



State of New Jersey
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Commissioner

FINAL DECISION

February 26, 2019 Government Records Council Meeting

Stuart J. Moskowitz, Esq.
(o/b/o KK Ventures, LLC)
Complainant

Complaint No. 2015-411

v.

Stockton University
Custodian of Record

At the February 26, 2019 public meeting, the Government Records Council (“Council”) considered the February 19, 2019 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’s response was insufficient because he failed to respond in writing to each correspondence request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. The Custodian did not unlawfully deny access to the first section of the Complainant’s request which sought the contract of sale and related documentation, since the Custodian certified that such records do not exist because the sale had not closed as of the date of the request. And the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. See Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian did not unlawfully deny access to the second section of the Complainant’s request which sought “[a]ll correspondence ... ” since said request is invalid because it fails to seek identifiable government records. N.J.S.A. 47:1A-6. MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005), N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 8, 2010) and Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011).
4. Although the Custodian failed to respond to each request item individually, he did bear his burden of proving that the denial of access to requested records was authorized by law. Additionally, the evidence of record does not indicate that the Custodian’s actions

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had a positive element of conscious wrongdoing or were 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.

5. 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, the Custodian bore his burden of proving that the denial of access to requested records, in whole and in part, was authorized by law. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. N.J.S.A. 47:1A-6; Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006); and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008).

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 26th Day of February, 2019

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: March 1, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
February 26, 2019 Council Meeting**

Stuart J. Moskowitz, Esq.
(On behalf of KK Ventures, LLC)¹
Complainant

GRC Complaint No. 2015-411

v.

Stockton University²
Custodial Agency

Records Relevant to Complaint: Electronic copies of “[c]ontract of sale, unredacted except as to buyer’s personal identification information, and all related sale documents involving the sale of the former Showboat casino and hotel property to Bart Blatstein, and/or any entity by which he acquired ownership and/or control of the property, including any side agreements, conditional agreements, leases, or any other legal document by and between Stockton University and Bart Blatstein and/or any entity by which he acquired ownership and/or control of the former Showboat casino and hotel property. All correspondence, whether by letter, email or any other form of communication and any memorialization of any telephone calls regarding, relating to or referring to the sale of the former Showboat casino and hotel property by Stockton University to Bart Blatstein, and/or any entity by which he acquired ownership and/or control of the property.”

Custodian of Record: Ellen Bailey, Esq.³

Request Received by Custodian: October 20, 2015

Responses Made by Custodian: October 20, 2015, October 26, 2015, October 28, 2015 and November 16, 2015

GRC Complaint Received: December 23, 2015

Background⁴

Request and Responses:

On October 20, 2015, the Complainant’s Counsel (hereinafter “Complainant”) submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 20, 2015, the date the request was received, the Custodian notified the

¹ Client, KK Ventures, LLC, represented by Complainant, Stuart J. Moskowitz, Esq. (Freehold, NJ).

² Represented by Maeve E. Cannon, Esq., of Stevens & Lee (Lawrenceville, NJ). Previously represented through the Statement of Information by Craig Bossong, Esq., of Florio Perrucci Steinhardt & Fader, LLC (Rochelle Park, NJ).

³ Thomas P. Chester was the original Custodian; Ms. Bailey is the present Interim Records Custodian.

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Council Staff the submissions necessary and relevant for the adjudication of this complaint.

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Complainant in writing that he received the request and the response would be due on October 29, 2015. On October 26, 2015, the fourth (4th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that the request would require additional time to fulfill. On October 28, 2015, the sixth (6th) business day following receipt of said request, the Custodian again responded in writing informing the Complainant that he would need an extension of time until November 16, 2015, at which time the Custodian anticipated that records could be provided. On November 16, 2015, the Custodian responded in writing informing the Complainant that the records listed in an attached document index have been provided in redacted form, with the reasons for the redactions listed on the document index.

The Custodian attached a document index. The Custodian broke the Complainant's request down into two sections. The first section was the request for:

Contract of sale, unredacted except as to buyer's personal identification information, and all related sale documents involving the sale of the former Showboat casino and hotel property to Bart Blatstein, and/or any entity by which he acquired ownership and/or control of the property, including any side agreements, conditional agreements, leases, or any other legal document by and between Stockton University and Bart Blatstein and/or any entity by which he acquired ownership and/or control of the former Showboat casino and hotel property.

The second section was the request for:

All correspondence, whether by letter, email or any other form of communication and any memorialization of any telephone calls regarding, relating to or referring to the sale of the former Showboat casino and hotel property by Stockton University to Bart Blatstein, and/or any entity by which he acquired ownership and/or control of the property.

The Custodian denied the first section of the request as an invalid request because he asserted that the request failed to identify the documents sought. The Custodian also denied access because he stated that the Open Public Meetings Act provides for certain discussions and deliberations to occur outside the public domain. The Custodian further denied access pursuant to the "common interest rule."

With respect to the second section of the request, the Custodian disclosed thirteen (13) pieces of correspondence identified by Bates Stamped numbers which he redacted to remove certain personal identifying information. The Custodian also disclosed two (2) pieces of correspondence identified by Bates Stamped numbers which he redacted to remove attorney-client communications and attorney work product pursuant to the "common interest rule." Finally, the Custodian disclosed two (2) pieces of correspondence identified by Bates Stamped numbers which were noted as "conference access code is still in use."⁵

⁵ The Custodian's November 16, 2015 response was unclear as to the number of records disclosed in response to the second section of the request because the Custodian only listed *redacted* correspondence in the document index Stuart J. Moskovitz, Esq. (On behalf of KK Ventures, LLC) v. Stockton University, 2015-411 – Findings and Recommendations of the Council Staff

Denial of Access Complaint:

On December 23, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he submitted the OPRA request to the Custodian on October 16, 2015, and that the Custodian responded on October 20, 2015, informing the Complainant that Stockton University received the OPRA request on October 16, 2015; however, the Custodian did not receive the request until October 20, 2016. The Complainant further asserted that a second response from the Custodian dated October 26, 2015, informed him that the Custodian would need an extension of time. The Complainant further asserted that on October 28, 2015, the Custodian informed him that he would need an extension of time until November 16, 2015 to address the Complainant’s request.

The Complainant stated that on November 16, 2015, he received from the Custodian “some emails and text messages.” The Complainant stated that “no letters, memos or memoranda of telephone conversations” were provided. The Complainant stated that redacted e-mails were disclosed, but that “we do not know exactly what was redacted.” The Complainant included with the complaint a copy of the Custodian’s document index which was attached to the response.

The Complainant further stated that, other than the e-mails (which had no attachments), the Custodian disclosed only one text message thread in response to his request. The Complainant stated that the Custodian failed to disclose to him the requested contract of sale, together with all related sales and legal documents; however, the Complainant contends that the Custodian had “already made [it] public” by disclosing it to the *Philadelphia Inquirer* in redacted form.

Statement of Information:

On January 14, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on October 20, 2015, and following an unopposed extension of time, responded in writing on November 16, 2015.

The Custodian certified that he denied access to the contract of sale, together with “any side agreements, conditional agreements, leases, or any other legal document by and between Stockton University and Bart Blatstein and/or any entity by which he acquired ownership and/or control of the former Showboat casino and hotel property” because it was an invalid request. The Custodian stated that the request failed to identify the documents sought. The Custodian cited NJ Builders Ass’n v. NJ Council on Affordable Hous., 390 N.J.Super. 166, 180 (App. Div. 2007), Bent v. Stafford Police Dep’t, 381 N.J.Super. 30, 37 (App. Div. 2005), MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), and Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012) in support of his denial. The Custodian also denied access because he stated that N.J.S.A. 10:4-12 provides for certain discussions and deliberations to occur outside the public domain. The Custodian cited N.D. v. Rumson-Fair Haven Bd. of Educ., GRC Complaint No. 2003-56 (December 2003) in support of his decision to deny access based on this statute. Finally, the Custodian denied access pursuant to the “common

attached to the response. It only became clear when the Statement of Information was submitted that the Custodian disclosed records Bates Stamped 1 through 94.

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interest rule” which the Custodian stated extends the confidentiality of attorney-client communications and attorney work product to information shared with attorneys representing separate clients. The Custodian cited O’Boyle v. Borough of Longport, 218 N.J. 168 (2014).

With respect to the second section of the request seeking “[a]ll correspondence ... ” the Custodian certified that documents with Bates Stamps 18, 27, 56, 57, 61, 62, 64, 65, 67, 68, 76, 87, and 89 were redacted to remove the following personal identifying information pursuant to N.J.S.A. 47:1A-1.1: home addresses, unlisted telephone numbers, and social security numbers. The Custodian certified that documents Bates Stamped 38 and 39 were redacted to remove information pursuant to N.J.S.A. 10:4-12, which provides that certain discussions and deliberations are to occur outside the public domain. The Custodian cited N.D., GRC 2003-56 in support of this denial. The Custodian also denied access based upon the records containing attorney-client communications and attorney work product pursuant to the “common interest rule” as articulated in O’Boyle, 218 N.J. 168. E-mails Bates Stamped 71 and 90, were denied because the Custodian asserted that the conference access code was still in use.

The Custodian’s Counsel supported all of the Custodian’s reasons for denying access to the records set forth in the first section of the Complainant’s request (with exception of the contract of sale, which Counsel acknowledged was specifically identified). Counsel added, however, that the most substantial reason for denying the “contract of sale ... by which he [Bart Blatstein] acquired ownership and/or control of the former Showboat casino and hotel property” is that the sale had not yet closed. As such, Counsel argued that there was no record for the University to produce in response to the first section of the Complainant’s request because there has been no sale of the former Showboat casino and hotel property.

With respect to the second section of the Complainant’s request concerning “[a]ll correspondence” the Custodian’s Counsel stated that the Custodian disclosed responsive documents Bates Stamped 1 through 94. Counsel stated that the request for any additional records must be denied because the request was not valid as it did not specifically identify a government record. Counsel cites MAG, 375 N.J. Super. 534, N.J. Builders Ass’n, 390 N.J. Super. 166, Bent, 381 N.J. Super. 30 and the Council’s decision in Elcavage v. West Milford Twp., GRC Complaint No. 2009-07 (April 2010). Counsel supported the Custodian’s reasons for redacting 17 of the 94 documents the Custodian disclosed.

Additional Submissions:

On February 5, 2019, the GRC e-mailed the Complainant requesting a certification and any supporting documentation which revealed that at the time of the request the sale had occurred and Bart Blatstein had acquired ownership. On February 5, 2019, the Complainant replied to the GRC, informing the GRC that its e-mail was misdirected. The Complainant also stated that he had “no idea why the time of the sale was relevant to any document request.”

On February 5, 2019, the GRC e-mailed the Custodian’s attorney of record, Craig Bossong, Esq., to seek a fuller explanation for the redaction of records Bates Stamped 71 and 90 because the “conference access code is still in use.” On February 7, 2019, Stockton University Deputy General Counsel Ellen Bailey e-mailed the GRC to clarify that the reference to

“conference access code is still in use” means that the conference call in instructions and the host’s code are still in use and the host’s code was redacted so that third parties could not use the conference line.

Analysis

Sufficiency of Response

OPRA provides that a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g). Further, in Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that “...[t]he Custodian’s response was legally insufficient because he failed to respond to each request item individually.” Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g).

Here, the Custodian responded to the Complainant’s OPRA request on November 16, 2015, by providing responsive correspondence records Bates Stamped 1 through 94; however, the document index referenced in the response and attached thereto, identified only seventeen (17) Bates Stamped records. The GRC later learned that the records listed in the document index were only those records that contained redactions, and not all of the correspondence records that were determined to have been responsive to the request.

Therefore, the Custodian’s response was insufficient because he failed to respond in writing to each correspondence request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff, GRC 2007-272.

Unlawful Denial of Access

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

The GRC has determined that the first section of the Complainant’s request which seeks a “[c]ontract of sale ... involving the sale of the former Showboat casino and hotel property to Bart Blatstein” did specifically identify a record. However, the Custodian certified that the sale had not closed as of the date of the request; therefore, there was no contract of sale involving the sale of the former Showboat casino and hotel property to Bart Blatstein.

On February 5, 2019, the GRC asked the Complainant to provide the GRC with a certification and any supporting documentation which revealed that at the time of the request the sale had in fact occurred and Bart Blatstein had acquired ownership. On February 5, 2019, the Complainant replied to the GRC, informing the GRC that its e-mail was misdirected. The Complainant also stated that he had no idea why the time of the sale was relevant to any document request. As such, the Complainant was not responsive to the GRC’s inquiry.

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

Here, the Custodian certified that the “[c]ontract of sale ... involving the sale of the former Showboat casino and hotel property to Bart Blatstein,” did not exist because the sale had not closed as of the date of the request; therefore, there was no responsive record.

As such, the Custodian did not unlawfully deny access to the first section of the Complainant's request which sought the contract of sale and related documentation, since the Custodian certified that such records do not exist because the sale had not closed as of the date of the request. And the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer, GRC 2005-49.

The second section of the Complainant's request seeks “[a]ll correspondence, whether by letter, email or any other form of communication and any memorialization of any telephone calls regarding, relating to or referring to the sale of the former Showboat casino and hotel property by Stockton University to Bart Blatstein ... ”

The New Jersey Superior Court has held that “[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records readily accessible for inspection, copying, or examination.” MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) (citing N.J.S.A. 47:1A-1) (quotations omitted). The Court reasoned that:

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

Id. at 549 (emphasis added).

The Court further held that “[u]nder OPRA, *agencies are required to disclose only ‘identifiable’ government records* not otherwise exempt In short, OPRA does not countenance open-ended searches of an agency's files.” Id. (emphasis added). See also Bent v.

Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005), N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Moreover, in Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 8, 2010), the Council established criteria deemed necessary under OPRA to request an e-mail communication. For such requests to be valid, they must contain: (1) the content and/or subject of the e-mail(s), (2) the specific date or range of dates during which the e-mail(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. *See also* Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007). Thus, the Council has determined that requests seeking correspondence but omitting the specific date or range of dates are invalid. *See* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010). The Council has also applied the criteria set forth in Elcavage to other forms of correspondence, such as letters. *See* Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011).

Here, the Complainant sought “all correspondence” but failed to specifically identify any of the records. In particular, the Complainant failed to provide the specific date or range of dates during which the e-mails or other correspondence were transmitted and the identity of the sender and/or the recipient, as required by Elcavage, GRC 2009-07 and Armenti, GRC 2009-154.

Therefore, the Custodian did not unlawfully deny access to the second section of the Complainant’s request which sought “[a]ll correspondence ... ” since said request is invalid because it fails to seek identifiable government records. N.J.S.A. 47:1A-6. MAG, 375 N.J. Super. 534 at 546; Bent, 381 N.J. Super. 30 at 37; N.J. Builders Ass'n, 390 N.J. Super. 166 at 180; Schuler, GRC 2007-151; Elcavage, GRC 2009-07 and Armenti, GRC 2009-154.

Notwithstanding the Council’s finding that the Custodian was under no obligation to disclose any records for the second section of the request, the Custodian did disclose 94 such records, 17 of which were in redacted form. The Complainant did not contest the legality of any of the redactions; however, the Complainant did state that he did not know exactly what information was redacted. To the contrary, the GRC notes that accompanying the Custodian’s November 16, 2015 response was a document index which listed the items that were redacted, together with the reason for redaction.

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, although the Custodian failed to respond to each request item individually, he did bear his burden of proving that the denial of access to requested records was authorized by law. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were 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.

Here, the Custodian bore his burden of proving that the denial of access to the requested records was authorized by law. Further, the evidence of record reveals that the records that were disclosed in redacted form were lawfully redacted and the reason for the redactions was provided

to the Complainant. As such, the complaint did not bring about a change in the Custodian's conduct.

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, the Custodian bore his burden of proving that the denial of access to requested records, in whole and in part, was authorized by law. 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 Council Staff respectfully recommends the Council find that:

1. The Custodian's response was insufficient because he failed to respond in writing to each correspondence request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. The Custodian did not unlawfully deny access to the first section of the Complainant's request which sought the contract of sale and related documentation, since the Custodian certified that such records do not exist because the sale had not closed as of the date of the request. And the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. *See* Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian did not unlawfully deny access to the second section of the Complainant's request which sought "[a]ll correspondence ..." since said request is invalid because it fails to seek identifiable government records. N.J.S.A. 47:1A-6. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005), N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 8, 2010) and Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011).
4. Although the Custodian failed to respond to each request item individually, he did bear his burden of proving that the denial of access to requested records was authorized by law. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were 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.

5. 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, the Custodian bore his burden of proving that the denial of access to requested records, in whole and in part, was authorized by law. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. N.J.S.A. 47:1A-6; Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006); and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008).

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