



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 7, 2020 Government Records Council Meeting

Suellen McCaulley
Complainant

Complaint No. 2018-107

v.

County of Hudson
Custodian of Record

At the January 7, 2020 public meeting, the Government Records Council (“Council”) considered the December 10, 2019 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 has borne his burden of proof that he lawfully denied access to the portion of the Complainant’s OPRA request seeking records regarding the 15mph speed limit sign without blinking lights. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
2. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian lawfully denied access to the subject OPRA request because no records existed. 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 7th Day of January 2020

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: January 9, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 7, 2020 Council Meeting**

**Suellen McCaulley¹
Complainant**

GRC Complaint No. 2018-107

v.

**County of Hudson²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. Installation and maintenance records for a 15 mile-per-hour (“mph”) speed limit sign on Garden Street between Tenth and Ninth Street.
2. Communications relating to the installation of the sign, including committee meeting notes, e-mails, and other records relating to the installation and need for the sign.

Custodian of Record: Michael Santopietro
Request Received by Custodian: March 21, 2018
Response Made by Custodian: March 26, 2018
GRC Complaint Received: June 12, 2018

Background³

Request and Response:

On March 1, 2018, on behalf of the Complainant, Complainant’s Counsel submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 19, 2018, Counsel sought a status update regarding his OPRA request. On March 21, 2018, County of Hudson (“County”) employee Jennifer Lambert e-mailed the Complainant advising that the County would respond by the end of the week. On March 23, 2018, Complainant’s Counsel e-mailed Custodian’s Counsel seeking a status update regarding his OPRA request.

On March 26, 2018, County employee Maite Fernandez responded in writing on behalf of the Custodian disclosing multiple records. On the same day, Complainant’s Counsel e-mailed Ms.

¹ Represented by Daniel L. Cevallos, Esq., of Edelman & Edelman, P.C. (New York, NY).

² Represented by Neil J. Carroll, Jr., Esq. (Jersey City, NJ).

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Fernandez clarifying that he was not seeking records regarding the speed limit sign with the blinking lights; rather, he sought records for a separate speed limit sign without lights.

On March 28, 2018, County Engineer Thomas Malavasi responded in writing on behalf of the Custodian advising that the County did not maintain any responsive records regarding the non-flashing 15mph speed limit sign on Garden Street. On the same day, Complainant's Counsel sought clarification as to who would maintain records regarding the non-flashing 15mph speed limit sign. County Engineer Malavasi responded stating that the County did not authorize installation and has no record of approving the sign. County Engineer Malavasi suggested that Complainant's Counsel contact the City of Hoboken ("City") "to see if they have any records of it."

On the same day, Complainant's Counsel responded advising that the City already advised that they had no records because Garden Street was a County road. Counsel contended that both the County and City were giving conflicting responses. Complainant's Counsel asked to whom the 15mph speed limit sign belongs. Thereafter, County employee Donna Dalessandro replied advising that the County does not use flashing signs: the City makes a request and the County approves it by ordinance, but the City maintains the flashing light sign. Ms. Dalessandro thus stated that if the County did not possess an ordinance, then a sign was erected without County authorization. Ms. Dalessandro further noted that the County does not use yellow speed limit signage.

Denial of Access Complaint:

On June 12, 2018, Complainant's Counsel filed a Denial of Access Complaint on behalf of the Complainant with the Government Records Council ("GRC"). Counsel stated that he has attempted to obtain records regarding a non-blinking, yellow 15mph speed limit sign located on Garden Street between Tenth and Ninth Streets in the City. Counsel stated that the County denied the request because no records existed; however, the City had already advised that Garden Street was a County road. Counsel thus contended that he filed this complaint because its impossible that neither agency has any information regarding the sign.

Counsel argued that the County may try and argue that this matter is similar to Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Counsel argued that it is not: the Custodian has not borne his burden of proof that no records exist. Counsel argued that to the contrary, he provided evidence from the City identifying the County as maintaining responsive records. Counsel further argued that the existence of the sign is proof that the County either installed or approved its placement. Counsel argued that to assume the County allowed anyone put up traffic signs is illogical.

Counsel further argued that the County failed to perform a sufficient search. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008); Oskay v. N.J. State Parole Bd., GRC Complaint No. 2008-53 (March 2009); Schiano v. Twp. of Lower (Cape May), GRC Complaint No. 2008-90 (June 2009).

Additional Submissions:

On July 6, 2018, Complainant's Counsel submitted a letter brief asserting newly discovered information. Counsel stated that he was recently advised that the sign at the center of this complaint was removed. Counsel argued that this removal "may be a potential act of intentional spoliation" that the County would rely on to further their claim that no responsive records existed.

Counsel further argued the County insisted that it maintained no responsive records in March 28, 2018 e-mails to him. Counsel noted that therein, County Engineer Malavasi stated that "[t]he County did not authorize the installation of this sign and has no records approving it." Counsel stated that County Engineer Malavasi suggested that Complainant's Counsel contact the City to "see if they have any records of it." Counsel further stated that County employee Donna Dalessandro advised him that the County "doesn't use yellow signage for speed limits."

Counsel argued that subsequent to his OPRA requests and this complaint, the County removed the sign as if it never existed. Counsel noted that this is "the same sign for which the County disavowed all responsibility and records." Counsel questioned how the County could have removed the sign if it belonged to the City. Counsel asserted that the County could not meet the Pusterhofer threshold because he submitted competent, credible evidence to refute the Custodian's certification.

Statement of Information:

On July 11, 2018, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on March 21, 2018. The Custodian certified that Ms. Lambert, Ms. Fernandez, County Engineer Malavasi, and Ms. Dalessandro combined to respond to the subject OPRA request between March 21, and 28, 2018.

The Custodian affirmed that he did his due diligence in attempting to locate responsive records and concluded that none existed. The Custodian certified that he initially worked with Traffic and Transportation Department Director Jose Sieria to locate records responsive to the subject OPRA request. The Custodian affirmed that the City engaged in a signage project on Garden Street and submitted plans for approval. The Custodian certified that he checked the Alchemy database and hard copy project files, located potentially responsive records, and disclosed them to the Complainant. The Custodian affirmed that after receiving Complainant Counsel's March 26, 2018 letter, he reviewed the City project plans and found that the subject speed limit sign was not included. The Custodian affirmed that he asked the Traffic and Roads Department to search for installation records: none existed. The Custodian averred that he checked the cartegraph database and could not locate the sign therein. The Custodian certified that he thus forwarded County Engineer Malavasi's letter stating that no records existed to the Complainant on March 28, 2018.

The Custodian argued that contrary to the Complainant's allegations, the instant complaint in on point with Pusterhofer, GRC 2005-49. The Custodian argued that also contrary to the Complainant's allegations, the City never stated that the County maintained responsive records: the City simply acknowledged that Garden Street was a County road and that the Complainant

may want to contact that agency accordingly. The Custodian refuted the Complainant's allegations that he performed an insufficient search. The Custodian asserted that the Complainant cited to case law where custodians failed to conduct a sufficient search and later located records after requestors filed a Denial of Access Complaint. The Custodian argued that to the contrary, he performed a sufficient search as detailed above and located no responsive records.

The Custodian finally refuted that the County removing the sign amounted to "covering something up." The Custodian averred that the County does not deny the sign's existence. The Custodian affirmed that following submission of this OPRA request alerting the County to the sign's existence, it was obligated to either approve same by resolution or remove it. The Custodian certified that the County chose to remove the sign after confirming with the City that it had no objection to this course of action.

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.

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer, GRC 2005-49. In the matter before the Council, the County initially responded to the subject OPRA request advising that no responsive records existed. In the Denial of Access Complaint, Complainant's Counsel argued that the Custodian could not meet the Pusterhofer threshold because he provided competent, credible evidence that the County maintained responsive records based on the City's statement that Garden Street was a County road. Further, Counsel argued that the Custodian performed an insufficient search. Following the Denial of Access Complaint, Complainant's Counsel submitted a letter brief advising that the County removed the sign at the center of his OPRA request. Counsel contended that the County could not have removed the sign if it belonged to the City.

In the SOI, the Custodian affirmed that he performed an extensive search within multiple databases and hardcopy files but was unable to locate responsive records. The Custodian further noted that the City never indicated that the County maintained records associated with the speed sign. The Custodian further certified that the County became aware of the sign through the subject OPRA request and chose to remove it after consulting with the City.

In reviewing the evidence submitted here, the GRC is satisfied that the Custodian lawfully denied the subject OPRA request because no records existed. Contrary to the Complainant's assertions, the fact that the City advised it that Garden Street was a County road did not confirm the existence of records at the County level. The Complainant appears to have assumed this position because the City advised that no records existed, then the County had to maintain same associated with the sign's installation. However, there is nothing in these e-mails that provide

competent, credible evidence that the County possessed responsive records. Further, the Custodian provided a detailed explanation of his search for records that adequately refuted the Complainant's assertion that he performed an insufficient response. Also, of significance, the fact that the County removed the sign after the subject OPRA request alerted them to its existence provides additional support to the conclusion that no records regarding the sign's installation existed.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to the portion of the Complainant's OPRA request seeking records regarding the 15mph speed limit sign without blinking lights. Specifically, the Custodian certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

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. Further, the Supreme Court expressed 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.

[196 N.J. at 73-76.]

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, [certif. denied] (1984).

[Id. at 76.]

In the complaint before the Council, Complainant's Counsel argued in the Denial of Access Complaint that the County unlawfully denied the Complainant access to responsive records. Counsel thus requested that the GRC require the County to disclose all that existed. However, the evidence of record supports that no records existed; thus, the Custodian lawfully denied access to the subject OPRA request. Pusterhofer, GRC 2005-49. For this reason, the Complainant is not a prevailing party.

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 lawfully denied access to the subject OPRA request because no records existed.

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 has borne his burden of proof that he lawfully denied access to the portion of the Complainant's OPRA request seeking records regarding the 15mph speed limit sign without blinking lights. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
2. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian lawfully denied access to the subject OPRA request because no records existed. 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: Frank F. Caruso
Executive Director

December 10, 2019