State of New Jersey
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

September 29, 2020 Government Records Council Meeting

Libertarians for Transparent Government
Complainant
v.
Red Bank Board of Education (Monmouth)
Custodian of Record

Complaint No. 2018-46

At the September 29, 2020 public meeting, the Government Records Council ("Council") considered the September 22, 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. Because the requested record is a student record pursuant to N.J.A.C. 6A:32-2.1, and because N.J.A.C. 6A:32-7.5(a) provides that only authorized organizations, agencies or persons enumerated in the regulation shall have access to student records, and because the evidence of record reveals that the Complainant is not such an authorized organization, agency or person, and because exemptions from disclosure provided by regulations promulgated under the authority of a statute apply to OPRA pursuant to N.J.S.A. 47:1A-9(a), the Custodian did not unlawfully deny the Complainant access to the requested record. N.J.S.A. 47:1A-6; See L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56 (App. Div. 2017); L.R. v. Camden City Pub. Sch. Dist., 238 N.J. 547 (2019).

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 Council concluded that the Custodian did not unlawfully deny the Complainant access to the requested record. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

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

at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 29th Day of September 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: October 1, 2020

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
September 29, 2020 Council Meeting

Libertarians for Transparent Government[1] **GRC Complaint No. 2018-46**
Complainant

v.

Red Bank Board of Education (Monmouth)[2]
Custodial Agency

Records Relevant to Complaint: A copy via e-mail to NJTransparency@yahoo.com of "[t]he most recently amended civil complaint filed by the Plaintiff or, if there are no amendments, please send the original civil complaint. Please do not send us summonses, case information statements, etc." for J.Z. v. Red Bank Bd. of Educ., Case No. 3:16-cv-9437. The court's computer system shows this case as having settled on April 18, 2017.[3]

Custodian of Record: Debra Pappagallo
Request Received by Custodian: August 23, 2017
Response Made by Custodian: September 1, 2017
GRC Complaint Received: March 22, 2018

Background[4]

Request and Response:

On August 23, 2017, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On September 1, 2017, the seventh (7th) business day following receipt of said request, the Custodian responded in writing informing the Complainant via e-mail that the requested records were attached.

Denial of Access Complaint:

On March 22, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the OPRA request was submitted to the Custodian on August 23, 2017, and denied in part on September 5, 2017.[5] The

[1] Represented by Walter M. Luers, Esq. (Camden, NJ).
[2] Represented by Eric L. Harrison, Esq., of Methfessel & Werbel (Edison, NJ).
[3] There were other records requested that are not relevant to 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.
[5] The evidence of record reveals that the Custodian responded in writing on September 1, 2017.

Complainant, through Counsel, alleged that the Custodian improperly redacted the student's gender, home address, date of birth and the names of institutions where placement was considered.

The Complainant's Counsel stated that the complaint and exhibits are public records and the Custodian must fully disclose them because neither the New Jersey Pupil Record Act nor the Federal (sic) Educational Rights and Privacy Act permits the redaction of a complaint filed in federal court. The Complainant's Counsel stated that the requested record is a judicial record which relates to a federal matter in which a minor student, through her counsel, asserted she was not properly accommodated with regards to her special educational needs. Counsel further stated that the Appellate Division has held that "the public has a common-law right of access to judicial proceedings and a right to inspect judicial records." Counsel argued that this right applies to civil as well as criminal proceedings (citations omitted). Counsel asserted that the requested record was filed in federal court, which is a public forum, and the attorney in the underlying lawsuit failed to avail himself of the privacy provisions afforded under the Local Civil Rules of the United States District Court for the District of New Jersey; therefore, the requested document is a matter of public record and must be disclosed in its entirety.

The Complainant's Counsel further argued that the Appellate Division's decisions in L.R. ex rel. J.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56 (App. Div. 2017) and K.L v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337, 365 (App. Div. 2011) (certif. denied, 210 N.J. 108 (2012)) do not apply here because the requested record, a complaint filed in federal court, is a public record. Counsel cites Zukerman v. Piper Pools, Inc., 256 N.J. Super. 622, 628-29 (App. Div. 1992) in support of his argument.

The Complainant's Counsel stated that although the court's decisions in L.R. and K.L, *supra*, shielded student records and education records from full disclosure, here the requested record is of a "significantly different nature" because it was filed in federal court. Counsel argued that for a fee such a record is ordinarily publicly available on PACER; therefore, the student has no expectation of privacy in the record.

Counsel also asserted that the neither the federal Educational Rights and Privacy Act nor the New Jersey Pupil Record Act apply here because the underlying policy of these acts is the protection of information in which a student has a reasonable expectation of privacy. Counsel stated that because the requested record is a publically available record, the student has no expectation of privacy with respect to the record. As such, Counsel argued, the policy behind the aforementioned acts does not apply.

Finally, the Complainant's Counsel asserted that the requested complaint is not a "student record" as defined by N.J.A.C. 6A:32-7.1 because the record contains information which is not objectively based on the personal observations or knowledge of school personnel. Counsel asserted that the requested record is a complaint filed in federal court which does not fall within such limitation.

Counsel argued that the requested record must be disclosed in its entirety because the Custodian did not have an independent right or duty to redact the record since it is public by its

very nature. Council also seeks prevailing party attorney fees if the Council orders the Custodian to produce the requested record.

Statement of Information:

On March 30, 2018, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on August 23, 2017, and responded in writing on September 1, 2017. The Custodian certified that she disclosed the requested record with exhibits, consisting of twenty-one (21) pages, in redacted form to the Complainant on September 1, 2017. The Custodian further certified that the redactions were made to remove the student's personal identifiers pursuant to the New Jersey Pupil Record Act ("NJPRA"), N.J.S.A. 18A:36-19, and the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g; 34 CFR Part 99. The Custodian certified the provisions of the statutes are applicable to OPRA through N.J.S.A. 47:1A-9(a).

The Custodian certified that in L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56, 90 (App. Div. 2017), the court confirmed the "vital importance of a careful redaction process" as it pertains to student records. The Custodian further certified that under NJPRA, a Board of Education ("BOE") is required to protect the reasonable privacy interests of both students and parents. The Custodian certified that under FERPA, a BOE is obligated to safeguard a student's privacy by removing the student's personal identifiers prior to disclosure of a record, which identifiers include: (a) the student's name; (b) the name of the student's parent or other family members; (c) the address of the student or student's family; (d) a personal identifier, such as the student's social security number, student number, or biometric record; (e) other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name; (f) other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or (g) information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

The Custodian certified that she considered the student's privacy concerns under NJPRA and FERPA. The Custodian further certified that she redacted that information from the record which she believed was necessary to protect the student's privacy interests. The Custodian attached to the SOI copies of the redacted records that were disclosed to the Complainant.

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 also provides that:

> The provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.
>
> [N.J.S.A. 47:1A-9(a)]

The regulations of the State Board of Education and the Commissioner define a "student record" as ". . . information ***related*** to an individual student *gathered within or outside the school district and maintained within the school district*, regardless of the physical form in which it is maintained." N.J.A.C. 6A:32-2.1 (emphasis added). The regulations of the State Board of Education and the Commissioner of Education provide that "[o]nly authorized organizations, agencies or persons as defined herein shall have access to student records . . ." to include "persons from outside the school if they have written consent of the parent . . ." N.J.A.C. 6A:32-7.5(e)(14). Finally, the regulations require that "[i]n complying with this section, individuals shall adhere to requirements pursuant to [OPRA] and [FERPA]." N.J.A.C. 6A:32-7.5(g). To this end, the Council has looked to these exceptions in determining whether a complainant can access "student records" in part or in whole under OPRA. See i.e. Martinez v. Edison Bd. of Educ. (Middlesex), GRC Complaint No. 2014-126 (May 2015); but see Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2014-92 (September 2014).

More recently, the Appellate Division addressed OPRA and the disclosure of "student records" in L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56 (App. Div. 2017). In one of the four (4) consolidated cases, the trial court ordered the school district to disclose student records requested under OPRA, with redactions made to all personally identifying information. The Appellate Division held that redacting personally identifying information from a document does not remove its classification as a "student record." Id. at 83. The court found that "N.J.A.C. 6A:32-7.5(g)'s does not expressly incorporate FERPA's provisions for the redaction of personally identifying information into the NJPRA or its regulations. Moreover, nothing in the NJPRA or its regulations states that sufficiently anonymized documents, with all personally identifying information removed, are no longer "student records" under N.J.A.C. 6A:32-1." Id. at 85.

The court further discussed the interplay between the NJPRA, FERPA and OPRA:

> It is reasonable to conclude that N.J.A.C. 6A:32-7.5(g) centrally concerns functionality—a district's *processing* of student record requests from an authorized person or organization. See K.L., *supra*, 423 N.J. Super. at 350, 32 A.3d 1136 ("In providing access to school records in accordance with N.J.A.C. 6A:32-7.5, school districts must also comply with the requirements of OPRA and FERPA, N.J.A.C. 6A:32-7.5(g)."). For instance, if a school district receives an OPRA request from an authorized person or organization listed under N.J.A.C.

> 6A:32-7.5(e), then it must process that request in compliance with OPRA and FERPA requirements. Nothing in the plain language of N.J.A.C. 6A:32-7.5(g), however, supersedes or nullifies the limitations of "authorized" parties, as set forth at N.J.A.C. 6A:32-7.5(a) and (e). Hence, we agree with the judge in the Hillsborough case that a requestor cannot gain access to a student record unless the requestor satisfies one of the "[a]uthorized" categories listed in N.J.A.C. 6A:32-7.5(e)(1) through (16).
>
> [Id. at 86-87 (emphasis in original).]

Subsequently, in L.R. v. Camden City Pub. Sch. Dist., 238 N.J. 547 (2019), the New Jersey Supreme Court was divided equally, thus affirming the judgement by the Appellate Division in L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56 (App. Div. 2017), wherein the court held, *inter alia*, that a requestor cannot gain access to a student record unless the requestor is within one of the categories of authorized individuals and entities identified under N.J.A.C. 6A:32-7.5(e)(1) through (16).

The threshold issue in the instant complaint is whether the requested record is a "student record" protected from disclosure under N.J.A.C. 6A:32-2.1. The Complainant argued that the requested record is not a student record, but rather a complaint filed in court, which is a public record that must be disclosed in its entirety. The GRC does not agree with the Complainant's characterization of the record. The fact that the complaint was filed in court does not, in and of itself, render it a matter of public record because regardless of the physical form in which it is maintained, by the Complainant's own admission it is a document that contains information related to an individual student gathered within or outside the school district. And given the circumstances of its disclosure (in redacted form) under OPRA, it was clearly maintained within the school district. As such, it meets the definition of a "student record" pursuant to N.J.A.C. 6A:32-2.1.

Moreover, the fact that the plaintiff student is identified by initials and not by name in the caption of the federal complaint to protect the student's privacy further supports this conclusion. There is a long-standing practice in New Jersey to use initials rather than full names in case captions in order to protect the privacy of a minor child. This practice is not inconsistent with federal case law that supports the practice of using initials to protect the identity of minors. See e.g. U.S. v. Pliego, 2000 WL 371160 (D. Minn. Feb. 8, 2008).

Although L.R., 452 N.J. Super. 56, provided for the disclosure of student records requested under OPRA with redactions of personally identifying information, it is unnecessary for the GRC to consider the propriety of the redactions in the instant complaint because the secondary issue is whether the Complainant is an authorized person entitled to access of such records.

Given that the requested record is a student record, N.J.A.C. 6A:32-7.5(a) provides that "[o]nly authorized organizations, agencies or persons . . . shall have access to student records[.]" In the instant complaint, there is nothing in the evidence of record to indicate that the Complainant is an authorized organization, agency or person as enumerated in said regulation

subsection 7.5(e)(1) through (16). Therefore, the Complainant is not authorized to gain access to the requested record.

Accordingly, because the requested record is a student record pursuant to N.J.A.C. 6A:32-2.1, and because N.J.A.C. 6A:32-7.5(a) provides that only authorized organizations, agencies or persons enumerated in the regulation shall have access to student records, and because the evidence of record reveals that the Complainant is not such an authorized organization, agency or person, and because exemptions from disclosure provided by regulations promulgated under the authority of a statute apply to OPRA pursuant to N.J.S.A. 47:1A-9(a), the Custodian did not unlawfully deny the Complainant access to the requested record. N.J.S.A. 47:1A-6; See L.R., 452 N.J. Super. 56; L.R., 238 N.J. 547.

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. The Supreme Court also 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, *cert denied* (1984).

Id. at 76.

The Complainant filed the instant complaint to seek disclosure of the requested complaint, J.Z. v. Red Bank Bd. of Educ., Case No. 3:16-cv-9437, in its entirety. The Council concluded that the requested record is a student record pursuant to N.J.A.C. 6A:32-2.1 and the Complainant is not an authorized organization, agency or person entitled to such a record under N.J.A.C. 6A:32-7.5(a); therefore, the Custodian did not unlawfully deny access to the requested record. Thus, the evidence of record indicates that the Complainant is not a prevailing party entitled to an award of attorney's fees.

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 Council concluded that the Custodian did not unlawfully deny the Complainant access to the requested record. 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. Because the requested record is a student record pursuant to N.J.A.C. 6A:32-2.1, and because N.J.A.C. 6A:32-7.5(a) provides that only authorized organizations, agencies or persons enumerated in the regulation shall have access to student records, and because the evidence of record reveals that the Complainant is not such an authorized organization, agency or person, and because exemptions from disclosure provided by regulations promulgated under the authority of a statute apply to OPRA pursuant to N.J.S.A. 47:1A-9(a), the Custodian did not unlawfully deny the Complainant access to the requested record. N.J.S.A. 47:1A-6; See L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56 (App. Div. 2017); L.R. v. Camden City Pub. Sch. Dist., 238 N.J. 547 (2019).

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 Council concluded that the Custodian did not unlawfully deny the Complainant access to the requested record. 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: John E. Stewart

September 22, 2020