



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

August 25, 2020 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o African American
Data & Research Institute)
Complainant

Complaint No. 2018-211

v.
City of Asbury Park (Monmouth)
Custodian of Record

At the August 25, 2020 public meeting, the Government Records Council (“Council”) considered the August 18, 2020 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). However, the Council declines to order disclosure since the evidence of record indicates that the Custodian provided the responsive records on October 2, 2018.
2. The Custodian’s failure to timely respond in writing resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian provided the Complainant with all responsive records on October 2, 2018. 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.
3. 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 attempted to respond, but her e-mail failed delivery based on a typo and resulting in a “deemed” denial. Further, the Custodian was able to prove that this complaint was not the catalyst for her response. 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 25th Day of August 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: August 27, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 25, 2020 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of African
American Data & Research Institute)¹
Complainant**

GRC Complaint No. 2018-211

v.

**City of Asbury Park (Monmouth)²
Custodial Agency**

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

1. “Record Retention and Disposition Schedules” used by the Asbury Park Police Department (“APPD”) from January through December 2016; January through December 2017; and January through present 2018.
2. Records Retention and Disposition policies and directives used by the APPD for the time frames in item No. 1.
3. Standard Operating Procedures (“SOP”) for retention and disposition used by the APPD for the time frames in item No. 1.
4. Agreement between the City of Asbury Park (“City”) and the applicable storage facility or any record showing the address where the City stored summonses and complaints for fifteen (15) years.

Custodian of Record: Cindy A. Dye

Request Received by Custodian: September 17, 2018

Response Made by Custodian: September 18, 2018

GRC Complaint Received: October 1, 2018

Background³

Request and Response:

On September 15, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 18, 2020,

¹ The Complainant represents the African American Data & Research Institute.

² Represented by Frederick Raffetto, Esq., of Ansell, Grimm & Aaron, P.C. (Ocean, 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.

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute) v. City of Asbury Park (Monmouth), 2018-211 – Findings and Recommendations of the Executive Director

the Custodian responded in writing via e-mail⁴ stating that the Complainant could access the records responsive to the subject OPRA request through the City's "public portal."

Denial of Access Complaint:

On October 1, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the Custodian failed to respond to the subject OPRA request. The Complainant requested that the Council determine that the Custodian violated OPRA, order disclosure of the requested records, and hold that he is a prevailing party entitled to an award of attorney's fees.

Supplemental Response:

On October 2, 2018, the Custodian again responded in writing via e-mail⁵ stating that the Complainant may access the responsive records through the City's "public portal."

Statement of Information:

On October 18, 2018, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on September 17, 2018. The Custodian certified that she responded in writing via e-mail on September 18, 2018. The Custodian averred she inadvertently misspelled the Complainant's e-mail address and did not immediately notice the error. The Custodian noted that she never received an "undeliverable" notice. The Custodian further noted that once she became aware of the error, she resent to the Complainant her response, containing a link to access all responsive records, on October 2, 2018.

The Custodian contended that she had no intention of denying access to the subject OPRA request. The Custodian asserted that the issue rested on an e-mail address typo, which she corrected immediately upon notification of the error.

Additional Submissions:

On October 19, 2018, the Complainant submitted a letter brief responding to the SOI. Therein, the Complainant stated that he received the responsive records after filing the instant complaint. The Complainant thus asserted that the only outstanding issue here is whether he is a prevailing party entitled to an award of attorney's fees. The Complainant stated that OPRA's fee shifting provision is decided based on the catalyst theory. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). The Complainant further contended that a party is considered to have prevailed when the relief on the merits materially alters the relationship between the parties by modifying defendant's behavior in a way that benefits plaintiff. See Warrington v. Village Supermarket, Inc., 328 N.J. Super. 410, 420 (App. Div. 2000).

⁴ A typo in the e-mail address resulted in the e-mail not being delivered to the Complainant.

⁵ The e-mail address used in this transmission appeared correct.

Rotimi Owoh, Eq. (On Behalf of African American Data & Research Institute) v. City of Asbury Park (Monmouth), 2018-211 – Findings and Recommendations of the Executive Director

The Complainant argued that here, he submitted his Denial of Access Complaint to the GRC via e-mail on September 30, 2018. The Complainant stated that thereafter, on October 2, 2018, the Custodian disclosed the responsive records. The Complainant argued that based on the test set forth in Warrington, he prevailed because the Denial of Access Complaint prompted the Custodian to disclose the responsive records. The Complainant thus contended that he is a prevailing party subject an award of reasonable attorney's fees. Teeters, 387 N.J. Super. 423.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁶ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Here, the Complainant argued that the Custodian failed to respond to his OPRA request within the statutory time frame. In the SOI, the Custodian certified that she initially responded to the Complainant via e-mail on September 18, 2018. The Custodian further certified that she accidentally mistyped the Complainant's e-mail address and did not notice (until presumably receiving the Denial of Access Complaint). The Custodian certified that once she became aware of the issue, she resent her response e-mail on October 2, 2018. Notwithstanding the Custodian's timely attempt to respond, the misspelled e-mail address resulted in a delivery failure and a "deemed" denial of access.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. However, the Council declines to order disclosure since the evidence of record indicates that the Custodian provided the responsive records on October 2, 2018.

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

⁶ 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.
Rotimi Owoh, Eq. (On Behalf of African American Data & Research Institute) v. City of Asbury Park (Monmouth), 2018-211 – Findings and Recommendations of the Executive Director

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)).

In the matter before the Council, the Custodian’s failure to timely respond in writing resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian provided the Complainant all responsive records on October 2, 2018. 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, 387 N.J. Super. 423, 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, 196 N.J. 51, 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.

[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, [certif. denied](1984).

[Id. at 76.]

In Mason, the plaintiff submitted an OPRA request on February 9, 2004. The defendant responded on February 20, eight (8) business days later, or one day beyond the statutory limit. Id. at 79. As a result, the Court shifted the burden to the defendant to prove that the plaintiff’s lawsuit, filed on March 4, was not the catalyst behind defendant’s voluntary disclosure. Id. Because defendant’s February 20 response included a copy of a memo dated February 19 -- the seventh business day -- which advised that one of the requested records should be available on February 27 and the other one week later, the Court determined that the plaintiff’s lawsuit was not the catalyst for the release of the records and found that she was not entitled to an award of prevailing party attorney fees. Id. at 80.

In determining whether the Complainant is a prevailing party, the GRC acknowledges that the Custodian’s failure to respond in writing in a timely manner resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). Thus, the burden of proving that this complaint was not the catalyst for providing the responsive records to the Complainant shifts to the Custodian pursuant to Mason, 196 N.J. at 79.

In the matter before the Council, the Complainant alleged that the Custodian failed to respond to his OPRA request. Following the Denial of Access Complaint, the Custodian resent her response via e-mail on October 2, 2018. Thereafter, the Custodian certified in her SOI that she initially responded but misspelled the Complainant’s e-mail address. She further certified that she did not receive an “undeliverable” notice, and thus was not aware of her error. The Custodian averred that after becoming aware of the error, she resent her response to the Complainant on October 2, 2018. In response to the SOI, the Complainant confirmed receipt of the records and argued that he was a prevailing party because this complaint changed the Custodian’s behavior.

In determining whether the Complainant is a prevailing party, the evidence of record must establish a causal nexus existed between the filing of this complaint and disclosure of the responsive records. However, in accordance with Mason 196 N.J. 79, the burden shifts to the Custodian to prove that the instant Denial of Access Complaint was not the catalyst for her disclosure. Having reviewed the evidence of record, the GRC does not find that a causal nexus exists between this complaint and the Custodian’s actions. Specifically, the Custodian intended to provide responsive records to the Complainant regardless of the filing of the complaint. However, she committed a typo in the e-mail address which resulted in a delivery failure. It was not until being made of aware of this error that she quickly rectified the issue. Thus, this complaint did not bring about a change because the Custodian intended to respond from the outset of the subject OPRA request.

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 attempted to respond, but her e-mail failed delivery based on a typo and resulting in a “deemed” denial. Further, the Custodian was able to prove that this complaint was not the catalyst for her response. 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 bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). However, the Council declines to order disclosure since the evidence of record indicates that the Custodian provided the responsive records on October 2, 2018.
2. The Custodian’s failure to timely respond in writing resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian provided the Complainant with all responsive records on October 2, 2018. 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.
3. 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 attempted to respond, but her e-mail failed delivery based on a typo and resulting in a “deemed” denial. Further, the Custodian was able to prove that this complaint was not the catalyst for her response. 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

August 18, 2020