N.J. 292, 322 (1995) (internal quotation marks omitted). However, this principle is not without exception. New Jerseyans for a Death Penalty Moratorium v. N.J. Dep’t of Corrections, (“NJMDP”) 185 N.J. 137, 152 (2005). Some statutes, such as OPRA, incorporate a “fee-shifting measure: to ensure ‘that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in cases involving statutory rights, . . . and to ensure justice for all citizens.’” Id. at 153 (*quoting* Coleman v. Fiore Bros., 113 N.J. 594, 598, (1989)).

OPRA provides that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State.” Id. at 152 (*citing* N.J.S.A. 47:1A-1). OPRA further 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. *See generally* NJDPM, 185 N.J. at 137 (“By making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the Legislature intended to even the fight.” Id. at 153. (*quoting* Courier News v. Hunterdon Cnty. Prosecutor’s Office, 378 N.J. Super. 539, 546 (App. Div. 2005)).

In the instant matter, the Council found the Complainant achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the [C]ustodian’s conduct.” Teeters, 387 N.J. Super. at 432. Further, the Council found a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 73. Accordingly, the Council ruled that the Complainant was a prevailing party, who is entitled to an award of a reasonable attorney’s fee, and ordered the parties to cooperate in an effort to reach an agreement on fees. Absent the parties’ ability to reach an agreement, the Council provided the Complainant’s Counsel an opportunity to file an application for fees.

A. Standards for Fee Award

The starting “‘point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate,’ a calculation known as the lodestar.” Rendine, 141 N.J. at 324 (*quoting* Hensley v. Eckerhart, 461 U.S. 424, 434 (1983)). Hours, however, are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. Hensley, 461 U.S. at 434. When determining the reasonableness of the hourly rate charged, the GRC should consider rates for similar services by lawyers of reasonably comparable experience, skill and reputation in the same geographical area. Walker v. Giuffre, 415 N.J. Super. 597, 606 (App. Div. 2010) (*quoting* Rendine, 141 N.J. at 337). However, the fee-shifting statutes do not contemplate payment for the learning experience of attorneys for the prevailing party. HIP (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc., 291 N.J. Super. 144, 160 (*citing* Council Entm’t, Inc. v. Atlantic City, 200 N.J. Super. 431, 441-42 (Law Div. 1984)).

Additionally, the NJDPM Court cautioned that “unusual circumstances may occasionally justify an upward adjustment of the lodestar,” but further cautioned that “[o]rordinarily[] the facts of an OPRA case will not warrant an enhancement of the lodestar amount because the economic risk in securing access to a particular government record will be minimal. For example, in a ‘garden variety’ OPRA matter . . . enhancement will likely be inappropriate.” Id. at 157. OPRA neither mandates nor prohibits enhancements. NJDPM, 185 N.J. at 157. However, “[b]ecause enhancements are not preordained . . . [they] should not be made as a matter of course.” Ibid. The loadstar enhancement may be adjusted, either upward or downward, depending on the

degree of success achieved. *Id.* at 153-55. “[T]he critical factor in adjusting the lodestar is the degree of success obtained.” *Id.* at 154 (*quoting* Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 556 (App. Div. 1993) (*quoting* Hensley, 461 U.S. at 435)). If “a plaintiff has achieved only partial or limited success . . . the product of hours reasonably expended on the litigation . . . times a reasonable hourly rate may be an excessive amount.” NJDPM, 185 N.J. at 153 (*quoting* Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (internal quotation marks omitted)). Conversely, “[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.” NJDPM, 185 N.J. at 154 (*quoting* Hensley, 461 U.S. at 435).

Moreover, in all cases, an attorney’s fee must be reasonable when interpreted in light of the Rules of Professional Conduct. For instance, in Rivera v. Bergen Cnty. Prosecutor’s Office, 2012 N.J. Super. Unpub. LEXIS 2752 (December 11, 2012) (*citing* Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21-22 (2004)), the trial court stated that:

To verify the reasonableness of a fee, courts must address: 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and 8) whether the fee is fixed or contingent.

Rivera, 2012 N.J. Super. Unpub. LEXIS 2752, at 11 (*applying* R.P.C. 1.5(a)).

In addition, N.J.A.C. 5:105-2.13 sets forth the information that counsel must provide in his or her application seeking fees in an OPRA matter. Providing the requisite information required by its regulations permits the Council to analyze the reasonableness of the requested fee.

Finally, the Court has noted that “[i]n fixing fees against a governmental entity, the judge must appreciate . . . that ‘the cost is ultimately borne by the public’ and that ‘the Legislature . . . intended that the fees awarded serve the public interest as it pertains to those individuals who require redress in the context of a recognition that limited public funds are available for such purposes.’” HIP, 291 N.J. Super. at 167 (*quoting* Furey v. Cnty. of Ocean, 287 N.J. Super. 42, 46 (1996)).

B. Evaluation of Fee Application

1. Lodestar Analysis

a. Hourly Rate

In the instant matter, Counsel is seeking a fee award of \$2,520.00, representing 8.4 hours at \$300 per hour. In support of this hourly rate, Counsel certified that he entered into a fee agreement with the Complainant in that amount. Further, Counsel certified that he has been a full time attorney since 1981 and has participated in hundreds of trials in both the Superior Court and municipal courts, with many resulting published opinions. Rosenberg Certif. at ¶ 8(a), (b), and (d). Counsel further affirmed that he has hundreds of clients and represented eleven (11) different State municipalities and boards during his career. Rosenberg Certif. at ¶ 8(c) and 9. Counsel finally certified that he never committed any ethical breaches and has never lost a fee arbitration. Rosenberg Certif. at ¶ 11.

With respect to Counsel's request for a \$300 hourly rate, he cites to his 36 years of full time professional experience before Superior Courts of New Jersey as well as before municipal courts. Rosenberg Certif. at ¶ 8. Although the extent of Counsel's specific experience with OPRA is unclear, he asserts that he has represented several State municipalities and boards, where he likely would have had to address OPRA issues after its inception in 2002.

Based on the foregoing, the rate of \$300 is reasonable for a practitioner with Counsel's experience and skill level in this geographical area.

b. Time Expended

In support of his request for fees, Counsel submitted a log of his time. For the period from November 2, 2015, through May 10, 2017, Counsel billed a total of 8.4 hours for work on the file. This included reviewing the file, reviewing e-mail correspondence to and/or from the GRC, communicating with the client regarding the action, participating in mediation, and preparing a fee application.

In accordance with the mandates of N.J.A.C. 105-2.13(b), Counsel's time sheet mostly provided detailed descriptions of the exact work performed in the required tenths of an hour. N.J.A.C. 105-2.13(b)(5). The entries are broken into time increments of one tenth of an hour, with an accompanying description of the work performed. Time entries of exchanges identify the entity or individual with whom Complainant's Counsel communicated. However, there is one instance where Complainant's Counsel provides a vague description of work: a November 2, 2015 entry, reflecting a charge of 1.2 hours for "[r]eview of GRC Rules and OPRA provisions re: Deadlines."

The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel's fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b) and provides the Council with enough detailed information from which to conduct its analysis.

The GRC finds that the accounting of charges is mostly acceptable with the exception of the November 2, 2015 entry for 1.2 hours charged for "[r]eview of GRC Rules and OPRA provisions re: Deadlines." For this entry, the GRC believes that 1.2 hours represents an excessive amount of time to research GRC deadlines, especially given Complainant Counsel's experience. The description of exactly what deadlines Complainant's Counsel needed to research is unclear

due to the vague nature of the entry. However, the GRC's deadlines are easily obtainable from its regulations, which are posted on the GRC's website. Additionally, the Complainant's Counsel could have contacted the GRC directly to inquire about agency deadlines or consulted with the Complainant, who is widely known as an open government advocate with years of OPRA experience. Ultimately, it is more reasonable to allow for a charge of 0.5 hours to complete the task vaguely described by Counsel.

Noting that the Custodian did not object to the fees requested and having reviewed the application, the Council finds that 7.7 hours at \$300 per hour is reasonable for the work performed in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Complainant's Counsel in the adjusted amount of \$2,310, representing 7.7 hours of service at \$300 per hour, or a decrease of 0.7 hours and \$210.00 from the originally filed fee application.**

2. Enhancement Analysis

Counsel declined a lodestar adjustment; thus, no enhancement should be awarded.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the parties failed to reach a fee agreement, and because the Complainant's Counsel subsequently submitted a timely fee application, the Council should determine the reasonable amount of attorney's fees to which the Complainant is entitled.
2. The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel's fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b) and provides the Council with detailed information from which to conduct its analysis. Noting that the Custodian did not object to the fees requested and having reviewed the application, the Council finds that 7.8 hours at \$300 per hour is reasonable for the work performed in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Complainant's Counsel in the adjusted amount of \$2,310, representing 7.7 hours of service at \$300 per hour, or a decrease of 0.7 hours and \$210.00 from the originally filed fee application.**
3. Counsel declined a lodestar adjustment; thus, no enhancement should be awarded.

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

June 20, 2017



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

April 25, 2017 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2015-342

v.

County of Salem
Custodian of Record

At the April 25, 2017 public meeting, the Government Records Council (“Council”) considered the April 18, 2017 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 his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the 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).
2. Notwithstanding the “deemed” denial, because the Custodian provided to the Complainant all responsive records on October 15, and November 10, 2015, and because there is no competent, credible evidence in the record to refute the Custodian’s certification, the Custodian has met his burden of proving that there was no unlawful denial of access. N.J.S.A. 47:1A-6; Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
3. The Custodian failed to respond timely to the Complainant’s OPRA request, thus resulting in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian ultimately provided all responsive records on October 15 and November 10, 2015. Further, 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 did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.



4. The Complainant has 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 exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian disclosed responsive records to the Complainant after the filing of this complaint. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is 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. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant’s Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Interim Order Rendered by the
Government Records Council
On The 25th Day of April, 2017

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: April 27, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 25, 2017 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2015-342

v.

**County of Salem²
Custodial Agency**

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

1. For Gross v. Pelura, Docket No. SLM-L-179-14, copies of (a) the civil complaint; (b) the order to stay proceeding entered on or about April 10, 2015; and (c) any written decisions by Judge McMaster in this case.
2. For Foreman, Jr. v. Cnty., Docket No. SLM-L-54-14, copies of the (a) complaint filed on or about March 28, 2014 and (b) any settlement agreement that resolved this case.
3. For Coleman v. Cnty., Docket No. SLM-L-116-14, copies of (a) the complaint filed on or about March 28, 2014 and (b) any settlement agreement that resolved this case.
4. For Penns Grove Dem. Comm. v. Salem Clerk, et. al, Docket No. SLM-L-91-15, copies of (a) the complaint filed on or about May 28, 2015 and (b) Roxanne Forman's *pro se* motion to dismiss, together with its supporting affidavit/certification and brief.

Custodian of Record: Curtis W. Harker

Request Received by Custodian: August 25, 2015

Response Made by Custodian: October 16, 2015 and November 10, 2015

GRC Complaint Received: November 5, 2015

Background³

Request and Response:

On August 20, 2015, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On August 25, 2015, the

¹ Represented by Ted M. Rosenberg, Esq. (Moorestown, NJ).

² Represented by Michael M. Mulligan, Esq. (Salem, 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.

Custodian wrote to the Complainant, acknowledging receipt of the request. He additionally wrote, “[I] will begin to fulfill it.”

On October 15, 2015, the thirty-fifth (35th) business day after receipt of the subject OPRA request, the Custodian responded to the Complainant in writing, attaching records responsive to item No. 3 of the request. He also advised that he awaited “further information” on the other OPRA request items.

Denial of Access Complaint:

On November 5, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that three (3) out of the four (4) requested items remained unfulfilled. He noted that OPRA requires requests to be fulfilled or denied within seven (7) business days of a request’s receipt. He argued that the Custodian’s failure to grant access, deny access, obtain an extension of time, or seek clarification of the remaining request items constituted a “deemed” denial.

The Complainant thus requested that the Council: 1) order the Custodian to disclose all remaining responsive records; and 2) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees.

Supplemental Response:

On November 10, 2015, the Custodian sent multiple e-mails to the Complainant, attaching a number of responsive records.⁴

Statement of Information:

On April 5, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on August 25, 2015. The Custodian certified that upon receipt of the request, his office contacted the Salem County (“County”) Legal Department to provide any responsive documents. The Custodian stated that “since the search was ongoing until October 16, 2015,” when the first items were disclosed, he did not obtain any extensions of time from the Complainant. The Custodian certified that he initially responded in writing on October 16, 2015,⁵ providing the Complainant with records responsive to item No. 3 and advising that he was awaiting “further information” on the other three (3) request items. The Custodian certified that he received the final batch of records responsive to OPRA request item Nos. 1, 2, and 4, on November 10, 2015, and disclosed them to the Complainant at that time. The Custodian affirmed that, “due to waiting on the Courts to provide ‘stay order’ and ‘settlement’ documents,” he delayed disclosure of those records.

⁴ The GRC notes that neither the Custodian nor the Complainant provided a copy of these e-mails. However, the Complainant confirmed receipt of them in his April 9, 2016 response to the Statement of Information.

⁵ The evidence of record actually indicates that the Custodian first provided the records responsive to item No. 3 on October 15, 2015.

Regarding item No. 1, the Custodian certified that he disclosed all responsive records but had “no stay order to provide.” Regarding item No. 2, the Custodian averred that he provided copies of the relevant complaint but had “no settlement record to provide.” Regarding item No. 3, the Custodian certified that he provided all responsive records, with redactions to the medical history, pursuant to the Health Insurance Portability and Accountability Act, 45 CFR Part 160 and Subparts A & E of Part 164. Regarding item No. 4, the Custodian averred that he disclosed all responsive records.

The Custodian asserted that he now recognized that instead of “holding open” the OPRA request while waiting for future documents to be created, he should have “closed out” the request as “no further documents exist.”

Additional Submissions:

On April 9, 2016, the Complainant’s Counsel submitted a response to the Custodian’s SOI.⁶ Therein, Counsel contended that, contrary to the Custodian’s assertion that he was “waiting on the Courts” to provide certain requested items, all of the records requested except for the Forman settlement agreement existed at the time of the Complainant’s request. He argued that there was no justification for the Custodian’s failure to provide responsive records in a timely manner. The Complainant’s Counsel attached screenshots from the NJ Courts website showing the following: 1) in Forman, Jr., Docket No. SLM-L-54-14, an entry marked “Not Settled” and dated April 1, 2016; 2) in Gross, Docket No. SLM-L-179-14, an entry marked “Ord Stay Proceed” and dated April 10, 2015; and 3) in Penns Grove, Docket No. SLM-L-91-15, an entry marked “Motion Dismissed” and dated August 13, 2015.

The Complainant’s Counsel’s submission included an additional certification by the Complainant. Therein, the Complainant certified that, as of the date of the filing of his GRC complaint, he had not received a response for the following records:

- Item No. 1 :
 - a) Civil Complaint in Gross, Docket No. SLM-L-179-14.
 - b) Order to Stay Proceedings in Gross, Docket No. SLM-L-179-14, and dated April 10, 2015.
 - c) Any written decisions by Judge McMaster in Gross, Docket No. SLM-L-179-14.
- Item No. 2:
 - a) Complaint filed on or about March 28, 2014 in Forman, Jr., Docket No. SLM-L-54-14.
 - b) Settlement agreement that resolved Forman, Jr., Docket No. SLM-L-54-14.
- Item No. 4:
 - a) Complaint filed on or about May 28, 2015 in Penns Grove Dem. Comm., Docket No. SLM-L-91-15.
 - b) Roxanne Forman’s *pro se* motion to dismiss together with its supporting affidavit/certification and brief in Penns Grove Dem. Comm., Docket No. SLM-L-91-15.

⁶ On May 11, 2016, the Custodian provided a more detailed document index per the GRC’s May 5, 2016 request for same.

The Complainant certified that on November 10, 2015, he received six (6) e-mails from the Custodian, five (5) of which contained attachments. The Complainant certified that those records satisfied the following items from above: 1(a) Civil Complaint in Gross; 1(b) Order to Stay in Gross; and 4(a) Complaint in Penns Grove. He certified that the Custodian's sixth (6th) e-mail advised that Forman, was awaiting arbitration and asked if the Complainant wished for the request to be held open until the settlement was finalized.

The Complainant noted that the "NJ Courts Public Access" screenshots attached to his certification showed that the matter was not ultimately settled until April 1, 2016. He noted that, accordingly, no document responsive to the portion of his request seeking the Forman settlement agreement (item No. 3(b) of the OPRA request) existed at the time of his OPRA request. However, the Complainant also averred that the aforementioned screenshots evidenced that records responsive to item No. 1(b) (Order to Stay in Gross)⁷ and item No. 4(b) (*pro se* motion in Penns Grove) did exist at the time of his OPRA request. He averred that he was unaware of whether records responsive to item No. 1(c) (written decision by Judge McMaster in Gross) existed, as the Custodian had yet to inform him of whether any written decisions in existed.

On February 8, 2017, the GRC sent a request for additional information, seeking clarification as to whether responsive records existed for item Nos. 1(c) and 4(b) of the OPRA request, and, if so, whether he disclosed such records to the Complainant. On March 13, 2017, the Custodian responded to the GRC's request, certifying that there were "no further records other than what has been . . . provided" to the Complainant "for [Gross, and Penn's Grove]."

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).⁸ 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).

Here, the Custodian certified in the SOI that he received the Complainant's OPRA request on August 25, 2015. The Custodian certified that he provided records responsive to item No. 3 on October 16, 2015. The GRC notes that the evidence actually supports that the Custodian responded on October 15, 2015. Notwithstanding the distinction, the Custodian still failed to respond in writing to the Complainant's OPRA request until roughly thirty-five (35)

⁷ The Complainant noted in the same submission that he received this record on November 10, 2015.

⁸ 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.

business days after receipt (accounting for holidays). The evidence thus clearly supports a “deemed” denial.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the 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, GRC 2007-11.

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 Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the custodian produced one (1) responsive record to the complainant’s OPRA request and stated that no other responsive records existed. The complainant argued that additional records existed. The GRC asked the custodian to certify as to whether all responsive records were produced. The custodian subsequently certified that the disclosed document was the only responsive record. In reviewing the matter, the GRC held that:

The Custodian certified that the [c]omplainant was in receipt of all contracts and agreements responsive to the request. The [c]ustodian has met the burden of proving that all records in existence responsive to the request were provided to the [c]omplainant. Therefore there was no unlawful denial of access.

Id.

Here, the Complainant requested several identifiable filings from four (4) lawsuits in which the County was a participant. The Custodian disclosed a number of records on October 15, and November 10, 2015, respectively and subsequently certified in the SOI that all records were provided. In response to the SOI, Complainant asserted that the Custodian did not advise whether a final decision in Gross, Docket No. SLM-L-179-14, existed. Further, the Complainant submitted evidence indicating that the *pro se* motion he sought in Penn’s Grove Dem. Comm., Docket No. SLM-L-91-15 was filed with the Court on August 13, 2015, prior to submission of the subject OPRA request. Thereafter, the GRC asked the Custodian to clarify whether any of the records the Complainant identified existed and were provided. The Custodian responded on March 13, 2017, certifying that no additional records regarding Gross, Docket No. SLM-L-179-14, and Penn’s Grove Dem. Comm., Docket No. SLM-L-91-15, existed.

Upon review of all the evidence submitted, the GRC is satisfied that the Custodian properly provided all responsive records and that no other records exist. Specifically, the Custodian affirmatively answered that no decision in Gross, Docket No. SLM-L-179-14, existed.

Additionally, while the Complainant submitted evidence that the *pro se* brief in Penn's Grove Dem. Comm., Docket No. SLM-L-91-15, was filed with the Court, this evidence does not prove that the County was also in possession of it.

Therefore, notwithstanding the “deemed” denial, because the Custodian provided to the Complainant all responsive records on October 15, and November 10, 2015, and because there is no competent, credible evidence in the record to refute the Custodian’s certification, the Custodian has met his burden of proving that there was no unlawful denial of access. N.J.S.A. 47:1A-6; Burns, GRC 2005-68.

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)).

Here, the Custodian failed to respond timely to the Complainant’s OPRA request, thus resulting in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian ultimately provided all responsive records on October 15 and November 10, 2015. Further, 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 did 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.

In the matter before the Council, the Custodian initially provided the Complainant records responsive to his OPRA request item No. 3 on October 15, 2015, albeit well beyond the statutorily mandated time frame. The Custodian also noted that he awaited “further information” on the remaining items. Thereafter, the Complainant filed the instant complaint on November 5, 2015, requesting that the GRC require the Custodian to disclose any remaining records responsive to the subject OPRA request. Finally, on November 10, 2015, the Custodian provided the remaining records. In the SOI, the Custodian certified that the delay in disclosure was due to the fact that he awaited the Court’s actions on two of the cases.

The evidence of record thus brings into question whether this complaint was the casual nexus for the Custodian’s final disclosure on November 10, 2015. However, notwithstanding any argument from the County regarding whether it would have responded in the absence of a complaint, the GRC is satisfied that the filing of this complaint caused the Custodian to produce the remaining responsive records on November 10, 2015. Thus, the GRC is satisfied that the Complainant is a prevailing party entitled to an award of attorney’s fees.

Accordingly, the Complainant has 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 exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Custodian disclosed responsive records to the Complainant after the filing of this complaint. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is 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. **Based on this determination, the parties**

shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the 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).
2. Notwithstanding the "deemed" denial, because the Custodian provided to the Complainant all responsive records on October 15, and November 10, 2015, and because there is no competent, credible evidence in the record to refute the Custodian's certification, the Custodian has met his burden of proving that there was no unlawful denial of access. N.J.S.A. 47:1A-6; Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
3. The Custodian failed to respond timely to the Complainant's OPRA request, thus resulting in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian ultimately provided all responsive records on October 15 and November 10, 2015. Further, 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 did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. The Complainant has 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 exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian disclosed responsive records to the Complainant after the filing of this complaint. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is 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. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's**

fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

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