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CHARLES A. RICHMAN
Commissioner

FINAL DECISION

September 29, 2016 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2015-61

v.

Franklin Fire District No.1 (Somerset)
Custodian of Record

At the September 29, 2016 public meeting, the Government Records Council (“Council”) considered the September 22, 2016 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 unlawfully deny access to the requested records because he certified that he provided the correspondence that he believed to be responsive to the request, and the Complainant possessed the Denial of Access Complaint document at the time of the OPRA request. Thus, requiring the Custodian to duplicate another copy of the requested records and send them to the Complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry. See Bart v. City of Paterson Hous. Auth., GRC Complaint No. 2005-145 (May 2006), and Owoh (on behalf of O.R.) v. West Windsor-Plainsboro Reg’l Sch. Dist. (Mercer), GRC Complaint No. 2012-330 (Interim Order dated February 26, 2013).
2. The Custodian disputes that a denial of access occurred at all, as he stated that he interpreted the Complainant’s OPRA request for “correspondences” as not inclusive of a GRC Complaint previously filed by the Complainant. The Custodian stated that he did not provide the Denial of Access Complaint because he did not determine it to be responsive to a request for “correspondence.” Additionally, the Custodian argued that no denial of access occurred because “the Complainant already had a copy of said record.” 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.
3. 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 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 Complainant did not prevail here because the records sought were provided, and the document in



dispute is a Denial of Access Complaint previously filed by the Complainant and thus no violation of OPRA occurred. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

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

Final Decision Rendered by the
Government Records Council
On The 29th Day of September, 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: October 4, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 29, 2016 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2015-61

v.

**Franklin Fire District No. 1 (Somerset)²
Custodial Agency**

Records Relevant to Complaint: An exact copy of the “correspondence to show the inundation of requests and correspondences received from the individuals” provided to the GRC.³

Custodian of Record: Tim Szymborski

Request Received by Custodian: December 18, 2014

Response Made by Custodian: December 22, 2014

GRC Complaint Received: March 9, 2015

Background⁴

Request and Response:

On December 18, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 22, 2014, Administrative Aide Dawn Cuddy responded to the request, attaching via e-mail a .pdf file comprising a total of 40 pages. The first page was a copy of the Complainant’s original OPRA request.

Denial of Access Complaint:

On March 8, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that his request was related to a September 30, 2014 GRC Meeting attended by the Custodian. During the meeting, the Custodian referred to “two (2) individuals [who] have used OPRA excessively” and claimed the District’s legal fee budget had “increased dramatically due to the volume of unnecessary OPRA requests . . .” The Complainant asserted his belief that he is one of the individuals to whom the Custodian referred during the GRC meeting.

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

² Represented by Dominic DiYanni, Esq. (Warren, NJ).

³ The Complainant’s request sought additional items that he deemed “not relevant to the instant complaint.” The GRC declines to adjudicate those items.

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.

Complainant's Counsel argued that the Complainant was "suspicious that the District and their agents" have been deliberately releasing only the responsive records they are willing to share with the public "while knowingly and purposefully concealing others they do not want the public to see." The Complainant stated that he submitted an identical OPRA request to the GRC on December 22, 2014, seeking the same items.

The Complainant noted that as the requests were identical, "it is reasonable to conclude the exact number of records (and responsive records) would be released from both agencies." The Complainant stated that on December 24, 2014, the GRC's Custodian e-mailed a .pdf file comprising a total of 58 pages, or 19 pages more than the District released in response to the identical OPRA request.

Complainant's Counsel argued that the "undisputable evidence verifies [the Complainant]'s concerns . . . that the District and their agents" are knowingly and purposefully shielding responsive government records from OPRA requestors. Complainant's Counsel further argued that the GRC should refer the matter to the Office of Administrative Law ("OAL") for an independent fact-finding hearing to: (1) find that the Custodian knowingly and willfully violated OPRA and unreasonably denied the Complainant access to the requested records warranting the assessment of a civil penalty; (2) find that the Complainant is a prevailing party; (3) find that the Complainant should be awarded attorney fees; (4) order, moving forward, that the District's agents produce a sworn certification to verify the extent to which the search was conducted, verify what records were disclosed and undisclosed, and verify that the records released are a complete and exact copy of all responsive records held by the District; and (5) order further relief as the GRC and OAL deem proper.

Statement of Information:

On April 14, 2015, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on December 18, 2014. The Custodian certified that the District Office "on behalf of the Custodian of Records" responded in writing on December 22, 2014, providing the responsive records. The Custodian certified that he reviewed the responsive records before they were released to the Complainant.

The Custodian certified that upon receipt of the request, he compiled the documents responsive to the request and did not include "the only document that was differing from the GRC's response," which was a recently filed GRC Complaint filed by the Complainant himself. The Custodian stated his view that the record was not responsive to the request because it was not "correspondence" as described in the original OPRA request. He further argued that the Complainant already had a copy of said record so there was no denial of access.

The Custodian averred that the responsive records consisted of thirty-nine (39) pages of various correspondences responsive to the subject request concerning the "inundation of requests." The Custodian, while he maintained his contention that the records requested should not be considered "government records" pursuant to OPRA, noted that his office did respond to the Complainant within the statutorily-mandated time frame of OPRA, providing said documents.

In response to the Complainant's contention that the District is "intentionally denying or shielding" public documents, the Custodian argued that the Complainant missed the fact that the page number discrepancy between the District's response and the GRC's response consisted of: (1) a copy of the title page, which is not responsive to the request; (2) pages marked "Document 1," "Document 2," "Document 3," "Document 4," and "Document 5," which the GRC created to separate the documents and are not responsive records; and (3) a thirteen page GRC Complaint, which had recently been filed by the Complainant himself, through his Counsel. The Custodian argued that these documents comprise a total of nineteen (19) pages and make up the purported difference cited by the Complainant.

The Custodian maintained that the only document not provided to the Complainant for this OPRA request was a copy of his own GRC Complaint, dated September 23, 2014, and that the Complaint was additionally not responsive to the request. The Custodian expressed no contention with the GRC providing the document to the Complainant but stated that the District's failure to provide it to the Complainant should not be deemed a denial, as the Complainant already possessed the document. The Custodian argued that the District had ultimately provided all responsive records to the Complainant and that he committed no knowing or willful violations of OPRA.

Additional Submissions:

On May 20, 2015, Complainant's Counsel submitted a "rebuttal brief" to the Custodian's SOI. The Complainant argued that the Custodian's SOI revealed that he "knowingly, purposefully and consciously removed fourteen (14) of the fifty-three (53) pages he 'provided to the GRC' before releasing the responsive records" to the Complainant.

The Complainant argued that there are several "glaring weaknesses in [the Custodian]'s feeble attempt to cover-up his conscious forethought" to knowingly and purposefully provide fifty-three (53) records to the GRC "and hide fourteen (14) records" from the Complainant. The Complainant additionally argued that he would not have known that the Custodian provided to the GRC the title page and the thirteen (13) page GRC Complaint had he not filed an identical request with the GRC. The Complainant concluded "it is evident that [the Custodian] and the Fire District had absolutely no intention of ever telling [the Complainant] about the fourteen (14) additional records" provided to the GRC. The Complainant additionally stated "just because [the Complainant] possesses a record in no way absolves [the Custodian] from telling [the Complainant] that the record he does possess is responsive to a subsequent OPRA request"

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request

“with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

New Jersey Courts have provided that “[t]he purpose of OPRA ‘is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.’” Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005)(quoting Asbury Park Press v. Ocean Cnty. Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). In Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 618 (App. Div. 2008),⁵ the Appellate Division looked to the Lafayette Yard case in determining whether a custodian knowingly and willfully violated OPRA by not providing to the complainant a record already in his possession. The Court held that a complainant could not have been denied access to a requested record if he already had in his possession at the time of the OPRA request the document he sought pursuant to OPRA. Id. at 617. The Appellate Division reasoned that requiring a custodian to duplicate another copy of the requested record and send it to the complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry. Id. at 618 (*citing Lafayette Yard*, 183 N.J. at 535).

The Appellate Division’s decision in Bart, however, turns upon the specific facts of that case. The Council’s decision noted that the custodian certified that copies of the requested record were available at the Housing Authority’s front desk upon simple verbal request by any member of the public. Bart v. City of Paterson Hous. Auth., GRC Complaint No. 2005-145 (May 2006). Moreover, the complainant actually admitted that he was in possession of this record at the time of the OPRA request for the same record. Id.

Additionally, in Owoh (on behalf of O.R.) v. West Windsor-Plainsboro Reg’l Sch. Dist. (Mercer), GRC Complaint No. 2012-330 (Interim Order February 2013), the complainant sought access to student discipline reports. The custodian’s counsel responded, indicating that he provided the records in response to a prior OPRA request. The Council held that:

The Custodian did not unlawfully deny access to the records responsive to request item no. 8 because at the time of the Complainant’s December 14, 2012 OPRA request, the Complainant had already been provided with full access to the requested records in both hard copy and in electronic format. Thus, requiring the Custodian to duplicate another copy of the requested records and send them to the Complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry, pursuant to [Bart, 403 N.J. Super. 609].

Id. at 13.

Here, the Complainant argued that the Custodian’s nondisclosure of his previous Denial of Access Complaint, in contrast with the GRC’s Custodian providing the Complainant with a copy, constituted a knowing and willful violation of OPRA because it evidenced a desire by the Custodian to “mask” that he provided said Complaint to the GRC. However, the Custodian disputes that a denial of access occurred at all, as he stated that he interpreted the Complainant’s OPRA request for “correspondences” as not inclusive of a GRC Complaint previously filed by

⁵ Reversing Bart v. City of Paterson Hous. Auth., GRC Complaint No. 2005-145 (May 2006).

the Complainant. The Custodian additionally averred that he “did not think” the Denial of Access Complaint was responsive to a request for “correspondence,” and therefore did not include this Complaint in this response. Additionally, the Custodian argued that no denial of access occurred because “the Complainant already had a copy of said record.” The Complainant did not deny that he was in possession of his own previously-filed Complaint, as he stated that the GRC Custodian had, in fact, provided him with a copy.

The intent of the Court’s decision in Bart can be applied to the facts of this complaint. Specifically, disclosing to the Complainant a Denial of Access Complaint that he composed neither maximizes his own knowledge about public affairs nor fosters a more informed Complainant. Simply put, the Complainant could not gain further insight into the inner workings of government by reviewing a document that he, himself, completed.

Therefore, the Custodian did not unlawfully deny access to the requested records because he certified that he provided the correspondence that he believed to be responsive to the request, and the Complainant possessed the Denial of Access Complaint document at the time of the OPRA request. Thus, requiring the Custodian to duplicate another copy of the requested records and send them to the Complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry. See Bart, 403 N.J. Super. 609 and Owoh, 2012-330.

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 disputes that a denial of access occurred at all, as he stated that he interpreted the Complainant's OPRA request for "correspondences" as not inclusive of a GRC Complaint previously filed by the Complainant. The Custodian stated that he did not provide the Denial of Access Complaint because he did not determine it to be responsive to a request for "correspondence." Additionally, the Custodian argued that no denial of access occurred because "the Complainant already had a copy of said record." Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

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

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

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

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

However, the Court noted in Mason, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, 387 N.J. Super. at

429; *see, e.g., Baer v. Klagholz*, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

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

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

Mason at 73-76 (2008).

The Court in Mason, further held that:

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

Id. at 76.

Here, the Complainant argued that the Custodian unlawfully denied him access to a document that the Custodian provided to the GRC. The Custodian certified that he believed the document in dispute, a Denial of Access Complaint previously filed by the Complainant, was not responsive to the request. Regardless of the disclosure or nondisclosure, the Complainant did not deny that he is, in fact, in possession of the disputed document.

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 Complainant did not prevail here because the records sought were provided, and the document in dispute is a Denial of Access Complaint previously filed by the Complainant and thus no violation of OPRA occurred. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not unlawfully deny access to the requested records because he certified that he provided the correspondence that he believed to be responsive to the request, and the Complainant possessed the Denial of Access Complaint document at the time of the OPRA request. Thus, requiring the Custodian to duplicate another copy of the requested records and send them to the Complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry. *See* Bart v. City of Paterson Hous. Auth., GRC Complaint No. 2005-145 (May 2006), and Owoh (on behalf of O.R.) v. West Windsor-Plainsboro Reg'l Sch. Dist. (Mercer), GRC Complaint No. 2012-330 (Interim Order dated February 26, 2013).
2. The Custodian disputes that a denial of access occurred at all, as he stated that he interpreted the Complainant's OPRA request for "correspondences" as not inclusive of a GRC Complaint previously filed by the Complainant. The Custodian stated that he did not provide the Denial of Access Complaint because he did not determine it to be responsive to a request for "correspondence." Additionally, the Custodian argued that no denial of access occurred because "the Complainant already had a copy of said record." 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.
3. 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 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 Complainant did not prevail here because the records sought were provided, and the document in dispute is a Denial of Access Complaint previously filed by the Complainant and thus no violation of OPRA occurred. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Prepared By: Husna Kazmir
Staff Attorney

September 22, 2016