



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

August 30, 2022 Government Records Council Meeting

S.V. (o/b/o S.V.)
Complainant

Complaint No. 2020-74

v.

Morris School District (Morris)
Custodian of Record

At the August 30, 2022 public meeting, the Government Records Council (“Council”) considered the August 23, 2022 Supplemental 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 Complainant’s Counsel has failed to establish in his request for reconsideration of the Council’s May 31, 2022 that either 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. Complainant’s Counsel failed to establish that the complaint should be reconsidered based on “mistake” and “new evidence.” Complainant’s Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, Complainant’s Counsel failed to prove that dismissal of this complaint based on an untimely filing was a “mistake” by the Council or that any “new evidence” exists warranting reconsideration. Thus, the Complainant Counsel’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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 30th Day of August 2022

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: September 1, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
Supplemental Findings and Recommendations of the Executive Director
August 30, 2022 Council Meeting

**S.V. (On Behalf of S.V.)¹
Complainant**

GRC Complaint No. 2020-74

v.

**Morris School District (Morris)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of the following from July 1, 2016 to present:

1. Financial records of S.V., including contracts, bills, invoices, receipts, ledger accounts, purchase orders, payments, and cancelled checks for services to S.V., as well as payment for legal services in “EDS 13578-18 or EDS 9197-19.”
2. Special education and education files for S.V. excluding those provided by the Morris School District (“District”) in its November 14, 2019 discovery response.
3. Health records files of S.V.
4. Communications (e-mails, memoranda, text messages, voice mail, and letters) between District staff members regarding S.V. and/or S.V. between July 1, 2016 and present.³

Custodian of Record: Anthony LoFranco

Request Received by Custodian: December 19, 2019

Response Made by Custodian: December 31, 2019

GRC Complaint Received: April 14, 2020

Background

May 31, 2022 Council Meeting:

At its May 31, 2022 public meeting, the Council considered the May 24, 2022 Supplemental 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, found that:

[T]he Complainant and Complainant’s Counsel failed to comply with the Council’s Interim Order because they failed to submit an application for attorney’s fees within the prescribed

¹ Represented by Jamie Epstein, Esq. (Hamilton, NJ).

² Represented by Raina Pitts, Esq., of Methfessel & Werbel, P.C. (Edison, NJ).

³ The Complainant sought additional records that are not at issue in this complaint.

deadline. N.J.A.C. 5:105-2.13(b). Accordingly, the Executive Director recommends that the Council close the matter, as no further analysis is necessary.

Procedural History:

On June 2, 2022, the Council distributed its Final Decision to all parties. On June 13, 2022, Complainant's Counsel filed a request for reconsideration of the Council's Final Decision absent the required form. On the same day, the Government Records Council ("GRC") advised Complainant's Counsel of his requirement to file same prior to the expiration of the ten (10) business day time frame, or June 16, 2022. On June 15, 2022, the GRC e-mailed Complainant's Counsel again reminding him of his requirement to file the required "request for reconsideration" form by close of business on June 16, 2022. On June 16, 2022, the GRC e-mailed Complainant's Counsel providing him with final notice of the form requirement and noted that failure to submit same would result in a denial of the filing.

Later on June 16, 2022, Complainant's Counsel submitted his request for reconsideration form identifying the bases for same as "mistake" and "new evidence."⁴ Complainant's Counsel first contended that the GRC erred by not accepting his fee application "43 minutes late" although the adjudication took "over three (3) year[s]." Counsel contended that the GRC failed to apply the test set forth in Cornblatt, P.A. v. Barow, 153 N.J. 218 (1998) to determine that he met "substantial compliance with the requirements of a statute or rule . . ." Counsel argued that said test supports that his filing, which was "43 minutes late" and included the reasons therefor, should have been accepted as timely. Counsel further contended that the GRC's "unprecedented . . . dismissal" is contrary to its "duty as a tribunal of the [sic] OPRA." Citing Ghandi v. Cespedes, 390 N.J. Super. 193, 197 (App. Div. 2007). Counsel also argued that the GRC failed to relax its regulations in accordance with N.J. Court Rules R. 1:3-4(a) in order to avoid "gamesmanship" because N.J.A.C. 5:105-2.13 "was not intended to reward Respondents who wait for a default and then file their opposition." Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144 (2003).

Counsel further contended that the GRC erred by comparing the facts here to Rodriguez v. Kean Univ., GRC Complaint No. 2015-290 (May 2021) and Owoh, Esq. (O.B.O. AADARI & Baffi Simmons) v. City of Atlantic City (Atlantic), GRC Complaint No. 2018-247 (January 2022) because those complainants failed to "prosecute their right" to fees. Counsel argued that in Owoh, Esq., GRC 2018-247, the complainant advised the GRC that the complaint was settled and that the GRC was in error by denying a claim no longer in controversy. Counsel further argued that the GRC violated its own regulation by not *sua sponte* reconsidering that decision. Counsel also contended that the facts in Rodriguez, 2015-290 are not similar to those here because the GRC provided an extension for negotiation and ultimately did not receive a fee application. Counsel thus contended that neither decision is "precedential" and both can be distinguished from the facts here, where the "fee application was filed out of time . . ." and the May 31, 2022 decision should be reconsidered accordingly.

⁴ The GRC notes that although its "Request for Reconsideration Form" is readily available on its website as a Microsoft Word document, Complainant's Counsel reformatted same to his own style complete with a comment regarding his position on the "Reason for Reconsideration" terms.
S.V. (On Behalf of S.V.) v. Morris School District (Morris), 2020-74 – Supplemental Findings and Recommendations of the Executive Director 2

Counsel finally argued that the GRC failed to appreciate that the Legislature’s intent of OPRA’s fee shifting provision outweighed its own promulgated regulations. Counsel argued that the OPRA’s inclusion of the fee shifting provision was meant to allow ordinary citizens to level the playing field in OPRA litigation. See New Jerseyans for a Death Penalty Moratorium v. N.J. Dep’t of Corr., 370 N.J. Super. 11 (App. Div. 2004). Counsel thus asked that the Council reconsider its May 31, 2022 Final Decision to accept his fee application as within time.

On June 30, 2022, Custodian’s Counsel submitted objections to the request for reconsideration. Therein, Counsel argued that Complainant’s Counsel failed to meet the threshold for reconsideration of the Final Decision and his request should thus be denied. Counsel argued that the parties were given clear notice of the “required” filing deadline and that Complainant’s Counsel failed to either seek an extension or even contact the District to obtain consent prior to its expiration. Counsel contended that Complainant’s Counsel attempts to minimize his late filing to “43 minutes”; however, at no time between Friday, February 11, 2022 and Monday, February 14, 2022 did he attempt to submit the fee application. Counsel further noted that upon submission of the fee application, Complainant’s Counsel only stated that he “did not have all the attorneys’ rate certifications in time.” Counsel further noted that on February 17, 2022 and again on February 18, 2022, without approval from the GRC, Complainant’s Counsel submitted supplemental fee applications with edits and attachment corrections.

Counsel argued that Complainant’s Counsel would have the GRC believe that his reason for filing late was that he did not have all rate certifications; however, each was dated prior to the February 11, 2022 deadline. Counsel also noted that Complainant’s Counsel’s submission included a “Philadelphia Community Legal Services” exhibit dated July 1, 2018 (and readily accessible on the internet) that was date-stamped February 13, 2022. Counsel thus argued that no extraordinary circumstances for the late filing existed.

Counsel next disputed Complainant Counsel’s argument that Rodriguez, GRC 2015-290 and Owoh, Esq., GRC 2018-247 did not apply here because those complainants failed to “prosecute their right” to fees. Counsel argued that in those complaints, the Council followed its regulations in dismissing both based on a failure to submit the fee application only and not due to a failure to prosecute. N.J.A.C. 5:105-2.13(f). Counsel asserted that here, the Council took the same stance in dismissing this complaint based on Complainant Counsel’s failure to adhere to the specific time frame known to the parties and absent an explanation.

Counsel finally argued that Complainant’s Counsel also tried to assert the “doctrine of substantial compliance,” which is “typically utilized in a ‘notice’ context[;] such as with an Affidavit of Merit . . . or a Notice of Tort claim . . .” (Citations omitted). Counsel argued that in order for such a doctrine to apply, parties are required to take several actions, up to and including providing a reasonable explanation of why compliance was not met. See Cnty. of Hudson v. State Dep’t of Corr., 208 N.J. 1, 21-22 (2011) (quoting Galik v. Clara Maass Med. Ctr., 167 N.J. 341, 352 (2001)). Counsel argued that Complainant’s Counsel has provided no evidence to support consideration of this doctrine. Counsel further argued that the “doctrine of substantial compliance” is “not an excuse for blatant disregard of statutory directive,” especially without the basic required evidence to support the application of same.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, Complainant's Counsel filed the request for reconsideration of the Council's May 31, 2022 on June 16, 2022, ten (10) business days from the issuance of the Council's Order.

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

[In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).]

Here, Complainant's Counsel contends that Council should reconsider its decision based on “mistake” and “new evidence.” Counsel attempted to minimize his failure to adhere to the Council's regulatory filing time frame by comparing his filing time (described as 43 minutes late) to the overall adjudication period (over three (3) years). Counsel further posited that the GRC has an obligation to relax its regulatory deadlines in accordance with the Legislature's intent of OPRA and also apply the “doctrine of substantial compliance.” Finally, Counsel argued that neither Rodriguez, GRC 2015-290 nor Owoh, Esq., GRC 2018-247 applied here because those complainants failed to “prosecute their right” to fees. Custodian's Counsel filed objections disputing each of Complainant Counsel's claims and arguing that the Council should uphold its decision.

Upon review, the GRC does not find any basis for reconsideration of the Council's May 31, 2022 Interim Order. Factually, Complainant's Counsel was given a deadline supported by regulation and failed to timely file the fee application. N.J.A.C. 5:105-2.13(b). Further, the evidence of record clearly supports that Complainant's Counsel failed to obtain an extension of the deadline by close of business on February 11, 2022. Also, and as noted by Custodian's Counsel, Complainant's Counsel provided no valid explanation for his untimely filings that may warrant additional consideration. Contrary to Complainant Counsel's assertions, the underlying reasons why neither attorney in Rodriguez, GRC 2015-290 and Owoh, Esq., GRC 2018-247 failed to meet the assigned deadline is of no moment; neither filed a fee application within the regulatory time frame and thus those complaints were dismissed accordingly. Thus, no reconsideration is necessary here, as the Council did not make a "mistake," nor did Complainant's Counsel submit "new evidence"⁵

To briefly address Complainant Counsel's remaining arguments, the GRC has no legal requirement to relax its own regulations and has discretionary authority to do so where appropriate. Instead, Complainant's Counsel appears to apply to the GRC to a court rule that only applies to court. N.J. Court Rules R. 1:3-4(a). Curiously, even the language therein provides that the courts "may" enlarge a fixed period of time "by court order on notice or . . . by consent of the parties in writing," but also identify several fixed time frames where enlargement is prohibited. Thus, even the courts are not required to relax a fixed time frame on a whim and without court approval. Further, the suggestion that the Council is somehow required to relax its fixed regulatory deadlines would defeat the purpose of promulgating regulations containing them.

Finally, and also contrary to Complainant Counsel's Legislative intent argument, the GRC's regulations take into clear consideration OPRA's prevailing party fee provision simply by creating a concise process to which all parties must adhere. Whether the parties themselves ultimately adhere to that process creates a threshold for which the Council proceeds with its analysis. Here, Complainant's Counsel did not meet the deadline and the Council dismissed accordingly: the request for reconsideration only reinforces the May 31, 2022 Final Decision that there exists no reasonable explanation for the untimely filing.

As the moving party, Complainant's Counsel was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. Complainant's Counsel failed to establish that the complaint should be reconsidered based on "mistake" and "new evidence." Complainant's Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria, 242 N.J. Super. at 401. Specifically, Complainant's Counsel failed to prove that dismissal of this complaint based on an untimely filing was a "mistake" by the Council or that any "new evidence" exists warranting reconsideration. Thus, Complainant Counsel's request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

⁵ "New Evidence" is specifically identified in the Request for Reconsideration form as evidence "that *could not* have been provided prior to the Council's Decision because the evidence did not exist at that time." (Emphasis in original). S.V. (On Behalf of S.V.) v. Morris School District (Morris), 2020-74 – Supplemental Findings and Recommendations of the Executive Director 5

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that Complainant's Counsel has failed to establish in his request for reconsideration of the Council's May 31, 2022 that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. Complainant's Counsel failed to establish that the complaint should be reconsidered based on "mistake" and "new evidence." Complainant's Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, Complainant's Counsel failed to prove that dismissal of this complaint based on an untimely filing was a "mistake" by the Council or that any "new evidence" exists warranting reconsideration. Thus, the Complainant Counsel's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Frank F. Caruso
Executive Director

August 23, 2022



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

May 31, 2022 Government Records Council Meeting

S.V. (o/b/o S.V.)
Complainant

Complaint No. 2020-74

v.

Morris School District (Morris)
Custodian of Record

At the May 31, 2022 public meeting, the Government Records Council (“Council”) considered the May 24, 2022 Supplemental 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 the Complainant and Complainant’s Counsel failed to comply with the Council’s Interim Order because they failed to submit an application for attorney’s fees within the prescribed deadline. N.J.A.C. 5:105-2.13(b). Accordingly, the Executive Director recommends that the Council close the matter, as no further analysis is necessary.

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 31st Day of May 2022

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: June 2, 2022



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
May 31, 2022 Council Meeting**

**S.V. (On Behalf of S.V.)¹
Complainant**

GRC Complaint No. 2020-74

v.

**Morris School District (Morris)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of the following from July 1, 2016 to present:

1. Financial records of S.V., including contracts, bills, invoices, receipts, ledger accounts, purchase orders, payments, and cancelled checks for services to S.V., as well as payment for legal services in “EDS 13578-18 or EDS 9197-19.”
2. Special education and education files for S.V. excluding those provided by the Morris School District (“District”) in its November 14, 2019 discovery response.
3. Health records files of S.V.
4. Communications (e-mails, memoranda, text messages, voice mail, and letters) between District staff members regarding S.V. and/or S.V. between July 1, 2016 and present.³

Custodian of Record: Anthony LoFranco

Request Received by Custodian: December 19, 2019

Response Made by Custodian: December 31, 2019

GRC Complaint Received: April 14, 2020

Background

November 9, 2021 Council Meeting:

At its November 9, 2021 public meeting, the Council considered the October 27, 2021 Supplemental 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, found that:

1. The Custodian complied with the Council’s September 28, 2021 Interim Order because he responded in the prescribed time frame disclosing thirteen (13) additional responsive

¹ Represented by Jamie Epstein, Esq. (Hamilton, NJ).

² Represented by Raina Pitts, Esq., of Methfessel & Werbel, P.C. (Edison, NJ).

³ The Complainant sought additional records that are not at issue in this complaint.

invoices and certifying that all responsive student records were disclosed to the Complainant during S.V. and S.V. O.B.O. S.V. v. Morris Sch. Dist., Docket Nos. EDS-13578-18 and EDS-01409-19. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

2. The Custodian's failure to timely respond either immediately or within the seven (7) business day time frame resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(e); N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to thirteen (13) invoices not previously disclosed to the Complainant. However, the Custodian disclosed a plethora of other invoices and did not unlawfully deny access to S.V.'s "student records," which were previously disclosed as part of S.V. and S.V. O.B.O. S.V. v. Morris Sch. Dist., Docket Nos. EDS-13578-18 and EDS-01409-19. Also, the Custodian timely complied with the Council's September 28, 2021 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violations 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. Pursuant to the Council's September 28, 2021 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a 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, 71 (2008). Specifically, this complaint resulted in the disclosure of thirteen (13) additional invoices not previously disclosed. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is 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. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Procedural History:

On November 10, 2021, the Council distributed its Interim Order to all parties. On December 8, 2021, Complainant's Counsel e-mailed the Government Records Council ("GRC") advising that he submitted a fee demand to the District and was awaiting a response. On the same day, Custodian's Counsel confirmed receipt of the fee demand and stated that she was awaiting a response from the District. On December 9, 2021, the GRC confirmed receipt of both e-mails and noted that the final day to advise of a settlement was December 13, 2021. The GRC further stated that the parties may seek an extension of time should one be deemed necessary.

On December 13, 2021, Complainant's Counsel e-mailed the GRC advising that the parties agreed to a settlement "in principle," but requested that this complaint not be dismissed until he notified the GRC that same was formally accepted. On December 20, 2021, the GRC e-mailed the parties acknowledging receipt of Complainant Counsel's e-mail and extending the fee settlement time frame through January 20, 2022. On the same day, the Custodian's Counsel responded noting that she was working to facilitate the payment ahead of receiving the executed settlement and should be able to meet the new deadline "well in advance." On January 6, 2022, Custodian's Counsel e-mailed the GRC advising that the parties reached an impasse on the fee issue because Complainant's Counsel "refused to provide a release signed by his client." On the same day, Complainant's Counsel confirmed that the parties could not reach a settlement.

On January 13, 2022, the Government Records Council ("GRC") advised the parties that because a settlement was not reached, Complainant's Counsel had twenty (20) business days to submit a fee application, or until February 11, 2022.

On February 14, 2022, one (1) business day after expiration of the submission time frame, Complainant's Counsel submitted a fee application noting the tardiness of his response because he "did not have all the attorneys' rate certifications in time." Complainant's Counsel sought a total fee of \$41,355.00 representing 55 hours at a rate of \$500.00 per hour (totaling \$27,570.00) and a 50% fee enhancement of \$13,785. On February 17, 2022, Complainant's Counsel e-mailed another copy of his brief with "added cover, TofC, TofA and typos fixed and with *no substantive changes.*" (Emphasis in original). On February 18, 2022, Complainant's Counsel e-mailed the GRC advising that he send the wrong amended copy of his brief to the GRC the prior day and was rectifying the issue with the correct copy.

On March 1, 2022, Custodian's Counsel submitted objections to the fee application.

Additional Submissions:

On April 12, 2022, Complainant's Counsel e-mailed the GRC requesting leave to supplement his fee application for further support of the requested \$500.00 hourly rate. The Complainant also sought to amend his fee application to add 0.8 hours of time to review Custodian Counsel's objections and 0.5 hours for this submission resulting in both a fee and enhancement increase from "\$20,320.00" to "\$20,970.00" and an enhancement increase to "\$10,485" for a total of "\$31,455.00."

Analysis

Compliance

At its November 9, 2021 meeting, the Council ordered the parties to "confer in an effort to decide the amount of reasonable attorney's fees" and notify the GRC of any fee agreement. Further, the Council ordered that, should the parties not reach an agreement, the Complainant's Counsel "shall submit a fee application . . . in accordance with N.J.A.C. 5:105-2.13." On November 01, 2021, the Council distributed its Interim Order to all parties, providing the parties

twenty (20) business days to reach a fee agreement. Thus, the parties were required to notify the GRC of any agreement by December 13, 2021.

On December 13, 2021, Complainant's Counsel sought an extension of time to notify the GRC of a settlement as the parties had agreed on terms in principle. The GRC granted the parties an extension through January 20, 2022; however, the parties advised on January 6, 2022 that settlement discussions reached an impasse. Based on that correspondence, the GRC advised the parties that the regulatory twenty (20) business day time frame for submission of the fee application expired on February 11, 2022. On February 14, 2022, following the expiration of deadline and absent any request for an extension of same, the Complainant's Counsel submitted his fee application noting its lateness because he "did not have all the attorneys' rate certifications in time."

In complaints where a complainant or their counsel has failed to submit a fee application within the prescribed (or extended) time frame, the Council has routinely dismissed those complaints without an award of fees. See *e.g.* Rodriguez v. Kean Univ., GRC Complaint No. 2015-290 (May 2021); Owoh, Esq. (O.B.O. AADARI & Baffi Simmons) v. City of Atlantic City (Atlantic), GRC Complaint No. 2018-247 (January 2022). Here, Complainant's Counsel allowed the submission time frame to expire and cavalierly submitted his fee application noting its lateness. Curiously, Counsel is aware of his ability to seek an extension of time based on his own action of obtaining an extension for settlement discussions to continue.⁴ Further, notwithstanding the fact that he filed after the deadline expired, Complainant's Counsel proceeded to submit two (2) corrected copies on February 17, and 18, 2022. All of the forgoing indicates that although Complainant's Counsel was obviously aware of the deadline, aware of his apparent inability to meet the deadline, and knew that he could request an extension of time, he chose to submit his fee application out of time. Further, there is no evidence in the record to support that some extraordinary circumstances could have detrimentally hindered Complainant's Counsel from addressing the deadline issue before it expired. For this reason, the GRC finds that it is appropriate to follow Rodriguez, GRC 2015-290 and other precedential cases in closing this matter because the fee application was filed out of time.

Therefore, the Complainant and Complainant's Counsel failed to comply with the Council's Interim Order because they failed to submit an application for attorney's fees within the prescribed deadline. N.J.A.C. 5:105-2.13(b). Accordingly, the Council close the matter, as no further analysis is necessary.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Complainant and Complainant's Counsel failed to comply with the Council's Interim Order because they failed to submit an application for attorney's fees within the prescribed deadline. N.J.A.C. 5:105-2.13(b).

⁴ The GRC also notes that Complainant's Counsel sought an extension to file objections to a request for reconsideration in Epstein, Esq. (O.B.O. C.B.) v. Hopewell Crest Bd. of Educ. (Cumberland), GRC Complaint No. 2018-257 (March 2021). That extension expired on September 9, 2020, yet Counsel inexplicably stated over a month later that he would submit his objections. The GRC denied this claim noting that the extended time frame had expired. S.V. (On Behalf of S.V.) v. Morris School District (Morris), 2020-74 – Supplemental Findings and Recommendations of the Executive Director 4

Accordingly, the Executive Director recommends that the Council close the matter, as no further analysis is necessary.

Prepared By: Frank F. Caruso
Executive Director

May 24, 2022



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

INTERIM ORDER

November 9, 2021 Government Records Council Meeting

S.V. (o/b/o S.V.)
Complainant

Complaint No. 2020-74

v.

Morris School District (Morris)
Custodian of Record

At the November 9, 2021 public meeting, the Government Records Council (“Council”) considered the October 26, 2021 Supplemental 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 complied with the Council’s September 28, 2021 Interim Order because he responded in the prescribed time frame disclosing thirteen (13) additional responsive invoices and certifying that all responsive student records were disclosed to the Complainant during S.V. and S.V. O.B.O. S.V. v. Morris Sch. Dist., Docket Nos. EDS-13578-18 and EDS-01409-19. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian’s failure to timely respond either immediately or within the seven (7) business day time frame resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(e); N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to thirteen (13) invoices not previously disclosed to the Complainant. However, the Custodian disclosed a plethora of other invoices and did not unlawfully deny access to S.V.’s “student records,” which were previously disclosed as part of S.V. and S.V. O.B.O. S.V. v. Morris Sch. Dist., Docket Nos. EDS-13578-18 and EDS-01409-19. Also, the Custodian timely complied with the Council’s September 28, 2021 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violations 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. Pursuant to the Council’s September 28, 2021 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a 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, 71 (2008).



Specifically, this complaint resulted in the disclosure of thirteen (13) additional invoices not previously disclosed. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is 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. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Interim Order Rendered by the
Government Records Council
On The 9th Day of November 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: November 10, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
November 9, 2021 Council Meeting**

**S.V. (On Behalf of S.V.)¹
Complainant**

GRC Complaint No. 2020-74

v.

**Morris School District (Morris)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of the following from July 1, 2016 to present:

1. Financial records of S.V., including contracts, bills, invoices, receipts, ledger accounts, purchase orders, payments, and cancelled checks for services to S.V., as well as payment for legal services in “EDS 13578-18 or EDS 9197-19.”
2. Special education and education files for S.V. excluding those provided by the Morris School District (“District”) in its November 14, 2019 discovery response.
3. Health records files of S.V.
4. Communications (e-mails, memoranda, text messages, voice mail, and letters) between District staff members regarding S.V. and/or S.V. between July 1, 2016 and present.³

Custodian of Record: Anthony LoFranco
Request Received by Custodian: December 19, 2019
Response Made by Custodian: December 31, 2019
GRC Complaint Received: April 14, 2020

Background

September 28, 2021 Council Meeting:

At its September 28, 2021 public meeting, the Council considered the September 21, 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, found that:

1. The Custodian did not bear his burden of proof that he 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 immediately to the portion of the Complainant’s OPRA request item

¹ Represented by Jamie Epstein, Esq. (Hamilton, NJ).

² Represented by Raina Pitts, Esq., of Methfessel & Werbel, P.C. (Edison, NJ).

³ The Complainant sought additional records that are not at issue in this complaint.

- No. 1 either granting access, denying access, seeking clarification or requesting an extension of time immediately resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e); Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007). Further, the Custodian's failure to respond to the remainder of the subject OPRA request within the extended time frame 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 Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. The Custodian may have unlawfully denied access to additional attorney billing records responsive to the Complainant's OPRA request item No. 1. N.J.S.A. 47:1A-6; Macek v. Bergen Cnty. Sheriff's Office, GRC Complaint No. 2017-156, *et seq.* (Interim Order dated June 25, 2019). Thus, the Custodian shall initiate a new search for the responsive billing records and, should he locate any, disclose them to the Complainant. Should the Custodian's, or any other District employee's, search fail to yield responsive records, the Custodian and those employees shall submit a certification specifically stating as such and inclusive of a detailed search explanation.
 3. The Custodian unlawfully denied access to the Complainant's OPRA request item Nos. 2, 3, and 4. N.J.S.A. 47:1A-6. Specifically, the Complainant qualified as an excepted person under N.J.A.C. 6A:32-7.5(e)(14), (g). and was thus entitled to receipt of S.V.'s academic, health, and communication records pursuant to L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56, 86-87 (2017). See also Doe v. Rutgers, State Univ. of N.J., 466 N.J. Super. 14 (App. Div. 2021); Epstein, Esq. (O.B.O. C.B.) v. Hopewell Crest Bd. of Educ. (Cumberland), GRC Complaint No. 2018-257 (Interim Order dated July 28, 2020). Thus, the Custodian must either: 1) disclose those "student records" not previously disclosed to Complainant's Counsel as part of a prior discovery (per Bart v. City of Paterson Hous. Auth. 403 N.J. Super. 609, 618 (App. Div. 2008)); or 2) certify that additional records beyond those previously disclosure existed. The Custodian shall include legal certifications regarding the search performed from himself and those individuals assisting him to comply with the forgoing.
 4. **The Custodian shall comply with conclusion Nos. 2 and 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Executive Director.⁶**

⁴ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On September 29, 2021, the Council distributed its Interim Order to all parties. On October 5, 2021, the Custodian responded to the Council's Interim Order. Therein, the Custodian recapitulated the facts of this complaint and the arguments he previously asserted in the Statement of Information ("SOI").

The Custodian certified that after receiving the Council's Order, he conducted a new search for additional financial records by contacting the District's accounting and pupil services staff on October 4, 2021. The Custodian certified that he confirmed through an accounting spreadsheet that he previously disclosed all responsive Schenck, Price, Smith & King, LLP and Porzio, Bromberg & Newman, P.C. invoices that existed without redactions. The Custodian certified that he also contacted Methfessel & Werbel ("Methfessel") for potentially responsive invoices. The Custodian affirmed that Methfessel did not send its invoices to the District; rather, Methfessel submitted them directly to the District's insurance carrier for review and payment. The Custodian certified that Methfessel forwarded thirteen (13) responsive invoices that were attached to his response (and copied to Complainant's Counsel). The Custodian noted that the invoices contained redactions for "attorney-client communications and attorney work product."

The Custodian further certified that prior to the Council's Order, Custodian's Counsel confirmed with Director of Pupil Services Marc Gold that all records sent to the Complainant during the discovery process in S.V. and S.V. O.B.O. S.V. v. Morris Sch. Dist., Docket Nos. EDS-13578-18 and EDS-01409-19 represented all of S.V.'s responsive "student records." The Custodian again affirmed that S.V.'s entire student file (totaling approximately 900 pages), inclusive of all records responsive to OPRA request item Nos. 2 through 4, were disclosed to the Complainant during discovery. The Custodian further affirmed that no additional records exist.

Analysis

Compliance

At its September 28, 2021 meeting, the Council ordered the Custodian to perform another search for additional attorney billing records responsive to OPRA request item No. 1 and either disclose those located or certify if no additional records existed. The Council similarly ordered the Custodian to disclose any records responsive to OPRA request item Nos. 2 through 4 or to certify if no additional records beyond those disclosed during discovery in S.V. existed. Finally, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On September 29, 2021, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply

with the terms of said Order. Thus, the Custodian's response was due by close of business on October 6, 2021.

On October 5, 2021, the fourth (4th) business day after receipt of the Council's Order, the Custodian responded to the Order by disclosing to Complainant's Counsel thirteen (13) Methfessel invoices (with redactions) and certifying that no additional "student records" beyond those disclosed in S.V. existed. The Custodian also simultaneously provided certified confirmation of compliance to the Executive Director, which included an explanation of the searches conducted to locate additional records. Thus, the Custodian has met his compliance obligation appropriately.

Therefore, the Custodian complied with the Council's September 28, 2021 Interim Order because he responded in the prescribed time frame disclosing thirteen (13) additional responsive invoices and certifying that all responsive student records were disclosed to the Complainant during S.V., Docket Nos. EDS-13578-18 and EDS-01409-19. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

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)).

Here, the Custodian's failure to timely respond either immediately or within the seven (7) business day time frame resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(e); N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to thirteen (13) invoices not previously disclosed to the Complainant. However, the Custodian disclosed a plethora of other invoices and did not unlawfully deny access to S.V.'s "student records," which were previously disclosed as part of S.V. Also, the Custodian timely complied with the Council's

September 28, 2021 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violations 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.

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 Appellate Division 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, 71 (2008), the 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." (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.]

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*, New Jersey v. Singer, 469 U.S. 832 (1984).

[Id. at 76.]

In the matter before the Council, Complainant’s Counsel filed the instant complaint asserting that the Custodian improperly denied the subject OPRA request as invalid. Counsel further argued that he was unlawfully denied access to multiple records responsive to the subject OPRA request. Counsel requested that the GRC determine that an unlawful denial of access occurred and order disclosure of any outstanding records. Counsel also sought a knowing and willful finding, as well as a determination that he was a prevailing party entitled to attorney’s fees. The Custodian subsequently maintained his position that a portion of the request was invalid and “student records” were not disclosable under OPRA.

Upon reviewing all submissions, the Council held that the Custodian may have unlawfully denied access to additional responsive records and ordered disclosures where applicable. In response to the Council’s Order, the Custodian disclosed thirteen (13) additional invoices responsive to OPRA request item No. 1; but certified that all responsive “student records” were previously disclosed to the Complainant’s Counsel. Thus, the facts support that the Complainant prevailed here based on the Council’s Order and resulting disclosure of previously undiscovered invoices.

Therefore, pursuant to the Council’s September 28, 2021 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. 432. Additionally, a 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, this complaint resulted in the disclosure of thirteen (13) additional invoices not previously disclosed. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is 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. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney’s fees, Complainant’s Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council’s September 28, 2021 Interim Order because he responded in the prescribed time frame disclosing thirteen (13) additional responsive invoices and certifying that all responsive student records were disclosed to the Complainant during S.V. and S.V. O.B.O. S.V. v. Morris Sch. Dist., Docket Nos. EDS-13578-18 and EDS-01409-19. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian’s failure to timely respond either immediately or within the seven (7) business day time frame resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(e); N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to thirteen (13) invoices not previously disclosed to the Complainant. However, the Custodian disclosed a plethora of other invoices and did not unlawfully deny access to S.V.’s “student records,” which were previously disclosed as part of S.V. and S.V. O.B.O. S.V. v. Morris Sch. Dist., Docket Nos. EDS-13578-18 and EDS-01409-19. Also, the Custodian timely complied with the Council’s September 28, 2021 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violations 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. Pursuant to the Council’s September 28, 2021 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a 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, 71 (2008). Specifically, this complaint resulted in the disclosure of thirteen (13) additional

invoices not previously disclosed. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is 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. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Prepared By: Frank F. Caruso
Executive Director

October 26, 2021



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

INTERIM ORDER

September 28, 2021 Government Records Council Meeting

S.V. (o/b/o S.V.)
Complainant

Complaint No. 2020-74

v.

Morris School District (Morris)
Custodian of Record

At the September 28, 2021 public meeting, the Government Records Council (“Council”) considered the September 21, 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 did not bear his burden of proof that he 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 immediately to the portion of the Complainant’s OPRA request item No. 1 either granting access, denying access, seeking clarification or requesting an extension of time immediately resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e); Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007). Further, the Custodian’s failure to respond to the remainder of the subject OPRA request within the extended time frame 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 Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. The Custodian may have unlawfully denied access to additional attorney billing records responsive to the Complainant’s OPRA request item No. 1. N.J.S.A. 47:1A-6; Macek v. Bergen Cnty. Sheriff’s Office, GRC Complaint No. 2017-156, *et seq.* (Interim Order dated June 25, 2019). Thus, the Custodian shall initiate a new search for the responsive billing records and, should he locate any, disclose them to the Complainant. Should the Custodian’s, or any other District employee’s, search fail to yield responsive records, the Custodian and those employees shall submit a certification specifically stating as such and inclusive of a detailed search explanation.
3. The Custodian unlawfully denied access to the Complainant’s OPRA request item Nos. 2, 3, and 4. N.J.S.A. 47:1A-6. Specifically, the Complainant qualified as an excepted person under N.J.A.C. 6A:32-7.5(e)(14), (g). and was thus entitled to receipt of S.V.’s academic, health, and communication records pursuant to L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56, 86-87 (2017). See also Doe v. Rutgers, State Univ. of N.J., 466 N.J. Super. 14 (App. Div. 2021); Epstein, Esq. (O.B.O. C.B.) v. Hopewell Crest Bd. of Educ. (Cumberland), GRC Complaint No. 2018-257 (Interim Order dated



July 28, 2020). Thus, the Custodian must either: 1) disclose those “student records” not previously disclosed to Complainant’s Counsel as part of a prior discovery (per Bart v. City of Paterson Hous. Auth. 403 N.J. Super. 609, 618 (App. Div. 2008)); or 2) certify that additional records beyond those previously disclosure existed. The Custodian shall include legal certifications regarding the search performed from himself and those individuals assisting him to comply with the forgoing.

4. **The Custodian shall comply with conclusion Nos. 2 and 3 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

Interim Order Rendered by the
Government Records Council
On The 28th Day of September 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: September 29, 2021

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 28, 2021 Council Meeting**

**S.V. (On Behalf of S.V.)¹
Complainant**

GRC Complaint No. 2020-74

v.

**Morris School District (Morris)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of the following from July 1, 2016 to present:

1. Financial records of S.V., including contracts, bills, invoices, receipts, ledger accounts, purchase orders, payments, and cancelled checks for services to S.V., as well as payment for legal services in “EDS 13578-18 or EDS 9197-19.”
2. Special education and education files for S.V. excluding those provided by the Morris School District (“District”) in its November 14, 2019 discovery response.
3. Health records files of S.V.
4. Communications (e-mails, memoranda, text messages, voice mail, and letters) between District staff members regarding S.V. and/or S.V. between July 1, 2016 and present.³

Custodian of Record: Anthony LoFranco
Request Received by Custodian: December 19, 2019
Response Made by Custodian: December 31, 2019
GRC Complaint Received: April 14, 2020

Background⁴

Request and Response:

On December 18, 2019, on behalf of the Complainant, the Complainant’s Counsel submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 31, 2019, the Custodian responded in writing stating that the District closed for holiday break on December 23, 2019 and would not reopen until January 2, 2020. The Custodian thus stated that the District would need an extension of time to respond

¹ Represented by Jamie Epstein, Esq. (Hamilton, NJ).

² Represented by Raina Pitts, Esq., of Methfessel & Werbel, P.C. (Edison, NJ).

³ The Complainant sought additional records that are not at issue in 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.

through January 8, 2020. The Custodian further stated that OPRA request item No. 1 was invalid and that the District did not maintain financial records by specific student. The Custodian thus sought clarification to include “specific documents, contracts, or invoices.” The Custodian further stated that OPRA request item Nos. 2, 3, and 4 sought “student records” not disclosable under OPRA; however, the District has S.V.’s consent and will review its files for any additional records not already provided to the Complainant in discovery as part of other litigation. On the same day, Complainant’s Counsel acknowledged and agreed to the extension request. Counsel further disputed that OPRA request item No. 1 was invalid, noting that the requested records were required to be maintained, are not exempt under OPRA, and that his request item was “narrowly tailored.” Counsel finally noted that whether he previously received any records responsive to OPRA request item Nos. 2, 3, and 4 does not absolve the Custodian of his obligation to disclose all responsive records.

On January 9, 2020, the Custodian responded in writing stating that the only records responsive to OPRA request item No. 1 were attorney bills. The Custodian stated that an additional extension to respond through January 16, 2020 was necessary so that the District may retrieve records from storage. The Custodian also stated that he was not denying access to OPRA request item Nos. 2, 3, and 4 because Counsel already received records; rather, they are not disclosable under OPRA. The Custodian noted that the District would comply with a “renewed student record request under the special education regulations.” Custodian’s Counsel responded demanding disclosure of those financial records not in storage and an explanation as to why an additional extension was necessary. The Custodian responded disclosing responsive billing records and asserting that no other financial information regarding S.V. existed.

On January 10, 2020, Complainant’s Counsel sent a letter to the Custodian. Regarding OPRA request item No. 1, Counsel requested that the Custodian provide a specific lawful basis for withholding:

1. Records the District does not possess but may be held by the agents or representatives of the District.
2. The Methfessel & Werbel (“Methfessel”) financial records.
3. Requested financial records, other than bills for legal services from Schenck, Price, Smith & King, LLP (“Schenck”) and Porzio, Bromberg & Newman, P.C. (“Porzio”).
4. The redacted portions of the bills for legal services from Schenck and Porzio.
5. The bills for legal services from Porzio except for February, May, and June 2018.

Counsel also asked the Custodian to explain why he failed to provide “immediate” access to the requested financial records as prescribed in N.J.S.A. 47:1A-5(e). Counsel further requested that the Custodian clarify the actual reason he was denying access to the remainder of the OPRA request, especially in light of L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56, 95 (2017). Counsel finally noted that he would withdraw his contention and accept the Custodian providing records responsive to OPRA request item Nos. 2, 3, and 4 not already disclosed in the District’s November 14, 2019 discovery response

On February 3, 2019, the Custodian responded stating that no additional financial records existed for item Nos. 1 through 3 of the Complainant’s January 10, 2020 e-mail. The Custodian

also sought clarification as to whether Complainant's Counsel was submitting a new OPRA request for all legal bills based on item Nos. 4 and 5 of the e-mail. The Custodian further stated that he sought an extension of time through January 8, 2020 to disclose financial records, which is why he did not provide "immediate access" to them. The Custodian finally stated that he was denying access to the remaining OPRA request items under L.R. v. Camden City Pub. Sch. Dist., 238 N.J. 547 (2019).

Denial of Access Complaint:

On April 14, 2020, Complainant's Counsel filed a Denial of Access Complaint with the Government Records Council ("GRC"). Counsel first disputed that the Custodian timely responded disclosing financial records sought in OPRA request item No. 1. N.J.S.A. 47:1A-5(e). Counsel also argued that the Custodian failed to certify to the reason for seeking multiple extensions in accordance with Paff v. N.J. Dep't of Labor, 392 N.J. Super. 334, 341 (App. Div. 2007). Counsel noted that the Custodian failed to respond thereafter until one (1) day beyond the expiration of the extended time frame. Counsel thus argued that a "deemed" denial of access occurred here and that the Custodian was "willfully and deliberately flaunting" his OPRA obligations. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). Counsel further argued that the forgoing is notwithstanding that the Custodian had already violated N.J.S.A. 47:1A-5(e) by failing to immediately respond to OPRA request item No. 1 seeking financial student records. Counsel thus contended that the Council should order disclosure of all financial records without redactions.

Counsel contended that the Custodian unlawfully denied access to the subject OPRA request on the basis that same was invalid. Counsel noted that the Custodian contradicted this denial by promising access to student records "not already" provided as part of a prior discovery request. Burke v. Brandes, 429 N.J. Super. 169, 177-178 (App. Div. 2012). Counsel also asserted that the Custodian's denial did not comport with MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Twp. of 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). Counsel argued that the subject OPRA request, while including the term "any and all," identified specific records and identified a finite time frame; the OPRA request included sufficient information to be valid. Counsel asserted that responding to the OPRA request only requires the Custodian to search for records in "centralized locations"

Counsel argued that the Custodian's remaining denial was unlawful pursuant to K.L. v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337, 350 (App. Div. 2011); L.R., 452 N.J. Super. 56. Counsel contended that per the forgoing decisions, a requestor seeking access to "student records" may obtain them if they fall within the category of authorized persons under N.J.A.C. 6A:32-7.5(e). Counsel argued that because the Complainant sought access to their own student records, the Custodian violated OPRA by denying access to them and the Council should order disclosure accordingly. Counsel further argued that the Council should find that the Custodian knowingly and willfully violated OPRA and that the Complainant is a prevailing party entitled to an award of attorney's fees.

Statement of Information:⁵

On July 15, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on December 19, 2019. The Custodian certified that his search included contacting the Pupil Service and Accounting Department for financial records, which yielded only attorney bills. The Custodian further affirmed that searched through District personnel records to identify additional responsive records. The Custodian certified that he responded multiple times between December 31, 2019 and February 3, 2020 disclosing attorney bills with redactions for other student information and limited student records not previously disclosed to the Complainant. The Custodian noted that he also denied portions of the OPRA request as invalid or seeking records exempt from access under OPRA pursuant to L.R., 238 N.J. 547.

The Custodian contended that the records responsive to the subject OPRA request are exempt under OPRA and more appropriately sought under the New Jersey Pupil Records Act (“NJPR”) and Family and Educational Records Privacy Act (“FERPA”). See L.R., 452 N.J. Super. 56; 238 N.J. 547. The Custodian argued that a plain reading of OPRA request item Nos. 2, 3, and 4 clearly indicate that the Complainant was seeking access to “student records,” which are patently exempt from disclosure under OPRA. Id. The Custodian further contended that Complainant’s Counsel has erroneously argued that S.V. had a right to access the records in question under OPRA as a “qualified” individual pursuant to N.J.A.C. 6A:32-7.5(e). The Custodian contended that to the contrary, both L.R. decisions support that “student records” are not disclosable under OPRA regardless of the identity of the requestor. The Custodian noted that the Complainant failed to avail himself of other available request processes, including those stemming from pending litigation with the District. S.V. and S.V. O.B.O. S.V. v. Morris Sch. Dist., Docket Nos. EDS-13578-18 and EDS-01409-19.

The Custodian additionally argued that the GRC should not consider the identity of the Complainant in determining whether access was unlawfully denied under OPRA. The Custodian argued that the L.R. decisions rejected applying the identity factor to requests for “student records” made under OPRA. The Custodian acknowledged that prior to L.R., the Council considered requestor identity as part of the “student record” analysis. See Bava v. Bergen Cnty. Sch. Dist., GRC Complaint No. 2003-84 (January 2004); Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2014-92 (September 2014); Martinez v. Edison Bd. of Educ. (Middlesex), GRC Complaint No. 2014-126 (May 2015). The Custodian contended that the L.R. court discussed how the Council’s decision in Popkin v. Englewood Bd. of Educ. (Bergen), GRC Complaint No. 2011-263 (December 2012) did not address the identity exceptions in the NJPR. The Custodian argued that this fact is significant because it rejected the Complainant’s identity argument here and supports that a “student record” can never be disclosable under OPRA. The Custodian further argued that the GRC has no authority to adjudicate any other request processes beyond OPRA.⁶

⁵ On May 7, 2020, this complaint was referred to mediation. On June 16, 2020, this complaint was referred back to the GRC for adjudication.

⁶ The GRC’s authority set forth in both OPRA and its own regulations applies to Denial of Access Complaints wherein a complainant is alleging an unlawful denial of access under OPRA. N.J.S.A. 47:1A-7; N.J.A.C. 5:105, *et seq.* As the issues presently before the GRC relate to an alleged unlawful denial of access based on an OPRA request, Custodian’s contention is without merit.

The Custodian finally contended that notwithstanding the forgoing, he disclosed records responsive to OPRA request item No. 1 with redactions and agreed to disclose additional “student records” not previously provided as part of discovery in S.V., Docket Nos. EDS-13578-18 and EDS-01409-19.

Additional Submissions:

On August 11, 2020, Custodian’s Counsel e-mailed the GRC providing a copy of the Office of Administrative Law’s (“OAL”) August 10, 2020 Initial Decision in S.V., Docket Nos. EDS-13578-18 and EDS-01409-19. Counsel noted that therein, the Administrative Law Judge (“ALJ”) dismissed the Complainant’s Petition for due process.

On September 8, 2020, Complainant’s Counsel submitted a letter brief refuting the Custodian’s SOI. Counsel first argued that the Custodian’s assertion that no Methfessel invoices responsive to item No. 1 existed is erroneous. Counsel noted that ALJ’s Initial Decision in S.V., which was sent to the GRC on August 11, 2020, identified Marc Mucciolo, Esq. from Methfessel as representing the District. Counsel further noted that the disclosed Schneck bills indicate that the S.V. cases were referred to Methfessel in October 2018, more than a year prior to the subject OPRA request. Counsel further contended that the Custodian’s SOI search certification was “misleading and/or false” because no Methfessel invoices were disclosed. Counsel further contended that the Custodian failed to prove that he lawfully denied access to the outstanding Methfessel bills. Counsel noted that the Custodian has an obligation to contact Methfessel to obtain said bills. See Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012); Gannett v. Cnty. of Middlesex, 379 N.J. Super. 205 (App. Div. 2005).

Counsel also contended that the Custodian’s SOI argument regarding “student records” was already rejected by the Council in Epstein, Esq. (O.B.O. C.B.) v. Hopewell Crest Bd. of Educ. (Cumberland), GRC Complaint No. 2018-257 (Interim Order dated July 28, 2020). Counsel contended that the facts and arguments here are exact to the facts and arguments in C.B., GRC 2018-257 and the Council should hold accordingly. Counsel further disputed the Custodian’s interpretation of L.R. and how the court’s analysis of Popkin, GRC 2011-263 bars the GRC from addressing the “student record” identity issue. Counsel noted that while the OPRA identity issue was not before the Supreme Court, the Appellate Division affirmatively held that L.R.’s authorized representative was entitled to “student records” under OPRA. Counsel also contended that the Custodian failed to cite to the holding in L.R. that barred the GRC from adjudicating a complaint involving an OPRA request for “student records.” Finally, Counsel asserted that the Custodian recognized that the District had consent for disclosure, and also waived his right to deny access after already disclosing attorney bills and promising to disclose additional “student records.”

On September 16, 2020, Custodian’s Counsel submitted a sur-reply asking the GRC to “revisit” C.B., GRC 2018-257 because it improperly created an OPRA pathway to access “student records” not contemplated in L.R., 238 N.J. 547. Counsel contended that C.B. represents a misinterpretation of the exceptions present in N.J.A.C. 6A:32-7.5(e) of the NJPRA in that they do not transform “student records” into a “public record.” Counsel noted that instead, the GRC failed to appreciate that while FERPA discusses a process by which a “student record” can be lawfully disclosed, the NJPRA contains no such process; L.R. further defines this relationship by stating

that “student records” retain their exempt status regardless of redactions under the NJPRA. Counsel also argued that although the Supreme Court agreed with the Appellate Division’s view that the N.J.A.C. 6A:32-7.5(g) required agencies to comply with OPRA and FERPA, the Court did not construe it to “undermine[] the privacy protections set forth in NJPRA regulations.” L.R., 238 N.J. at 569.

On September 18, 2020, Complainant’s Counsel e-mailed the GRC attaching a September 10, 2020 decision of the Special Master in one of the remanded consolidated matters from L.R., 238 N.J. 547. Counsel noted that said decision rejected the exact arguments made here, and that the GRC should hold similarly.

On April 21, 2021, Complainant’s Counsel e-mailed the GRC advising of the Superior Court’s decision in M.A. v. Cherry Hill Bd. of Educ., Docket No. CAM-L-2682-20 (April 12, 2021). Counsel stated that therein, the court denied defendant’s argument that “student records” were not subject to disclosure under OPRA for an excepted party relying on L.R., 452 N.J. 56. Counsel noted that the court’s decision postdated a similar holding in Doe v. Rutgers, State Univ. of N.J., 466 N.J. Super. 14 (App. Div. 2021), as well as lending additional support to the Council’s decision in C.B., GRC 2018-257. Counsel also noted that Custodian’s Counsel represented defendants in M.A. and abandoned the “student records” argument therein while still maintaining it here.

On April 23, 2021, Custodian’s Counsel e-mailed a letter to the GRC recounting the procedural history of the instant complaint. Counsel further noted that since the filing of this complaint, Complainant’s Counsel has submitted various cases interpreting L.R., 452 N.J. Super. 56; all were decided after the Custodian proffered his denial of access to S.V.’s “student records.” Counsel argued that while those decisions did not directly state that “student records” are subject to access under OPRA, Doe, 466 N.J. Super. 14 expressly stated such. Counsel argued that notwithstanding, Complainant’s Counsel received a plethora of records as part of discovery in S.V. and the Custodian offered to provide additional “student record” information not already provided. Counsel noted that the Complainant’s Counsel never identified any potentially outstanding information and instead pursued this complaint.

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).⁷ 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

⁷ 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.

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).

In Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007), the GRC held that "immediate access language of OPRA (N.J.S.A. 47:1A-5(e)) suggests that the Custodian was still obligated to immediately notify the Complainant. . ." Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when immediate access records are requested, a custodian must respond to the request for those records immediately, granting or denying access, requesting additional time to respond or requesting clarification of the request. Additionally, if immediate access items are contained within a larger OPRA request containing a combination of records requiring a response within seven (7) business days and immediate access records requiring an immediate response, a custodian still has an obligation to respond to immediate access items immediately. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Interim Order dated February 26, 2013).

Moreover, in Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant's March 19, 2007 OPRA request seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records would be provided later in the week. Id. The evidence of record showed that no records were provided until May 31, 2007. Id. The GRC held that:

The Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5(i) resulting in a "deemed" denial of access to the records.

[Id.]

Here, the Complainant's OPRA request item No. 1 sought, among other records, contracts, bills, invoices, and purchase orders. The Custodian responded on December 31, 2019 noting that the District closed for holiday break on December 23, 2019 and would not reopen until January 2, 2020. In the SOI, the Custodian certified that he received the subject OPRA request on December 19, 2019. However, no immediate response to these items occurred, although the District was open for another three (3) business days after receipt of the OPRA request. Thus, the Custodian violated the immediate access provision.

Additionally, in his December 31, 2019 response, the Custodian extended the response time frame through January 8, 2020. However, the Custodian did not respond in writing again until January 9, 2020. Thus, in accordance with Kohn, GRC 2007-124, the Custodian failure to respond within the extended time frame resulted in a "deemed" denial of access to the remainder of the subject OPRA request.

Therefore, the Custodian did not bear his burden of proof that he 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 immediately to the portion of the Complainant's OPRA request item No. 1 either granting access, denying access, seeking clarification or requesting an extension of time immediately resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e); Herron, GRC 2006-178. Further, the Custodian's failure to respond to the remainder of the subject OPRA request within the extended time frame 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 Kohn, GRC 2007-124.

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 request item No. 1 – Financial Records⁸

In Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010), the Council found that the custodian did not unlawfully deny access to the requested records based on the custodian's certification that all such records were provided to the complainant. The Council held that the custodian's certification, in addition to the lack of refuting evidence from the complainant, was sufficient to meet the custodian's burden of proof. See also Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015). However, in Macek v. Bergen Cnty. Sheriff's Office, GRC Complaint No. 2017-156, *et seq.* (Interim Order dated June 25, 2019), the Council held that evidence contained in the record suggested that additional responsive records may exist. Based on this, the Council ordered the Custodian to perform another search and submit a certification regarding the results of that search.

Here, the Custodian disclosed multiple attorney bills and stated that he had no further records responsive to the subject OPRA request. The Complainant responded January 10, 2020 disputing this point, seizing on the Custodian's use of term "legal bills *I have*" in his response. (Emphasis in original). The Complainant asked the Custodian to provide a specific lawful basis for redactions to the bills' for denying access to additional financial records, and for denying access to multiple Porzio and Methfessel bills. In response, the Custodian again advised that no additional records existed and subsequently certified to such in the SOI. The Custodian did note that he was confused by the Complainant's January 10, 2020 e-mail and believed he may be submitting a new OPRA request. Following the SOI, the Complainant argued that the Custodian failed to disclose responsive attorney bills for Methfessel even though Schenck referred S.V. cases to them in October 2018 (as indicated in a November 6, 2018 Schenck bill).

⁸ The GRC notes that it will not address whether this request item is invalid because the Custodian did not pursue that argument in the SOI and disclosed records responsive to said request after conducting a search. Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012).

The GRC has reviewed the arguments of the parties and documentation submitted in support of same. The Custodian responded and later certified that no additional invoices existed; however, he also questioned whether the Complainant was submitting a new OPRA request for additional records. Further calling into question the Custodian's response is the Complainant's submission pointing to the Schenck November 6, 2018 bill showing a discussion with another attorney regarding an S.V. case. In total, the Complainant's questions about potentially missing records could not be construed as a new OPRA request, as the Complainant clearly argued that he believed additional responsive records existed. The GRC agrees that enough evidence points to the possible existence of additional bills, whether maintained by the District or Porzio and Methfessel. Thus, this complaint more closely mirrors the facts in Macek, GRC 2017-156 than Danis, 2009-156. That is, there is sufficient evidence to support that the Custodian failed to disclose at these four (4) remaining summonses. Thus, determining that another search in this matter is appropriate and consistent with Macek.

Accordingly, the Custodian may have unlawfully denied access to additional attorney billing records responsive to the Complainant's OPRA request item No. 1. N.J.S.A. 47:1A-6; Macek, GRC 2017-156. Thus, the Custodian shall initiate a new search for the responsive billing records and, should he locate any, disclose them to the Complainant. Should the Custodian's, or any other District employee's, search fail to yield responsive records, the Custodian and those employees shall submit a certification specifically stating as such and inclusive of a detailed search explanation.

OPRA request item Nos. 2, 3, & 4 – Special Education, Health, Communications

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 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., 452 N.J. Super. 56.⁹ 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 (“PII”). The Appellate Division held that redacting PII 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 PII into the NJPRA or its regulations. Moreover, nothing in the NJPRA or its regulations states that sufficiently anonymized documents, with all PII 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).]¹⁰

After the filing of this complaint, in C.B., GRC 2018-257, the Council interpreted L.R. to allow for the disclosure of “student records” under OPRA where the requestor could substantiate that they were an excepted party. In reaching this conclusion, the Council noted that the New Jersey Department of Education’s own regulations support OPRA as an option for access to “student records.” N.J.A.C. 6A:32-7.5(g). This position was supported by Doe, 466 N.J. Super. 14, where the court held that plaintiff could access his own higher education records under OPRA. Id. at 25 (citing L.R., 452 N.J. Super. at 89).

In the matter before the Council, the Complainant submitted his OPRA request seeking, among other records, special education records, health records, and communications regarding

⁹ The GRC notes that the Complainant represented plaintiff in L.R.

¹⁰ The Supreme Court of New Jersey subsequently affirmed by equal division noting that “N.J.A.C. 6A:32-7.5(g) confirms that individuals and entities may request student records in accordance with OPRA’s provisions, and that educational agencies must comply with those provisions when they respond to such requests.” L.R. v. Camden City Pub. Sch. Dist., 238 N.J. 547, 569 (2019).

S.V. and included a signed authorization form from S.V.'s parent. Notwithstanding, the Custodian denied access to this portion of OPRA request and noted that the Complainant could seek same in accordance with the "special education regulations." It should be noted that although the Custodian proffered a denial, he agreed to search for additional records not provided to Complainant's Counsel as part of an earlier discovery disclosure due to the signed authorization. The Complainant initially refuted this position but withdrew the objection in writing to the Custodian on January 10, 2020. This complaint ensued, wherein the Complainant argued that the subject OPRA request fell within the exceptions set forth under FERPA and DOE's regulations regarding access to student records. In the SOI, the Custodian maintained the position that submitting an OPRA request for a student record was inappropriate. Thereafter, the parties traded submissions regarding various case law addressing the disclosure issue and L.R. interpretations.

Initially, the GRC notes that the Appellate Division was clear that the existence of other statutes regarding the management and disclosability of student records does not infringe on an individual's right to submit a request under OPRA. In fact, DOE's regulations expressly provide such an option by requiring districts to adhere to OPRA and FERPA. N.J.A.C. 6A:32-7.5(g); L.R., 452 N.J. Super. at 87. This position, which was established in C.B., GRC 2018-257, received concurring support in Doe, 466 N.J. Super. 14. Thus, the GRC finds no basis to revisit its decision in C.B. (as requested by Custodian's Counsel) and that an unlawful denial of access may have occurred here. Such a determination as to the unlawful denial will be predicated on the Custodian's ability to locate records not already in Complainant Counsel's position from an earlier acknowledged disclosure. See Bart v. City of Paterson Hous. Auth. 403 N.J. Super. 609, 618 (App. Div. 2008).

Accordingly, the Custodian unlawfully denied access to the Complainant's OPRA request item Nos. 2, 3, and 4. N.J.S.A. 47:1A-6. Specifically, the Complainant qualified as an excepted person under N.J.A.C. 6A:32-7.5(e)(14), (g). and was thus entitled to receipt of S.V.'s academic, health, and communication records pursuant to L.R., 452 N.J. Super. at 86-87. See also Doe, 466 N.J. Super. 14; C.B., GRC 2018-257. Thus, the Custodian must either: 1) disclose those "student records" not previously disclosed to Complainant's Counsel as part of a prior discovery (per Bart, 403 N.J. Super. 609); or 2) certify that additional records beyond those previously disclosure existed. The Custodian shall include legal certifications regarding the search performed from himself and those individuals assisting him to comply with the forgoing.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he 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 immediately to the portion of the Complainant's OPRA request item No. 1 either granting access, denying access, seeking clarification or requesting an extension of time immediately resulted in a violation of OPRA. N.J.S.A. 47:1A-5(e); Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007). Further, the Custodian's failure to respond to the remainder of the subject OPRA request within the extended time frame 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 Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. The Custodian may have unlawfully denied access to additional attorney billing records responsive to the Complainant's OPRA request item No. 1. N.J.S.A. 47:1A-6; Macek v. Bergen Cnty. Sheriff's Office, GRC Complaint No. 2017-156, *et seq.* (Interim Order dated June 25, 2019). Thus, the Custodian shall initiate a new search for the responsive billing records and, should he locate any, disclose them to the Complainant. Should the Custodian's, or any other District employee's, search fail to yield responsive records, the Custodian and those employees shall submit a certification specifically stating as such and inclusive of a detailed search explanation.
3. The Custodian unlawfully denied access to the Complainant's OPRA request item Nos. 2, 3, and 4. N.J.S.A. 47:1A-6. Specifically, the Complainant qualified as an excepted person under N.J.A.C. 6A:32-7.5(e)(14), (g) and was thus entitled to receipt of S.V.'s academic, health, and communication records pursuant to L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56, 86-87 (2017). See also Doe v. Rutgers, State Univ. of N.J., 466 N.J. Super. 14 (App. Div. 2021); Epstein, Esq. (O.B.O. C.B.) v. Hopewell Crest Bd. of Educ. (Cumberland), GRC Complaint No. 2018-257 (Interim Order dated July 28, 2020). Thus, the Custodian must either: 1) disclose those "student records" not previously disclosed to Complainant's Counsel as part of a prior discovery (per Bart v. City of Paterson Hous. Auth. 403 N.J. Super. 609, 618 (App. Div. 2008)); or 2) certify that additional records beyond those previously disclosure existed. The Custodian shall include legal certifications regarding the search performed from himself and those individuals assisting him to comply with the forgoing.
4. **The Custodian shall comply with conclusion Nos. 2 and 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously**

deliver¹¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,¹² to the Executive Director.¹³

5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

September 21, 2021

¹¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

¹² "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

¹³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.