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Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

May 24, 2016 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2015-56

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the May 24, 2016 public meeting, the Government Records Council (“Council”) considered the May 17, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted 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 February 4, 2015 OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing, 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. The Custodian lawfully denied access to the requested e-mail logs because no records responsive existed and he was not required to create them in order to respond to the Complainant’s four (4) OPRA requests. N.J.S.A. 47:1A-6; Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005); Eden v. Little Egg Harbor Twp. (Ocean), GRC Complaint No. 2014-369 (June 2015)(*citing* Fang v. Dep’t of Transp., GRC Complaint No. 2006-93 (May 2007) and Kehoe v. NJ Dep’t of Env’tl. Prot., Div. of Fish and Wildlife, GRC Complaint No. 2010-300 (July 2012)); Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005); Paff v. Galloway Twp., 2016 N.J. Super. LEXIS 54 (App. Div. 2016).
3. Although the Custodian’s failure to respond in a timely manner resulted in a “deemed” denial of access, the Custodian lawfully denied access to the e-mail log because he was not required to create same. N.J.S.A. 47:1A-6; Paff v. Galloway Twp., 2016 N.J. Super. LEXIS 54 (App. Div. 2016). Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.



4. 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 GRC determined that the Custodian lawfully denied access to the Complainant's four (4) OPRA requests because he was not required to create e-mail logs. 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. at 432, and Mason, 196 N.J. at 51.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 24th Day of May, 2016

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: May 27, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 24, 2016 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2015-56

v.

**Borough of South Bound Brook (Somerset)²
Custodial Agency**

Records Relevant to Complaint:

June 13, 2014 OPRA request: Electronic copy via e-mail of a record similar to the attached e-mail log³ that shows e-mails sent by the Custodian between June 1, 2014 and June 12, 2014.

June 23, 2014 OPRA request: Electronic copy via e-mail of a record similar to the attached e-mail log that shows e-mails sent by the Custodian between June 13, 2014 and June 22, 2014.

July 25, 2014 OPRA request: Electronic copy via e-mail of a record similar to the attached e-mail log that shows e-mails sent by the Custodian between June 23, 2014 and July 24, 2014.

September 22, 2014 OPRA request: Electronic copy via e-mail of a record similar to the attached e-mail log that shows e-mails sent by the Custodian between July 25, 2014 and September 22, 2014.

February 4, 2015 OPRA request: Electronic copy via e-mail of a record similar to the attached e-mail log that shows e-mails sent by the Custodian between September 23, 2014 and February 4, 2015.

Custodian of Record: Donald E. Kazar

Request Received by Custodian: June 13, 2014, June 23, 2014, July 25, 2015, September 22, 2014, and February 4, 2015

Response Made by Custodian: June 13, 2014, June 26, 2014, July 28, 2014, September 30, 2014, and February 18, 2015

GRC Complaint Received: March 9, 2015

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

² Represented by Francesco Taddeo, Esq. (Somerville, NJ).

³ The Complainant attached to his OPRA request an e-mail log that he had previously received in response to an unrelated OPRA request. The log appears to reflect e-mails sent from the Galloway Township Clerk's e-mail account.

Background⁴

Request and Response:

On June 13, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On the same day, the Custodian responded in writing, stating that no responsive record existed. The Complainant responded via e-mail, advising the Custodian that he could print an e-mail log in Microsoft Outlook® through the print screen by selecting the “Table Style” option. The Custodian responded via e-mail, stating that he would have to check into the matter as he was not familiar with the process.

On June 23, 2014, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On June 26, 2014, the Custodian responded in writing, stating that no records exist. On the same day, the Complainant reiterated the directions for producing an e-mail log in Microsoft Outlook® per his June 13, 2014 e-mail. The Complainant also reminded the Custodian that July 1, 2014, represented the last business day to provide access to the responsive record.

On July 1, 2014, the Custodian responded in writing, advising that the Borough of South Bound Brook (“Borough”) did not maintain any responsive records. On the same day, the Complainant responded via e-mail, disputing that no records existed. The Complainant noted that, by way of example, the Borough did not maintain a check registry in hard copy but could easily produce the record with a few key strokes. The Complainant stated that producing an e-mail log was similar. The Complainant suggested that the Custodian contact the Government Records Council (“GRC”) if he had any questions and noted that he would allow the Custodian an extension of time until 12:00 p.m., on July 3, 2014, to provide the responsive record.

On July 25, 2014, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On July 28, 2014, the Custodian responded in writing, stating that no records existed.

On September 22, 2014, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On September 30, 2014, the Custodian responded in writing, stating that no records existed.

On February 4, 2015, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On February 18, 2015, the ninth (9th) business day after receipt of the OPRA request, the Custodian responded in writing, stating that no records existed.

Denial of Access Complaint:

On March 9, 2015, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant contended that he repeatedly provided the Custodian directions on how to

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

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produce an e-mail log from Microsoft Outlook®, but the Custodian continuously responded that no records existed. The Complainant argued this response was misleading and factually inaccurate.

The Complainant stated that, given the Custodian’s twenty-four (24) years of service, attendance at various OPRA trainings, numerous guidance from the GRC, and dozens of Denial of Access Complaints, it is assumed that the Custodian is well-versed in OPRA. The Complainant contended that the facts here prove beyond a doubt that the Custodian knowingly and willfully denied access to the responsive records. N.J.S.A. 47:1A-11.

The Complainant thus requested that the GRC: 1) determine that the Custodian’s responses resulted in a “deemed” denial; 2) order disclosure of all responsive records; 3) determine that the Custodian knowingly and willfully violated OPRA, thereby warranting an assessment of the civil penalty; 4) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees; and 5) order any further relief deemed appropriate.

Statement of Information:

On April 9, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA requests on various dates and responded in writing on various dates advising that no records exist.

The Custodian argued that no records existed and noted that the Complainant required him to create a record in order to fulfill the subject OPRA requests. The Custodian contended that the Courts have consistently held that an agency is required to disclose identifiable government records and that OPRA does not require a custodian to conduct research or create new records. MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005).⁵

Additional Submissions

On February 9, 2016, the Complainant’s Counsel submitted a letter brief to dispute the SOI. Therein, Counsel first argued that the Custodian erroneously certified that no records exist. Counsel noted that the Complainant provided the Custodian with simple instructions for printing a log that is automatically maintained by Microsoft Outlook® (by virtue of one’s ability to print same). Counsel also made note of the Complainant’s intimate knowledge of Microsoft Outlook® because the Borough began using the program on his recommendation during the time he was employed there. Counsel argued that the Custodian could not contend that no records existed based on the Complainant’s instructions and the fact that Microsoft Outlook® automatically maintains a log.⁶ More specifically, Counsel alleged that the Custodian could not argue that he

⁵ The Custodian requested that the GRC explore the possibility of allowing the Borough to seek fees and costs from the Complainant for frivolous litigation. The GRC notes that OPRA’s fee shifting provision only applies to complainants. N.J.S.A. 47:1A-6.

⁶ Complainant’s Counsel provided two (2) links to Microsoft Office webpages describing how to access and print in Microsoft Outlook®.

did not maintain records or that no entries existed because same would be implausible.⁷

Additionally, Counsel noted that the Superior Court ruled on this exact issue in Verry v. Borough of South Bound Brook, Docket No. SOM-L-1046-15. Counsel stated that the trial court in that matter determined that the Custodian unlawfully denied access to the responsive logs, reasoning that:

The [Custodian's] argument that no record of [his] e-mails exists is patently untrue. All relevant case law favors . . . that the requested e-mail log is a government record subject to OPRA. *See e.g. Courier News v. Hunterdon Cnty. Prosecutor's Office*, 358 N.J. Super. 373, 382-83 (App. Div. 2003); Paff v. Galloway Twp., Docket No. ATL-L-5428-13 (June 10, 2014).

Moreover, [the Complainant] did [the Custodian] the favor of spelling out the instructions for fulfilling his request. An appropriate response by [the Custodian] would have been stating reasons for denial, and exploring alternatives with counsel for both sides.

[The Custodian's] refusal to cooperate violated [the Complainant's] rights under OPRA.

Judge Yolanda Ciccone's Letter Opinion, dated November 2, 2015 at 5-6.

Counsel stated that the trial court reinforced this holding in a letter decision dated January 15, 2016. Further, Counsel stated that the Custodian disclosed responsive records and did not appeal the decision. Counsel thus argued that the Custodian can no longer claim that the records at issue here do not exist. Additionally, Counsel alleged that the decision proved that the Custodian's position was "patently untrue" and that he willfully submitted a false certification to the GRC.

Based on the foregoing, Counsel argued that the Custodian knowingly and willfully violated OPRA by submitting a false certification to support an erroneous position. Additionally, Counsel argued that the Complainant should be considered a prevailing party entitled to an award of reasonable attorney's fees.

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

⁷ Complainant's Counsel noted that the Complainant had e-mail exchanges with the Custodian within the time frames identified in the subject OPRA requests.

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).

The Complainant filed this complaint, requesting that the GRC determine that the requests at issue here were "deemed" denied. The GRC notes that a "deemed" denial carries a specific legal meaning based on a plain reading of OPRA – to wit, a custodian fails to respond in writing within the statutorily mandated seven (7) business day time frame. Here, the Custodian responded in writing to four (4) of the OPRA requests within this time frame, stating that no records existed.

However, all available evidence regarding the Custodian's written response to the Complainant's February 4, 2015 OPRA request indicates that he failed to respond timely. Specifically, he responded in writing on February 18, 2015, the ninth (9th) business day after receipt of the request.⁹ Accordingly, the evidence supports that this request was "deemed" denied.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's February 4, 2015 OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to this 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 Eden v. Little Egg Harbor Twp. (Ocean), GRC Complaint No. 2014-369 (June 2015), the complainant sought access to a list of residential properties within a certain assessed value. The complainant identified certain categories of information he wished to see as part of the list. The custodian responded, denying access because no records existed. In response, the Complainant filed a Denial of Access Complaint, wherein the complainant disputed the denial on the basis that the responsive information was stored electronically as a MODIV report. The custodian conversely certified in the SOI that no record existed and that they were not required to create one to satisfy the complainant's OPRA request.

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.

⁹ This calculation takes into account the President's Day holiday, which fell on February 16, 2015. The GRC notes no evidence in the record to support additional time for other holidays or inclement weather closings.

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The Council looked to its prior decisions in Fang v. Dep't of Transp., GRC Complaint No. 2006-93 (May 2007), and Kehoe v. NJ Dep't of Env'tl. Prot., Div. of Fish and Wildlife, GRC Complaint No. 2010-300 (July 2012), and held that:

[B]ecause OPRA does not require custodians to research and compile information to create a record that may be responsive to an OPRA request, the Custodian had no legal duty to create a record containing the information that the Complainant specifically requested. Thus, the Custodian has met the burden of proof that access to any responsive records was not unlawfully denied.

Id. at 3. The Council further held that the custodian did not unlawfully deny access to the responsive records in accordance with Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Most recently, in Paff v. Galloway Twp., 2016 N.J. Super. LEXIS 54 (App. Div. 2016),¹⁰ the Appellate Division was tasked with determining whether the trial court correctly held that Defendants were required to disclose an e-mail log showing sender, recipient, date, and time. There, Plaintiff's OPRA request sought an e-mail log for the Custodian and Chief of Police over a certain time frame. Plaintiff filed a verified complaint after the Defendants denied access to the records. Defendants argued that they did not have the necessary resources to create new records. Defendants further argued that the Defendants would incur inappropriate additional costs to create responsive records. The trial court was unpersuaded, holding that:

Whether termed "metadata" . . . or not, the fact remains that the e[-]mails of the Township Clerk and Chief of Police are public records as defined by [OPRA] because they comprise "information stored or maintained electronically . . . that has been made, maintained and kept on file in the course of his or its official business . . ." By logical/reasonable extension, a log or list of e[-]mails that can be easily prepared, is likewise within the [ambit] of that definition.

Id. at 7.

An appeal followed: Defendants argued that Plaintiff's OPRA request required creation of a record that did not exist at the time of the request. Defendants contended that, among other things, OPRA did not require such an action, regardless of whether the actual task would only take a few minutes. Plaintiff disagreed, arguing that the responsive logs were essentially "metadata." Plaintiff also argued that there was no distinction between "'information' and 'records' where electronic records [were] concerned, contending that computer searches do not create records . . ." Id. at 12. Plaintiff contended that his request required Defendants to retrieve information that is "kept as data." Id. Defendants countered that the e-mail log represented an independent compilation of metadata that did not exist in such a form. Defendants contended that OPRA did not require them to "assemble a new list that extract[ed] this metadata and display[ed] it in a newly-created document." Id. at 13.

¹⁰ Approved for publication on April 18, 2016.

The Appellate Division, reviewing the issue *de novo*, agreed with Defendants' position and reversed the Law Division's decision. In reaching this conclusion, the Court rejected the Plaintiff's "metadata" argument. Instead, the Court held that Defendants were not required to create the requested log, which Defendants did not previously create for employee use. The Court reasoned that:

The Township's computers store the emails, which are government records, but the Township has never created an email database for the use of Township personnel. Unlike a library's card catalogue, the email logs requested here never existed prior to plaintiff's OPRA request. While a computer may be able to create an email log quickly, it is still creating a new government record, which is not required under OPRA as interpreted in [Sussex Commons Assocs., LLC v. Rutgers, 210 N.J. 531, 544 (2012)], [Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005)], and [MAG, 375 N.J. Super. at 546].

Id. at 14.

Although the Court acknowledged that creating the log might take minimal time, the Court nonetheless recognized that redaction could require a substantial effort. The Court further concluded that any extension of OPRA to include creation of this type of a record should come by way of Legislative amendments.

In the matter currently before the Council, the Complainant disputed the Custodian's denial of access, noting that he provided simple and concise instructions for producing the logs from Microsoft Outlook® by which the Custodian could have easily produced the responsive records. In relation to the June 23, 2014 OPRA request, the Complainant contacted the Custodian, likening the disclosure of the logs to seeking access to a check registry, whereby the Borough did not keep a hardcopy of it but could produce same with a few simple key strokes. Conversely, the Custodian argued in his SOI that he maintained no responsive records and that the request (by the Complainant's own admittance) would require creation of a record.

Although adjudicated during the pendency of this complaint, the Court's decision in Paff is both instructive and falls on all four corners of the current complaint. Further, its status as a published Appellate Division decision supersedes the Law Division's letter opinion in Verry.¹¹

Specifically, similar to the request at issue in Paff, the Complainant's four (4) OPRA requests sought an e-mail log that likely required certain steps to create. The Complainant went so far as to explain those steps to the Custodian. As was also the case in Paff, the Custodian responded to each OPRA request that no records existed. In the SOI, the Custodian certified that no records existed and argued that he was not required to create a record. Although the Complainant disputed this contention, the GRC is satisfied that the Custodian was not required to create the requested records, regardless of whether he could have easily produced them in a minimal amount of time.

¹¹ This action and subsequent decision arose from an OPRA request submitted to the Borough after the instant complaint was filed and ran concurrently with the adjudication of same.

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Accordingly, the Custodian lawfully denied access to the requested e-mail logs because no records responsive existed and he was not required to create them in order to respond to the Complainant's four (4) OPRA requests. N.J.S.A. 47:1A-6; Eden, GRC 2014-369 (*citing Fang*, GRC 2006-93 and Kehoe, GRC 2010-300); Pusterhofer, GRC 2005-49 (July 2005); Paff, 2016 N.J. Super. LEXIS 54.

The GRC notes that this decision is limited to the creation of logs from an e-mail account. The GRC has previously addressed a custodian's obligation to compile and provide electronic information from a database or by performing a software function to extract responsive electronic information. Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014); McBride v. City of Camden (Camden), GRC Complaint No. 2014-54 (Interim Order dated September 30, 2014). Currently, the GRC is unsure whether the Court's decision in Paff will affect its previous decisions regarding database information. However, the application of the instant case to other forms of electronic records will likely be applied on a case-by-case basis.

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)).

Although the Custodian's failure to respond in a timely manner resulted in a “deemed” denial of access, the Custodian lawfully denied access to the e-mail log because he was not required to create same. N.J.S.A. 47:1A-6; Paff, 2016 N.J. Super. LEXIS 54. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's

actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . . ; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a “prevailing party” if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. Id. at 432. Additionally, the Court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties,” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

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

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

Mason at 73-76 (2008).

The Court in Mason, further held that:

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

Id. at 76.

In this matter, the Complainant requested that the GRC order the Custodian to disclose the responsive records. However, the GRC has not granted the requested relief. Specifically, the GRC has determined that the Custodian was not required to create e-mail logs in order to satisfy the Complainant's four (4) OPRA requests. Accordingly, the Complainant could not have prevailed in this complaint and is not entitled to an award of reasonable attorney's fees.

Accordingly, 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 GRC determined that the Custodian lawfully denied access to the Complainant's four (4) OPRA requests because he was not required to create e-mail logs. 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. at 432, and Mason, 196 N.J. at 51.

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 February 4, 2015 OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing, 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. The Custodian lawfully denied access to the requested e-mail logs because no records responsive existed and he was not required to create them in order to respond to the Complainant’s four (4) OPRA requests. N.J.S.A. 47:1A-6; Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005); Eden v. Little Egg Harbor Twp. (Ocean), GRC Complaint No. 2014-369 (June 2015)(*citing* Fang v. Dep’t of Transp., GRC Complaint No. 2006-93 (May 2007) and Kehoe v. NJ Dep’t of Env’tl. Prot., Div. of Fish and Wildlife, GRC Complaint No. 2010-300 (July 2012)); Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005); Paff v. Galloway Twp., 2016 N.J. Super. LEXIS 54 (App. Div. 2016).
3. Although the Custodian’s failure to respond in a timely manner resulted in a “deemed” denial of access, the Custodian lawfully denied access to the e-mail log because he was not required to create same. N.J.S.A. 47:1A-6; Paff v. Galloway Twp., 2016 N.J. Super. LEXIS 54 (App. Div. 2016). Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. 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 GRC determined that the Custodian lawfully denied access to the Complainant’s four (4) OPRA requests because he was not required to create e-mail logs. 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. at 432, and Mason, 196 N.J. at 51.

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¹² This complaint was prepared for adjudication at the Council’s February 23, 2016 meeting but was tabled based on legal advice.