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LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 26, 2020 Government Records Council Meeting

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

Complaint No. 2018-65

v.

Borough of Helmetta (Middlesex)
Custodian of Record

At the February 26, 2020 public meeting, the Government Records Council (“Council”) considered the February 19, 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 dated October 31, 2007). However, the Council declines to order disclosure since the evidence in the record indicates that the Custodian provided responsive records on April 11, 2018 and again on April 18, 2018.
2. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) resulting in a “deemed” denial of access, the Custodian provided the Complainant with responsive records to the Complainant’s March 14, 2018 OPRA request Item Nos. 3-6 on April 11, 2018 and April 18, 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 evidence of record supports that the Custodian intended to respond despite not receiving clarification since the Helmetta Police

Department was scheduled to close at the end of the month. Therefore, the Complainant is not a prevailing party and is not entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51.

Final Decision Rendered by the
Government Records Council
On The 26th Day of February 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: March 3, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 26, 2020 Council Meeting**

**Rotimi Owoh, Esq. (on behalf of¹
African American Data and Research Institute)
Complainant**

GRC Complaint No. 2018-65

v.

**Borough of Helmetta (Middlesex)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:

1. Drug Recognition Expert (“DRE”) Rolling Log from January of 2016 to the present.
2. Copies of complaints that were prepared by the Helmetta Police Department (“HPD”) relating to the DRE Rolling Logs mentioned in Item No. 1 above.
3. Copies of DRE Reports prepared by the HPD’s DRE Officer(s) from January of 2016 to the present.
4. Copies of Driving While Intoxicated/Driving Under the Influence (“DWI/DUI”) complaints that were prepared and filed by the HPD from January of 2016 to the present.
5. Copies of drug possession complaints that were prepared and filed by the HPD from January of 2016 to the present.
6. Copy or copies of the HPD’s “Arrest Listings.” It is our understating that the record includes: arrest number, date, name, sex, race, and offense. We request it from January of 2016 to the present.

Custodian of Record: Sandra Bohinski

Request Received by Custodian: March 14, 2018; March 15, 2018

Response Made by Custodian: N/A

GRC Complaint Received: April 10, 2018

Background³

Request and Response:

On March 14, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 15, 2018, the Custodian

¹ The Complainant represents that African American Data and Research Institute.

² Represented by Joseph D. Youssouf, Esq. (Manalapan, 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.

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forwarded an e-mail from Officer Eric T. Fricks, who therein asked for clarification of “complaints” as referenced in Item Nos. 4 and 5.

Denial of Access Complaint:

On April 10, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that as of April 7, 2018, he has not received a response from the Custodian. The Complainant requested the GRC to compel compliance and award counsel fees.

Supplemental Response:

On April 11, 2018, the Custodian responded in writing to the Complainant, initially stating that Officer Fricks never received clarification from the Complainant and that the HPD was shutting down by the end of the month. The Custodian then stated that she was providing records she received from HPD that day, and hoped they were responsive to the Complainant’s request. The Custodian also stated that if what was provided was incorrect, then the Complainant could contact her. The Custodian also stated that the responsive records contained redactions to Social Security numbers, driver’s license numbers and birth dates. The Custodian’s e-mail also included a separate letter, wherein it stated that no responsive records exist for Item Nos. 1-3.

Additional Correspondence:

On April 11, 2018, the Complainant replied to the Custodian, requesting a copy of Officer Fricks’s clarification request. On April 13, 2018, the Custodian responded via e-mail, providing a copy of her March 15, 2018 e-mail.

On April 14, 2018, the Complainant submitted an OPRA request seeking an on-site inspection and copy of the Custodian’s e-mail, as well as any related metadata.

On April 18, 2018, the Custodian e-mailed the GRC and the Complainant, stating that upon reviewing the March 15, 2018 e-mail’s metadata, she discovered that she mistakenly misspelled the Complainant’s e-mail address when forwarding Officer Fricks’s clarification request. The Custodian also stated that she never received a “bounce back” or other notification from her e-mail server to indicate that the error occurred. The Custodian also re-submitted responsive records to the Complainant’s OPRA request.

Statement of Information:

On April 25, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on March 14, 2018. The Custodian certified that on March 15, 2018, she received an e-mail from Officer Fricks, who therein asked for clarification on the Complainant’s request Item Nos. 4 and 5. The Custodian certified that she forwarded Officer Fricks’s e-mail to the Complainant that same day. The Custodian then certified that she responded to the Complainant on April 11, 2018, providing responsive records for Item Nos. 4-6, and stating that no responsive records exist for Item Nos. 1-3.

The Custodian maintained that the reason the Complainant did not receive a response to his OPRA request was because she did not receive a reply from the Complainant when she forwarded Officer Fricks's e-mail. The Custodian asserted that the Complainant did not receive the e-mail due to the Custodian erroneously misspelling the Complainant's e-mail address. The Custodian also contended that she provided all responsive records on April 11, 2018 and again on April 18, 2018. The Custodian also attached the responsive records via several e-mails accompanying the SOI.

Additional Submissions:

On April 30, 2018, the Complainant submitted a reply to the Custodian's SOI, stating that upon receipt of the Custodian's April 11, 2018 response, he requested via OPRA an on-site inspection and copy of the Custodian's e-mail containing Officer Fricks's clarification request, as well as any related metadata. The Complainant noted that he submitted the OPRA request on April 14, 2018, four (4) days prior to the Custodian's April 18, 2018 e-mail explaining the typographic error.

The Complainant contended that that because he received the responsive records four (4) calendar days after verifying his complaint, it served as the catalyst for the Borough of Helmetta ("Borough") to provide the responsive records. The Complainant therefore argued that he was a prevailing party and entitled to an award of counsel fees.

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).⁴ 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 dated October 31, 2007).

Here, the Complainant contended that he submitted his OPRA request on March 14, 2018, but never received a response. Thereafter, the Complainant filed the instant complaint on April 10, 2018. The Custodian certified that she received the Complainant's OPRA request on March 14, 2018 and forwarded the complaint to Officer Fricks that same day. The Custodian then certified that she received a request for clarification from Officer Fricks on March 15, 2018 and forwarded the request to the Complainant via e-mail that same day. The Complainant certified that she

⁴ 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.

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mistakenly committed a typographic error and misspelled the Complainant's e-mail address when she forwarded Officer Fricks's e-mail. The Custodian certified that because she never received an error notification, she did not resend the clarification request. The Custodian certified that she responded to the Complainant's request on April 11, 2018, two (2) business days after the Complainant verified the instant complaint.

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 in the record indicates that the Custodian provided responsive records on April 11, 2018 and again on April 18, 2018.⁵

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)).

Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) resulting in a "deemed" denial of access, the Custodian provided the Complainant with responsive records to the Complainant's March 14, 2018 OPRA request Item Nos. 3-6 on April 11, 2018 and April 18, 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.

⁵ The GRC does not address the Custodian's redactions made to the responsive records because the Complainant did not raise the issue at any point during the pendency of this complaint.
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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.

[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 (7th) 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. 51.

In the matter before the Council, the Complainant alleged that the Custodian failed to respond to his March 14, 2018 OPRA request. The Custodian contended that on March 15, 2018 she forwarded a clarification request to the Complainant but did not receive a response. Following the Denial of Access Complaint, the Custodian responded to the Complainant on April 11, 2018 providing responsive record. On April 14, 2018, the Complainant requested via OPRA a copy of

the March 15, 2018 e-mail as well as any related metadata. On April 18, 2018, the Custodian e-mailed the parties explaining the basis for why the Complainant did not receive a response. The Custodian stated that while reviewing the e-mail's metadata, she discovered that she misspelled the Complainant's e-mail address when forwarding the clarification request. In subsequent correspondence with the parties, the Complainant confirmed receipt of the records and argued that he was a prevailing party.

A review of the facts indicates that the Custodian intended to provide responsive records to the Complainant, regardless of the filing of the complaint. The Custodian's April 11, 2018 response demonstrates that the Custodian was still awaiting a response to the clarification request, but nevertheless provided what she hoped would be responsive records since the HPD was scheduled to be disbanded at the end of the month. The Custodian also stated that the Officer seeking clarification had since been laid off. Thus, the GRC finds that the complaint was not the catalyst for the Custodian's intended disclosure and that no causal nexus exists. Thus, the Complainant is not a prevailing party and is not entitled to an award of reasonable 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 evidence of record supports that the Custodian intended to respond despite not receiving clarification since the HPD was scheduled to close at the end of the month. 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 dated October 31, 2007). However, the Council declines to order disclosure since the evidence in the record indicates that the Custodian provided responsive records on April 11, 2018 and again on April 18, 2018.
2. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) resulting in a "deemed" denial of access, the Custodian provided the Complainant with responsive records to the Complainant's March 14, 2018 OPRA request Item Nos. 3-6 on April 11, 2018 and April 18, 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 evidence of record supports that the Custodian intended to respond despite not receiving clarification since the Helmetta Police Department was scheduled to close at the end of the month. Therefore, the Complainant is not a prevailing party and is not entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51.

Prepared By: Samuel A. Rosado
Staff Attorney

February 19, 2020