



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 7, 2020 Government Records Council Meeting

Suellen McCaulley
Complainant

Complaint No. 2018-71

v.

City of Hoboken (Hudson)
Custodian of Record

At the January 7, 2020 public meeting, the Government Records Council (“Council”) considered the December 10, 2019 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has borne his burden of proof that he lawfully denied access to the portion of the Complainant’s OPRA request seeking records regarding the 15mph speed limit sign without blinking lights. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
2. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian lawfully denied access to the subject OPRA request because no records existed. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

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



Final Decision Rendered by the
Government Records Council
On The 7th Day of January 2020

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: January 9, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Suellen McCaulley¹
Complainant**

GRC Complaint No. 2018-71

v.

**City of Hoboken (Hudson)²
Custodial Agency**

Records Relevant to Complaint: Copies of:

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

Custodian of Record: Michael Mastropasqua

Request Received by Custodian: March 28, 2018

Response Made by Custodian: April 10, 2018

GRC Complaint Received: April 19, 2018

Background³

Request and Response:

On March 28, 2018, on behalf of the Complainant, Complainant’s Counsel submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. Counsel stated that he believed the City of Hoboken (“City”) maintained responsive records for multiple reasons. Counsel stated that in response to an OPRA request, the County of Hudson (“County”) advised that they maintained no responsive records. Counsel stated that the County also did not maintain an ordinance for the sign, which meant they did not approve its placement. Counsel further stated that only the City used yellow speed limit signage.

On April 3, 2018, Complainant’s Counsel e-mailed the Custodian seeking a status update on the subject OPRA request. On the same day, the Custodian e-mailed Counsel advising that he was not in the office on March 28, 2018 but also did not receive an e-mail on March 29, 2018. The

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

² Represented by Alyssa Bongiovanni, Esq. (Hoboken, 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.

Custodian noted that Counsel's e-mail may have went to his junk mail folder. The Custodian stated that the City would begin to process the OPRA request. Counsel responding expressing dismay that no one in the City received his OPRA request, as he copied multiple individuals.

On April 10, 2018, the Custodian responded in writing disclosing several records relating to a 15mph speed limit sign with blinking lights. On April 11, 2018, Complainant's Counsel responded clarifying that he was not seeking records regarding the speed limit sign with the blinking lights; rather, he sought records for a separate speed limit sign without lights.

On April 17, 2018, Complainant's Counsel sought a status update on his April 11, 2018 clarification. On the same day, the Custodian responded advising that the City had no additional records responsive to the subject OPRA request. Complainant's Counsel responded disputing that no records existed. Counsel argued that it was impossible that the City had no information regarding the speed limit sign. Counsel alleged that either the City would not search for records or that it allows citizens to put up traffic signs at their leisure.

Denial of Access Complaint:

On April 19, 2018, Complainant's Counsel filed a Denial of Access Complaint on behalf of the Complainant with the Government Records Council ("GRC"). The Complainant asserted that the City unlawfully denied access to records responsive to the subject OPRA request. The Complainant noted that the County had already advised that "the yellow 15mph sign was installed and maintained by the City." The Complainant also noted that only the City uses yellow signs and the County had no ordinance regarding the sign in question. The Complainant argued that either the City did not feel like searching for responsive records or allowed its citizens to install signs "anytime and anywhere" they want.

Additional Submissions:⁴

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

Counsel further argued that two (2) e-mails he received from the County provide "ample evidence" that the City maintained responsive records. Counsel noted that therein, County Engineer Thomas Malavasi suggested that he "contact the [City] to see if they have any records. . ." Counsel further stated that County employee Donna Dalessandro advised him that the County "doesn't use yellow signage for speed limits."

Counsel finally argued that the City threatened him with a "Frivolous Litigation" lawsuit in accordance with N.J. Court Rules, R. 1:4-8. The Complainant argued that this complaint did not represent litigation; rather, it was a citizen's right to seek access to records and ask the GRC for assistance to obtain same. Counsel contended that the City attempted to use this threat as an

⁴ On May 3, 2018, this complaint was referred to mediation. On June 11, 2018, this complaint was referred back to the GRC for adjudication.

additional step to cover their denial of access and removal of the sign. Counsel thus requested that the GRC: 1) consider the new evidence addressed here in determining whether the City conducted a sufficient search; 2) instruct Custodian's Counsel that sanctions are not available in cases that are not frivolous; and 3) instruct Custodian's Counsel that every citizen has a right to file a Denial of Access Complaint.

Statement of Information:

On July 9, 2018, the Custodian filed a Statement of Information ("SOI") attaching legal certifications from Municipal Clerk James J. Farina and Transportation and Parking Department Director Ryan Sharp. The Custodian certified that he received the Complainant's OPRA request on March 28, 2018. The Custodian certified that the City's search included reviewing all electronic records, books, paper documents, ordinances, agendas, and meeting minutes over a twenty (20) year period. See Farina Cert. ¶ 3-6. The Custodian further certified that the Transportation and Parking Department searched all signage records and the City Municipal Code Book, as well as spoke with relevant personnel regarding their knowledge of the subject speed limit sign. Sharp Cert. ¶ 4-6. The Custodian certified that he responded in writing on April 10, 2018 disclosing records and again on April 17, 2018 advising that no additional records existed.⁵

The Custodian contended that the Complainant's OPRA request was invalid because it sought "any and all" documents regarding the speed limit sign. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). The Custodian argued that in the absence of a valid request, the City could only conduct a search to the best of their ability. The Custodian reiterated that the sign was located on a County road and that there was a strong possibility that it was installed by the County.

The Custodian further contended that he lawfully denied access to the responsive records because none exist. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005); Kasko v. Town of Westfield (Union), GRC Complaint No. 2011-6 (March 2012); Akers v. Buena Vista Twp. (Atlantic), GRC Complaint No. 2014-190 (November 2014). The Custodian averred that here, both the City Clerk and Director certified to their search and that no records existed. Farina Cert. ¶ 7; Sharp Cert. ¶ 7, 9. The Custodian further argued that the Complainant did not provide any competent, credible evidence to refute these certifications. The Custodian argued that the Complainant merely relied on his belief that the City "should" have responsive records. The Custodian further asserted that whether the City should have maintained records and failed to do so does not equate to a violation of OPRA.

⁵ The Custodian included an explanation of actions taken while this complaint was in mediation. The GRC notes that pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq., communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications that occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative, or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4.

The Custodian further asserted that the Complainant misrepresented that County e-mails “prove[d]” the City maintained responsive records. The Custodian argued that the County never stated that the City possessed responsive records or utilized yellow speed limit signs; rather, it attempted to assist the Complainant by suggesting he contact the City. The Custodian asserted that the Complainant’s unsubstantiated arguments and “evidence” did not override the City’s multiple certifications.

The Custodian finally argued that on July 6, 2018, Complainant’s Counsel advanced “various conspiratorial allegations” regarding the sign’s removal. The Custodian stated that he attached to the SOI an e-mail chain between County Engineer Malavasi and members of the City inquiring whether the City maintained responsive records. The Custodian averred that upon confirming that the City had no record of the sign’s installation, the County had the sign removed. The Custodian asserted that if anything, the County’s removal of the sign is further proof supporting that the County was responsible for maintaining Garden Street.

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer, GRC 2005-49. In the matter before the Council, the City initially responded that it possessed no records regarding the 15mph speed limit sign without blinking lights. In the Denial of Access Complaint, Complainant’s Counsel refuted the City’s arguments by contending that “the sign was installed and maintained by the City” based on correspondence he had with the County. Thereafter, Counsel submitted a letter brief arguing that the sign was removed in an apparent attempt to further the City’s argument that it had no responsive records. In the SOI, the Custodian subsequently certified that no records existed and included certifications from the City Clerk and Transportation and Parking Department Director regarding their search to locate responsive records. The Custodian further affirmed that Garden Street was a County road, and suggested that if any agency maintained responsive records, it would be the County.

In reviewing the evidence submitted here, the GRC is satisfied that the Custodian lawfully denied the subject OPRA request because no records existed. Contrary to the Complainant’s assertions, none of the e-mails he provided from the County affirmatively state that the City maintained responsive records. The Complainant appears to have assumed this position because the County suggested he contact the City and because the County confirmed it did not use yellow speed limit signs. However, there is nothing in these e-mails that provide competent, credible evidence that the City possessed responsive records. Further, the Custodian provided as part of the SOI two (2) certifications from the individuals who performed the search that adequately refute

the Complainant's assertion that the City "did not feel like searching for responsive records." Also, of significance, the e-mail correspondence between the City and County prior to the sign's removal further solidify the City's position that no responsive records existed.

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

In closing, the GRC notes that to the extent that the City "should have maintained" responsive records is not within the Council's authority. See *e.g.* Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-15 (June 2012). Also, the GRC does not address the Complainant's assertion that the City threatened him with a lawsuit under R. 1:4-8 because such an issue is not properly before the Council.

Prevailing Party Attorney's Fees

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

[N.J.S.A. 47:1A-6.]

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a "prevailing party" if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. Id. at 432. Additionally, the Court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . ." Id. at 605, 121 S. Ct. at 1840, 149 L.

Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, citing Teeters, 387 N.J. Super. at 429; see, e.g., Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), certif. denied, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a **prevailing party**; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

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

The Court in Mason, further held that:

[R]equestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) “a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved”; and (2) “that the relief ultimately secured by plaintiffs had a basis in law.” Singer v. State, 95 N.J. 487, 495, [certif. denied] (1984).

[Id. at 76.]

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

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters, 387 N.J. Super. 432. Additionally, no factual causal nexus exists between the Complainant’s filing of a

Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Custodian lawfully denied access to the subject OPRA request because no records existed. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has borne his burden of proof that he lawfully denied access to the portion of the Complainant's OPRA request seeking records regarding the 15mph speed limit sign without blinking lights. Specifically, the Custodian certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
2. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian lawfully denied access to the subject OPRA request because no records existed. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Prepared By: Frank F. Caruso
Executive Director

December 10, 2019