



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**April 27, 2021 Government Records Council Meeting**

Michael I. Inzelbuch, Esq. (o/b/o Fooksman)  
Complainant

Complaint No. 2020-37

v.

Elizabeth Board of Education (Union)  
Custodian of Record

At the April 27, 2021 public meeting, the Government Records Council (“Council”) considered the April 20, 2021 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 has borne his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Further, the Custodian bore his burden of proof that he responded in writing within the prescribed time frame. As such, there was no “deemed” denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the GRC declines to address any other potential issues because the Complainant has not challenged the Custodian’s January 2, 2020 response.
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 found that the Custodian timely responded to the subject OPRA request and no further action is required. 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 27<sup>th</sup> Day of April 2021

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: April 29, 2021**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 27, 2021 Council Meeting**

**Michael I Inzelbuch, Esq.  
(On Behalf of Fooksman)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2020-37**

v.

**Elizabeth Board of Education (Union)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of:

1. Any and all payments made by Elizabeth Board of Education (“EBOE”) to the accredited Sinai School (“Sinai”) from 2000 to present.
2. Any and all communications between EBOE and/or its staff and Sinai from 2016 to present.

**Custodian of Record:** Harold E. Kennedy, Jr.  
**Request Received by Custodian:** December 17, 2019  
**Response Made by Custodian:** January 2, 2020  
**GRC Complaint Received:** February 11, 2020

**Background<sup>3</sup>**

**Request and Response:**

On December 6, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 2, 2020 the Custodian responded in writing stating that he was disclosing records responsive to OPRA request item No. 1. The Custodian also denied OPRA request item No. 2 as overly broad. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 515 (App. Div. 2010); Burke v. Brandes, 429 N.J. Super. 169, 174-175 (App. Div. 2012); Donato v. Twp. of Union, GRC 2005-182 (January 2007).

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<sup>1</sup> The Complainant notes on his Denial of Access Complaint that he is representing “Fooksman.”

<sup>2</sup> Represented by Christina M. DiPalo, Esq., Esq., of LaCorte, Bundy, Varady & Kinsella (Union, NJ).

<sup>3</sup> 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 February 11, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he did not receive a response to the subject OPRA request.

### Statement of Information:

On March 9, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on December 17, 2019. The Custodian certified that his search included “initiating a search” of EBOE’s files for responsive records. The Custodian certified that he responded in writing on January 2, 2020 disclosing seven (7) pages of records responsive to OPRA request item No. 1 and denying OPRA request No. 2 as invalid.

The Custodian argued that the Complainant’s allegation that he did not receive a response is erroneous. The Custodian averred that he timely responded by regular mail to the address listed on the subject OPRA request. The Custodian noted that the letter was not returned to him as “undeliverable.”

The Custodian asserted that it is undeniable that he disclosed records to the Complainant in response to OPRA request item No. 1. The Custodian also maintained his position that OPRA request item No. 2 was invalid. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; Burke, 429 N.J. Super. at 176. The Custodian contended that the request item did not include “the type of documents requested, the subject matter, or the ‘to’ or ‘from’.”

## 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).<sup>4</sup> 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 October 31, 2007).

The Complainant filed the instant Denial of Access Complaint contending that the Custodian failed to respond to the subject OPRA request. In the SOI, the Custodian certified that he responded in writing on January 2, 2020 disclosing records responsive to item No. 1 and denying item No. 2 as invalid. The Custodian supported his certification with documentary

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<sup>4</sup> 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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evidence of his response. Thus, the evidence of record supports that the Custodian timely responded to the Complainant's OPRA request.

Therefore, the Custodian has borne his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Further, the Custodian bore his burden of proof that he responded in writing within the prescribed time frame. As such, there was no "deemed" denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the GRC declines to address any other potential issues because the Complainant has not challenged the Custodian's January 2, 2020 response.

### **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 (7<sup>th</sup> 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, *cert denied* (1984).

[Id. at 76.]

In the matter before the Council, the Complainant filed the instant complaint contending that the Custodian failed to respond to the subject OPRA request. As part of the complaint, the Complainant identified that he was representing “Fooksman.”<sup>5</sup> In the SOI, the Custodian certified that he responded in writing on January 2, 2020 and provided documentation supporting his position. Thus, the Council has held no “deemed” denial occurred here. Thus, the evidence of record supports a finding that the Complainant is not a prevailing party subject to 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 found that the Custodian timely responded to the subject OPRA request and no further action is required. Therefore, the Complainant is not a prevailing party entitled to an award of a

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<sup>5</sup> The GRC notes that the Complainant did not identify in his original OPRA request that he was representing a client. Michael I. Inzelbuch, Esq. (On Behalf of Fooksman) v. Elizabeth Board of Education (Union), 2020-37 – Findings and Recommendations of the Executive Director

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 timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Further, the Custodian bore his burden of proof that he responded in writing within the prescribed time frame. As such, there was no "deemed" denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the GRC declines to address any other potential issues because the Complainant has not challenged the Custodian's January 2, 2020 response.
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 found that the Custodian timely responded to the subject OPRA request and no further action is required. 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

April 20, 2021