



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

September 29, 2020 Government Records Council Meeting

Richard M. Weinstein
Complainant

Complaint No. 2019-79

v.

City of Hoboken (Hudson)
Custodian of Record

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. Ms. Emanuelli’s response was insufficient because she failed to state definitively that the records responsive to the Complainant’s OPRA request did not exist. N.J.S.A. 47:1A-5(g); Shanker v. Borough of Cliffside Heights (Bergen), GRC Complaint No. 2007-245 (March 2009). However, the GRC declines to order disclosure of any records because the evidence of record supports that the Custodian possesses no responsive records. See Paff v. City of Union City (Hudson), GRC Complaint No. 2012-262 (August 2013); Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
2. Although Ms. Emanuelli’s response (on behalf of the Custodian) was insufficient, the signed summons sought in the instant complaint did not exist. Additionally, the evidence of record does not indicate that Ms. Emanuelli’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Ms. Emanuelli’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 is not entitled to reasonable attorney’s fees pursuant to OPRA based on the fact that the courts have determined that the State’s fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff, and not an attorney who is the plaintiff representing himself. See Boggia v. Borough of Oakland, GRC Complaint No. 2005-36 (April 2006); Pitts v. N.J. Dep’t of Corrections, GRC Complaint No. 2005-71 (April 2006).

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**

**Richard M. Weinstein¹
Complainant**

GRC Complaint No. 2019-79

v.

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

Records Relevant to Complaint: Electronic copies via e-mail or facsimile of a “signed and certified” copy of Summons No. 0905-P26-190072 issued to him by “Office of Parking Utility” employee Daniel Rodriguez on January 5, 2019 at 1:35 p.m.

Custodian of Record: Michael Mastropasqua
Request Received by Custodian: March 27, 2019
Response Made by Custodian: April 4, 2019
GRC Complaint Received: April 10, 2019

Background³

Request and Response:

On March 27, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 4, 2019, Chief Clerk Maritza Emanuelli responded in writing on behalf of the Custodian disclosing a printout of the municipal court ticket and a two (2) page printout from the Parking Authority Ticketing System. On the same day, the Complainant responded contending that the attached was not the record sought. The Complainant stated that he wanted a copy of the ticket “supposedly put under [his] wind shield.” The Complainant “demand[ed]” that the City of Hoboken (“City”) disclose the summons in question by August 5, 2019. On the same day, Ms. Emanuelli forwarded the Complainant’s e-mail to Assistant Gina Dedio and asked her to advise accordingly.

On April 5, 2019, the Complainant e-mailed Ms. Emanuelli stating that because she failed to respond, he had no choice but to “appeal [her] determination and[/] seek[] civil court relief.” On April 8, 2019, the Complainant e-mailed Ms. Emanuelli stating that he attempted to call her without success. The Complainant stated that he intended to “notify Trenton” of Ms. Emanuelli’s failure to disclose the record sought because what she provided was not responsive.

¹ The Complainant is representing himself.

² Represented by Alyssa L. 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.

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Denial of Access Complaint:

On April 10, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he sought a copy of a signed parking summons, which he argued was required under N.J.S.A. 39:4-139.4(d).⁴ The Complainant contended that the City failed to disclose the record he sought.

Supplemental Response:

On April 10, 2019, Ms. Emanuelli sent another e-mail to Ms. Dedio asking her to advise accordingly on the Complainant’s April 4, 2019 e-mail.

Statement of Information:

On April 23, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on March 27, 2019. The Custodian certified that his search included forwarding the subject OPRA request to the Department of Transportation. The Custodian certified that Ms. Emanuelli responded in writing on his behalf on April 5, 2019 disclosing all “potentially responsive” records that existed.

The Custodian contended that it appeared the Complainant was seeking a copy of the specific summons left on his vehicle as he allegedly never saw it. The Custodian certified that the record the Complainant sought does not exist and the original summons cannot be re-printed. The Custodian averred that parking summonses are generated electronically on a tablet and a print-out is simultaneously transferred to the court. The Custodian noted that the City disclosed to the Complainant a copy of that print-out.

The Custodian further argued that the Complainant had no “legal argument related to the OPRA request.” The Custodian argued that instead, the Complainant appears to take issue with the sufficiency of the summons provided to him because it was not signed by the Enforcement Officer. The Custodian argued that this is not an OPRA issue: the City can only provide those records in its possession, which it did on April 5, 2019. The Custodian thus contended that no unlawful denial of access occurred here.

Additional Submissions:

On April 25, 2019, the Complainant e-mailed the GRC stating that on April 24, 2019, municipal court dismissed the underlying parking violation due to the City’s failure to prosecute. The Complainant contended that the SOI seemed to imply that he misused OPRA to obtain records regarding the court action. The Complainant argued that, to the extent he was correct, he disagreed: OPRA was intended to promote access to “government records” giving the public insight into government process. The Complainant further argued that the Custodian’s admission that the

⁴ N.J.S.A. 39:4-139.4(d) provides that: “[t]he original parking ticket shall be signed by the complainant, who shall certify to the truth of the facts set forth therein. The original parking ticket or a true copy of the parking ticket shall be considered a record kept in the ordinary business of the enforcement agency and shall be prima facie evidence of the facts contained therein.”

record sought did not exist “sheds light on the practices of procedure of a local state agency to which OPRA is applicable.”

Analysis

Sufficiency of Response

OPRA provides that if a “custodian is unable to comply with a request for access, the custodian *shall indicate the specific basis therefor . . .* on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5(g) (emphasis added). The Council has held that for a denial of access to be in compliance with OPRA, the custodian must state definitively that records did not exist at the time of the initial response. See Shanker v. Borough of Cliffside Heights (Bergen), GRC Complaint No. 2007-245 (March 2009); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-175 (September 2011).

Here, the Complainant sought a signed copy of the summons he received on January 5, 2019. Ms. Emanuelli responded on behalf of the Custodian disclosing two (2) records, neither of which were the summons requested. Following multiple e-mails to Ms. Emanuelli stating that he had not received a responsive record, the Complainant filed the instant complaint. In the SOI, the Custodian certified that the City provided those records “potentially responsive” to the subject OPRA request, but certified that no signed copy of the summons existed. The Custodian also provided an explanation as to why the original summons did not exist.

The facts of this complaint are on point with the facts in Shanker, GRC 2007-245. Specifically, although Ms. Emanuelli disclosed records associated with the parking summons, she did not disclose the record actually sought. Further, it was not until the SOI that the Custodian certified that no record existed. Thus, because Ms. Emanuelli undertook the responsibility of responding on behalf of the Custodian, her initial response was ultimately insufficient.

Accordingly, Ms. Emanuelli’s response was insufficient because she failed to state definitively that the records responsive to the Complainant’s OPRA request did not exist. N.J.S.A. 47:1A-5(g); Shanker, GRC 2007-245. However, the GRC declines to order disclosure of any records because the evidence of record supports that the Custodian possesses no responsive records. See Paff v. City of Union City (Hudson), GRC Complaint No. 2012-262 (August 2013); Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

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, although Ms. Emanuelli's response (on behalf of the Custodian) was insufficient, the signed summons sought in the instant complaint did not exist. Additionally, the evidence of record does not indicate that Ms. Emanuelli's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Ms. Emanuelli'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.*

The threshold aspect in this case is whether the Complainant, who is representing himself, would qualify for reasonable attorney's fees. According to the New Jersey Supreme Court, the New Jersey Legislature has promulgated a "substantial number of statutes authorizing an award of a reasonable counsel fee *to the attorney for the prevailing party.*" (emphasis added) New Jerseyans For A Death Penalty Moratorium v. N.J. Dep't of Corr. and Devon Brown, 182 N.J. 628 (2005) (decision without a published opinion) (quoting Rendine v. Pantzer, 141 N.J. 292 (1995)). Although the underlying purpose of those statutes may vary, they share a common rationale for

incorporating a fee-shifting measure: to ensure “that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in cases involving statutory rights, . . . and to ensure justice for all citizens.” New Jerseyans (quoting Coleman v. Fiore Bros., 113 N.J. 594, 598 (1989)). Thus, the courts of the State have determined that the state’s fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff, not an attorney who is the plaintiff representing himself. See also Feld v. City of Orange Twp., 2019 N.J. Super. Unpub. LEXIS 903 (App. Div. 2019).

OPRA provides that a person who is denied access to a government record may either file a proceeding in Superior Court or file action with the GRC. N.J.S.A. 47:1A-6. In Boggia v. Borough of Oakland, GRC Complaint No. 2005-36 (April 2006), the requestor was an attorney requesting records and did not identify that he was representing a client. The Council held that “[b]ased on the fact that the courts of the state have determined that the state’s fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff *not an attorney who is the plaintiff representing himself*, the Complainant is not entitled to reasonable attorney’s fees pursuant to OPRA.” (Emphasis added.) See also Pitts v. N.J. Dep’t of Corrections, GRC Complaint No. 2005-71 (April 2006).

Here, the Complainant filed the subject OPRA request and subsequently filed this complaint. Within the Denial of Access Complaint form, the Complainant noted that he was an attorney representing himself.⁵ However, in accordance with the forgoing case law, the Complainant cannot be awarded attorney’s fees in a case where he represented himself and prevailed.⁶

Therefore, the Complainant is not entitled to reasonable attorney’s fees pursuant to OPRA based on the fact that the courts have determined that the State’s fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff, and not an attorney who is the plaintiff representing himself. See Boggia, GRC 2005-36; Pitts, GRC 2005-71.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Ms. Emanuelli’s response was insufficient because she failed to state definitively that the records responsive to the Complainant’s OPRA request did not exist. N.J.S.A. 47:1A-5(g); Shanker v. Borough of Cliffside Heights (Bergen), GRC Complaint No. 2007-245 (March 2009). However, the GRC declines to order disclosure of any records because the evidence of record supports that the Custodian possesses no responsive records. See Paff v. City of Union City (Hudson), GRC Complaint No. 2012-262

⁵ The GRC confirmed through the New Jersey Courts website that the Complainant is an attorney with an active registration in the State of New Jersey. https://portalattyssearch-cloud.njcourts.gov/prweb/PRServletPublicAuth/-amRUHgepTwWWiiBQpI9_yQNuUm4oN16*/!STANDARD?AppName=AttorneySearch (accessed August 27, 2020).

⁶ The GRC notes that notwithstanding that the threshold issue addressed here, the Complainant here nonetheless failed to prevail. That is, his complaint did not bring about a change in the Custodian’s conduct and no relief was achieved because the requested record did not exist. N.J.S.A. 47:1A-6; Teeters, 387 N.J. Super. 432; Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008).

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(August 2013); Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

2. Although Ms. Emanuelli's response (on behalf of the Custodian) was insufficient, the signed summons sought in the instant complaint did not exist. Additionally, the evidence of record does not indicate that Ms. Emanuelli's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, Ms. Emanuelli'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 is not entitled to reasonable attorney's fees pursuant to OPRA based on the fact that the courts have determined that the State's fee-shifting statutes are intended to compensate an attorney hired to represent a plaintiff, and not an attorney who is the plaintiff representing himself. See Boggia v. Borough of Oakland, GRC Complaint No. 2005-36 (April 2006); Pitts v. N.J. Dep't of Corrections, GRC Complaint No. 2005-71 (April 2006).

Prepared By: Frank F. Caruso
Executive Director

September 22, 2020