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

January 26, 2021 Government Records Council Meeting

Luis F. Rodriguez
Complainant
v.
Kean University
Custodian of Record

Complaint No. 2018-262

At the January 26, 2021 public meeting, the Government Records Council ("Council") considered the January 19, 2021 Supplemental 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 the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant's Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 26th Day of January 2021

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 28, 2021

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Prevailing Party Attorney's Fees
Supplemental Findings and Recommendations of the Executive Director
January 26, 2021 Council Meeting

Luis F. Rodriguez[1] **GRC Complaint No. 2018-262**
Complainant

v.

Kean University[2]
Custodial Agency

Records Relevant to Complaint: Electronic copies via e-mail of the "Supplemental Information Report" ("Report") that the Middle States Commission on Higher Education ("MSCHE") asked Kean University ("Kean") to submit by September 21, 2018.[3]

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: September 26, 2018
Response Made by Custodian: October 5, 2018
GRC Complaint Received: November 1, 2018

Background

November 10, 2020 Council Meeting:

At its November 10, 2020 public meeting, the Council considered the October 27, 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, found that:

1. The Custodian unlawfully denied access to the requested "Supplemental Information Report." N.J.S.A. 47:1A-6. The Custodian failed to prove that the Report contained trade secret and proprietary information or that disclosure would present an advantage to competitors or bidders. N.J.S.A 47:1A-1.1; Newark Morning Ledger, Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140 (App. Div. 2011). However, the GRC declines to order disclosure of the Report because the Custodian did so on August 30, 2019.

2. The Custodian unlawfully denied access to the responsive Report. N.J.S.A. 47:1A-6. However, the Custodian ultimately disclosed it to the Complainant on August 30, 2019.

[1] Represented by Walter M. Luers, Esq., of Cohn, Lifland, Pearlman, Herrmann & Knopf, LLP. (Saddle Brook, NJ).
[2] Represented by Kraig M. Dowd, Esq. of Weber Dowd Law, LLC (Woodland Park, NJ).
[3] The Complainant sought additional records that are not at issue in this complaint.

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 achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a 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, notwithstanding the Custodian acting on her October 19, 2018 response that she would disclose the Report at the conclusion of the accreditation process, she unlawfully denied access in the first instance. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is 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. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Procedural History:

On November 12, 2020, the Council distributed its Interim Order to all parties. On December 14, 2020, Custodian's Counsel sought an extension of time to continue to confer on the fee issue. On December 16, 2020, the Government Records Council ("GRC") granted an extension through January 13, 2021 to allow the parties additional time to reach a fee resolution.

On January 13, 2021, Custodian's Counsel confirmed via e-mail, which was copied to Custodian's Counsel, that the fee issue was amicably resolved. On the same day, Complainant's Counsel confirmed via e-mail that the fee issue was resolved.

Analysis

Prevailing Party Attorney's Fees

At its November 10, 2020 meeting, the Council determined that the Complainant was a prevailing party entitled to an award of reasonable attorney's fees. The Council thus ordered that the "parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days." The Council further ordered that the parties notify of any settlement prior to the expiration of the twenty (20) business day time frame. Finally, the Council ordered that, should the parties not reach an agreement, the Complainant's Counsel would be required to "submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13."

On November 12, 2020, the Council distributed its Interim Order to all parties; thus, the parties' response was due by close of business on December 14, 2020. On December 14, 2020, the last business day to notify the GRC of an agreement, Custodian's Counsel sought an extension of time to confer on the fee issue. On December 16, 2020, the GRC granted said extension through January 13, 2021. On January 13, 2021, both parties confirmed that the fee issue was resolved.

Accordingly, the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant's Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant's Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Executive Director

January 19, 2021

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

INTERIM ORDER

November 10, 2020 Government Records Council Meeting

Luis F. Rodriguez
Complainant
v.
Kean University
Custodian of Record

Complaint No. 2018-262

At the November 10, 2020 public meeting, the Government Records Council ("Council") considered the October 27, 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 unlawfully denied access to the requested "Supplemental Information Report." N.J.S.A. 47:1A-6. The Custodian failed to prove that the Report contained trade secret and proprietary information or that disclosure would present an advantage to competitors or bidders. N.J.S.A 47:1A-1.1; Newark Morning Ledger, Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140 (App. Div. 2011). However, the GRC declines to order disclosure of the Report because the Custodian did so on August 30, 2019.

2. The Custodian unlawfully denied access to the responsive Report. N.J.S.A. 47:1A-6. However, the Custodian ultimately disclosed it to the Complainant on August 30, 2019. 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 achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a 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, notwithstanding the Custodian acting on her October 19, 2018 response that she would disclose the Report at the conclusion of the accreditation process, she unlawfully denied access in the first instance. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is 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. **Based on this determination, the parties shall**

confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

Interim Order Rendered by the
Government Records Council
On The 10th Day of November 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: November 12, 2020

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
November 10, 2020 Council Meeting

Luis F. Rodriguez[1]
Complainant

GRC Complaint No. 2018-262

v.

Kean University[2]
Custodial Agency

Records Relevant to Complaint: Electronic copies via e-mail of the "Supplemental Information Report" ("Report") that the Middle States Commission on Higher Education ("MSCHE") asked Kean University ("Kean") to submit by September 21, 2018.[3]

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: September 26, 2018
Response Made by Custodian: October 5, 2018
GRC Complaint Received: November 1, 2018

Background[4]

Request and Response:

On September 25, 2018, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On October 5, 2018, the Custodian responded in writing advising that an extension of time until October 19, 2018 was necessary to process the OPRA request appropriately.

On October 19, 2018, the Custodian responded in writing denying access to the Report under the proprietary and trade secret, advantage to bidders and competitors, and "inter-agency or intra-agency advisory, consultative, or deliberative [("ACD")] material" exemptions. N.J.S.A. 47:1A-1.1. The Custodian noted that this position is consistent with that in recent litigation in Rodriguez v. Kean Univ., *et. al.*, Docket No. UNN-L-185-18 concerning records sought in connection with the accreditation process. The Custodian further stated that consistent with the Settlement Agreement reached in Rodriguez, Kean would disclose the Report after the accrediting

[1] Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Annandale, NJ).
[2] Represented by Kraig M. Dowd, Esq. of Weber Dowd Law, LLC (Woodland Park, NJ).
[3] The Complainant sought additional records that are not at issue in this complaint.
[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.

agency at the center of that complaint makes a final accreditation determination, which had not yet occurred.

Denial of Access Complaint:

On November 1, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant disputed the Custodian's denial of access to the Report. The Complainant initially asked that the GRC nullify the Custodian's ACD argument because the record at issue here is similar to that in Rodriguez v. Kean Univ., GRC Complaint No. 2013-130 (Interim Order dated December 20, 2013) (holding that the ACD exemption did not apply to Kean's responses to third-party comments). The Complainant also contended that in light of the Council's decision in Rodriguez, GRC 2013-130, the Custodian's reliance on the ACD exemption was knowing and willful in nature.

The Complainant next argued that the trade secret and proprietary exemption was addressed by Complainant's Counsel in Rodriguez, Docket No. UNN-L-185-18. The Complainant stated that Counsel argued in his brief that the records there originated with Kean and were not "obtained from any source." N.J.S.A. 47:1A-1.1; N.J.S.A. 56:15-1; Newark Morning Ledger, Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140 (App. Div. 2011). The Complainant further stated that Counsel similarly argued that the records at issue in Rodriguez did not pass the proprietary test set forth in Lamorte Burns & Co. v. Walters, 167 N.J. 285, 299-301 (2001). See also Commc'ns Workers of Am. v. Rousseau, 417 N.J. Super. 341 (App. Div. 2010).

The Complainant next argued that Counsel also addressed the competitive advantage exemption in his brief, arguing that it did not apply to records sought in Rodriguez. The Complainant stated that Counsel argued that Kean could not meet its burden of proof that disclosure would lead to some type of competitive disadvantage. The Complainant further stated that Counsel argued that the industry was aware of accrediting agency standards and there was no reason to believe disclosure would hinder Kean's position therein.

The Complainant finally argued that any constraints set in place by the Settlement Agreement in Rodriguez were voided as of September 19, 2018. The Complainant stated that on that day, he advised Kean that they violated the terms of the Agreement and that it was null and void. The Complainant noted that even if the Agreement were still in effect, the Report was not part of those records at issue in Rodriguez, Docket No. UNN-L-185-18.

The Complainant also asked that, should he prevail here, the GRC find that he is a prevailing party subject to an award of attorney's fees.

Statement of Information:[5]

On October 11, 2019, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on September 26, 2018. The Custodian affirmed that her search included sending the OPRA request for legal review due

[5] On November 26, 2018, this complaint was referred to mediation. On September 13, 2019, this complaint was referred back to the GRC for adjudication.

to Rodriguez, Docket No. UNN-L-185-18. The Custodian certified that she responded in writing on October 5, 2018 extending the time frame to respond through October 19, 2018. The Custodian averred that in reviewing the OPRA request, Kean decided to rely on the same position it took in Rodriguez. The Custodian averred that she subsequently responded on October 19, 2018 denying access to the requested Report. The Custodian also noted that during the pendency of this complaint, the accrediting agency reached its final decision on August 20, 2019. The Custodian stated that thereafter, she obtained a copy of the Report, reviewed it, redacted it, and disclosed same to the Complainant through Complainant's Counsel on August 30, 2019.

The Custodian stated that, for background and context, Kean was in the process of seeking accreditation for its MPA program from the Commission of Peer Review and Accreditation ("COPRA"), a body associated with the Network of Schools of Public Policy, Affairs and Administration ("NASPAA"). The Custodian stated that during the accreditation process, the MSCHE requested the Report regarding Kean's ongoing accreditation process with NASPAA. The Custodian asserted that while reviewing the subject request, she was aware that Kean's accreditation status was of vital importance for several reasons. The Custodian argued that the final stages of the accreditation process are particularly sensitive and involve "many levels of evaluation and review, as well as an ongoing exchange of information." The Custodian argued that disclosure of records and correspondence during that period could cause irreparable harm to Kean. The Custodian contended that based on this, she lawfully denied access to the Report

The Custodian first argued that the Report was exempt under the trade secret exemption. N.J.S.A. 47:1A-1.1; CWA, 417 N.J. Super. at 361 (citing Hammock by Hammock v. Hoffmann-LaRoche, 142 N.J. 356, 384 (1995)). The Custodian argued that Kean took great lengths to ensure confidentiality during the accreditation process, including limiting physical and electronic access to relevant documents and designating secure rooms for review. The Custodian reiterated that disclosure would have irreparable harm on its ability to recruit students, whose tuition accounts for "the vast majority of its funding." The Custodian noted that by way of example, in early 2012 pre-decisional documents were disclosed and published in the media. The Custodian stated that this disclosure resulted in an 8.3% decrease in enrollment from Fall 2011 through Fall 2013. The Custodian further stated that the enrollment decrease caused funding issues that resulted in MSCHE reprimanding Kean for failing to safeguard its confidential information. The Custodian noted that this reprimand forced Kean to update its accreditation confidentiality process.

The Custodian argued that the Report relates to perceived deficiencies in Kean's MPA program, as well as its pending accreditation with the NASPAA. The Custodian contended that disclosure would have given Kean's competitors intimate details of its vulnerability and allow them to gain an advantage in recruitment.

The Custodian next argued that the Report was exempt because it comprised of proprietary commercial information. N.J.S.A. 47:1A-1.1; CWA, 417 N.J. Super. at 356 (citing Lamorte, 167 N.J. 285). The Custodian averred that Kean's "business and financial well-being is closely related to its accreditation status." The Custodian further contended that Kean's overall accreditation is with MSCHE, whose internal policy on maintenance and retention calls for non-disclosure without written consent. The Custodian asserted that the Report addressed Kean's ability to remain in

compliance with the MSCHE's accreditation standards and is thus "proprietary commercial information."

The Custodian finally argued that the Report was exempt under the "advantage to competitors and bidders" exemption. N.J.S.A. 47:1A-1.1. The Custodian reiterated that the 2012 disclosure resulted in enrollment declines that "undoubtedly provided other colleges and universities with a competitive advantage over Kean." The Custodian argued that this advantage would not have occurred had the records not been disclosed. The Custodian asserted that the Report at issue here address MSCHE's concerns, the premature disclosure of which would result in competitors being allowed to assess and exploit Kean's vulnerabilities.

The Custodian contended that notwithstanding the forgoing, and consistent with her October 19, 2018 response, she disclosed the Report to the Complainant. The Custodian thus contended that no unlawful denial of access occurred. Desoto v. City of Bayonne (Hudson), GRC Complaint No. 2012-243 (July 2013). The Custodian further contended that the Complainant should not be considered a prevailing party entitled to an award of attorney's fees. N.J.S.A. 47:1A-6.

Additional Submissions:

On October 21, 2019, the Complainant sent an e-mail to the GRC refuting the Custodian's assertion that the "2012 disclosure resulted in enrollment declines" and a reprimand. The Complainant contended that the "disclosure" was likely made at a public meeting held at Kean where MSCHE gave an oral summary of the report Kean filed. The Complainant noted that he only found one article relevant to this issue which discussed that meeting. The Complainant also noted that at that time, Kean's spokesman asserted that the MSCHE's visit and report did not impact enrollment, which he touted as "better than ever." The Complainant surmised that the enrollment decrease was likely due to two (2) other high-profile incidents involving the president's resume and violations within the athletics program.

The Complainant also denied that the MSCHE actually reprimanded Kean over confidentiality issues. The Complainant averred that in response to an OPRA request, Kean admitted that no record containing an MSCHE reprimand existed. The Complainant asserted that Kean also made this argument in Rodriguez, Docket No. UNN-L-185-18. The Complainant stated that there, Complainant's Counsel argued that two (2) other private accreditation agencies do not have similar confidentiality clauses, notwithstanding that those clauses only applied to the private agencies and not Kean.

On October 22, 2019, Complainant's Counsel submitted a letter brief refuting the SOI. Initially, Counsel argued that Kean was collaterally estopped from arguing that the Report was exempt as ACD material. Tarus v. Borough of Pine Hill, 189 N.J. 497, 520 (2007) (citing Velasquez v. Franz123 N.J. 498, 505 (1991)). Counsel noted that this is because the Council already held that "materials transmitted from Kean to an accredited agency" did not fall under the ACD exemption. Rodriguez, GRC 2013-130. Counsel argued that because this issue was already litigated, Kean is precluded from raising that exemption again here. Mancuso v. North Arlington, 203 N.J. Super. 427, 431-432 (App. Div. 1985). Counsel argued that to the extent that the ACD

exemption is contemplated, the Report did not fall within the exemption because the privilege is only intended to protect internal communications.

Counsel next argued that neither the trade secret nor proprietary exemptions applied here. Counsel stated that Kean is a public agency and not a private company. Newark Morning Ledger, 423 N.J. Super. 140; CWA, 417 N.J. Super. 341; Tractenberg, 416 N.J. Super. 354, 366 (App. Div. 2010).

Counsel argued that public agencies does not have trade secret or proprietary information; rather, the exemptions are intended to protect private company information. Counsel further noted that even if the exemptions applied to public entities, Kean did not have a nondisclosure or confidentiality agreement with the accreditation agencies "implicated by [the Complainant's] OPRA request." Counsel, however, noted that even if such an agreement did exist, it would not supersede OPRA. Counsel argued that to this end, MSCHE's internal confidentiality policy has no bearing on the instant complaint because it is not recognizable under OPRA. Golden v. N.J. Inst. of Tech., 934 F.3d 302 (3d Cir. 2019).

Counsel finally argued that because the Custodian disclosed the Report to the Complainant on August 30, 2019, he has prevailed and is entitled to an award of reasonable attorney's fees. N.J.S.A. 47:1A-6; C&M Door Controls, Inc., 200 N.J. 348, 354 (1989); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Counsel argued that Kean voluntarily disclosed the Report after initially denying access, which shows a casual nexus between this complaint and the Custodian's actions. Counsel argued that the disclosure had a basis in law because the Report was a "government record" subject to disclosure under OPRA. Counsel thus argued that the Kean unlawfully denied access to the Report, which should have been produced; thus, the Complainant has prevailed.

On November 14, 2019, Custodian's Counsel submitted a letter brief. Therein, Counsel first argued that the ACD exemption is not at issue; thus, Complainant Counsel's collateral estoppel argument is moot. Counsel further argued that Complainant Counsel's remaining arguments about Kean's inability to support the denial are "plainly contradicted" by the SOI.

Counsel finally refuted that the Complainant is a prevailing party, arguing that he failed to prove a casual nexus existed between this complaint and the relief achieved. Counsel argued that Complainant's Counsel presumed that an unlawful denial occurred and that the "voluntar[y]" production happened after the complaint filing. Counsel asserted that this argument "ignored that fact" that the Custodian advised on October 19, 2018 that the record would be disclosed at the conclusion of the accreditation process. Counsel stated that as indicated in the SOI, that process concluded on August 20, 2019; shortly thereafter the Custodian disclosed the Report. Counsel argued there is no evidence in the record to support that Kean would have continued to withhold the Report absent this complaint. Counsel thus argued that the Complainant has not shown that this complaint caused production of records "that would have been produced otherwise." Spectraserv, Inc. v. Middlesex Cnty. Util. Auth., 416 N.J. Super. 565, 584 (App. Div. 2010).

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.

OPRA provides that:

> A government record shall not include . . . trade secrets and proprietary commercial or financial information obtained from any source. For the purposes of this paragraph, trade secrets shall include data processing software obtained by a public body under a licensing agreement which prohibits its disclosure (emphasis added).
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> [N.J.S.A. 47:1A-1.1.]

In Newark Morning Star Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140 (App. Div. 2011), the Appellate Division elaborated on defining trade secret and proprietary information and its application to OPRA's proprietary and trade secret exemption:

> Relying on the Court's guidance set forth in Lamorte Burns & Co. v. Walters, 167 N.J. 285, 299-301, 770 A.2d 1158 (2001), we considered "the key elements" to determine when commercial financial information was proprietary. [Commc'ns Workers of America v. Rousseau, 417 N.J. Super. 341, 356, 9 A.3d 1064 (App. Div. 2010)]. Lamorte suggested we must analyze "the relationship of the parties at the time of disclosure[,] . . . the intended use of the information[,]" and "the expectations of the parties." Ibid. (citing Lamorte, *supra*, 167 N.J. at 299-300, 770 A.2d 1158). "[U]nder OPRA, if the document contains commercial or proprietary information it is not considered a government record and not subject to disclosure." Id. at 358, 9 A.3d 1064. We concluded the investment agreements sought by the plaintiffs were proprietary as their content was not intended for wide dissemination, the "[d]efendants' expectation of confidentiality [was] manifest" and the agreements delineated the specific terms and specific persons who may review the information. Id. at 359, 9 A.3d 1064. Further,
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> > [e]ach agreement contains specific information about the capitalization of the partnership, its commencement and termination date, and other information pertinent to the operational fortunes of the partnership. Finally, each agreement is a complex document. Each reflects years of experience and expertise by trained legal and financial professionals. Id. at 359-60, 9 A.3d 1064.

> In analyzing whether information qualifies as "trade-secrets," a term not defined by OPRA, Id. at 360, 9 A.3d 1064, we considered the Court's prior reliance on Comment b of the Restatement of Torts § 757 (1939). Id. at 361, 9 A.3d 1064 (citing Hammock v. Hoffmann-LaRoche, 142 N.J. 356, 384, 662 A.2d 546 (1995)). The comment provides: "'[a] trade secret may consist of any . . . compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.'" Ibid. (quoting Restatement of Torts § 757 cmt. b (1939)). Other considerations include the extent to which the information is known outside of the owner's business, the extent to which it is known by employees of the owner, the measures taken to guard the secrecy of the information, the value of the information to the owner and competitors, the effort expended to develop the information, and the ease or difficulty by which the information can be duplicated. Ibid. (citing Hoffmann-LaRoche, 142 N.J. at 384, 662 A.2d 546).
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> "'Trade secrets are a peculiar kind of property. Their only value consists in their being kept private. If they are disclosed or revealed, they are destroyed.'" Trump's Castle Assocs. v. Tallone, 275 N.J. Super. 159, 163, 645 A.2d 1207 (App. Div. 1994) (quoting In re Iowa Freedom of Info. Council, 724 F.2d 658, 662 (8th Cir. 1983)).
>
> [Newark Morning Ledger, 423 N.J. Super. at 169.]

OPRA also exempts access to "information which, if disclosed, would give an advantage to competitors or bidders . . ." N.J.S.A. 47:1A-1.1.

In the matter before the Council, the Custodian initially denied access to the requested Report under the ACD, trade secret and proprietary, and competitors and bidders exemptions. The Custodian also noted that it would disclose the Report once the accreditation process concluded, which she described as consistent with Kean's position regarding similar records in a settlement agreement resolving Rodriguez, Docket No. UNN-L-185-18. This complaint ensued, wherein the Complainant contended that none of the exemptions applied to the requested Report. The Complainant provided arguments presented to the trial court in Rodriguez to refute the Custodian's response here. In the SOI, the Custodian maintained her position that the Report was exempt from disclosure under the trade secret and proprietary, as well as the competitive advantage, exemptions. However, the Custodian abandoned the ACD exemption.[6] The Custodian certified that Kean ultimately disclosed the Report after the NASPAA concluded its review. Thereafter, the parties engaged in competing arguments regarding the cited exemptions, as well as whether the Complainant is a prevailing party entitled to a fee award.

In reviewing the submissions and arguments of the parties, the GRC is persuaded that the Custodian unlawfully denied access to the Report. As to the trade secret and proprietary exemption, Complainant and Counsel make a compelling argument that the exemption only applies to information "*obtained* from any source." (emphasis added). A plain reading of the exemption strongly suggests that public agencies cannot assert this exemption for their own

[6] The GRC notes that it will not address the ACD exemption as same no longer applies.

internal information. The GRC does recognize that such a narrow view could adversely affect public agencies engaging in innovative ways of operating their business. Notwithstanding, the Custodian has not provided, nor is the GRC aware of, any precedential decision interpreting the trade secret exemption as applying to information originating from a public agency's internal business.

Even in assuming that the exemption applies, the Custodian has failed to prove that the elements of the Report could meet the test routinely used by the Courts. See NJSEA, 423 N.J. Super. at 169. Specifically, the Custodian provided no details as to the content of the Report or how that content met the factors discussed in NJSEA. Further, the Custodian failed to provide a compelling link between the disclosure of information prior to accreditation in 2012 and the alleged enrollment losses that ensued. Finally, the GRC agrees with the Complainant and Council that any confidentiality agreement that MSCHE may impose on itself does not inherently apply to Kean.

Further, the Custodian has failed to prove that disclosure of the Report would present an advantage to competitors or bidders. The Custodian again presented the 2012 disclosure and ensuing enrollment issue as a specific example of how the prior disclosure affected Kean's enrollment, which "undoubtedly provided other colleges and universities with a competitive advantage over Kean." However, the Custodian provides no definitive evidence to support that the disclosure alone led to the alleged decrease in enrollment. Additionally, the Custodian provides no evidence to show that prospective students chose to attend competing institutions over Kean as a result of this voluntary disclosure.

Accordingly, the Custodian unlawfully denied access to the requested Report. N.J.S.A. 47:1A-6. The Custodian failed to prove that the Report contained trade secret and proprietary information or that disclosure would present an advantage to competitors or bidders. N.J.S.A 47:1A-1.1; NJSEA, 423 N.J. Super. 140. However, the GRC declines to order disclosure of the Report because the Custodian did so on August 30, 2019.

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)).

In the matter before the Council, the Custodian unlawfully denied access to the responsive Report. N.J.S.A. 47:1A-6. However, the Custodian ultimately disclosed it to the Complainant on August 30, 2019. 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. 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.
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> [Mason 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, *cert denied* (1984).
>
> [Id. at 76.]

In the matter before the Council, the Custodian denied access to the requested Report under several bases but noted that same would be disclosed once the NASPAA completed its review. The Custodian stated that this position was consistent with a settlement agreement reached in Rodriguez, Docket No. UNN-L-185-18. The Complainant filed the instant complaint arguing that the Custodian unlawfully denied access to the requested Report. In the SOI, the Custodian certified that she denied access to the Report under the trade secret and proprietary, as well as the competitors and bidders, exemption. Notwithstanding, the Custodian noted that in accordance with her initial response, she disclosed the Report to the Complainant (through Counsel) upon completion of NASPAA's accreditation review on August 20, 2019. In reply to the SOI, Complainant's Counsel confirmed that he received the Report on August 30, 2019 and argued that

the Complainant should be considered a prevailing party. Thereafter, Custodian's Counsel refuted that the Complainant was a prevailing party, arguing that the Custodian disclosed the Report consistent with her October 19, 2018 response. Counsel argued that this disclosure did not represent a change in the Custodian's conduct and there was no causal nexus triggering OPRA's fee-shifting provision. Citing Spectraserv, Inc., 416 N.J. Super. at 584.

The evidence of record here supports that the Complainant has prevailed. The GRC acknowledges that in her October 19, 2018, the Custodian stated that she would provide the Report once the accreditation process concluded. In his November 14, 2019 letter brief, Custodian's Counsel argued that the Complainant was not a prevailing party because of the Custodian's pre-complaint offer to disclose the Report at the conclusion of the accreditation process. However, the Council has found that the Custodian denied access to the Report in the first place. Additionally, this offer to disclose did not include a specific date. Thus, had the accreditation process still been ongoing at the time of this decision, the Council would have ordered disclosure.

Additionally, this complaint is inapposite to Spectraserv. There, the court held that plaintiff was not a prevailing party because 1) the subject OPRA request comprising sixteen (16) items was invalid; and 2) defendants acknowledged its obligation to disclose records and produced many documents prior to court action. Here, there is no question as to the validity of the Complainant's OPRA request, and the Custodian outright denied access to the responsive Report with a qualified disclosure at a future unknown date. One can assume that the Custodian would have eventually disclosed the Report based on her October 19, 2018 response. However, that time frame remained entirely open-ended, whereas defendants in Spectraserv proceeded within confined time frames set forth by the parties and also the court.

Based on this, and notwithstanding the eventual disclosure, a causal nexus does exist between this complaint and the relief achieved. That relief is found in the Council's determination that the Custodian unlawfully denied access to the responsive Report at the time of her denial. Additionally, the eventual disclosure has a basis in law regardless of the Custodian's voluntary action. For these reasons, the Complainant prevailed and is entitled to a reasonable award in attorney's fees.

Therefore, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a 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, notwithstanding the Custodian acting on her October 19, 2018 response that she would disclose the Report at the conclusion of the accreditation process, she unlawfully denied access in the first instance. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is 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. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian unlawfully denied access to the requested "Supplemental Information Report." N.J.S.A. 47:1A-6. The Custodian failed to prove that the Report contained trade secret and proprietary information or that disclosure would present an advantage to competitors or bidders. N.J.S.A 47:1A-1.1; Newark Morning Ledger, Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140 (App. Div. 2011). However, the GRC declines to order disclosure of the Report because the Custodian did so on August 30, 2019.

2. The Custodian unlawfully denied access to the responsive Report. N.J.S.A. 47:1A-6. However, the Custodian ultimately disclosed it to the Complainant on August 30, 2019. 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 achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a 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, notwithstanding the Custodian acting on her October 19, 2018 response that she would disclose the Report at the conclusion of the accreditation process, she unlawfully denied access in the first instance. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is 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. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Prepared By: Frank F. Caruso
Executive Director

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