



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 31, 2023 Government Records Council Meeting

James Kilkenny
Complainant

Complaint No. 2021-187

v.

Port Authority of NY & NJ
Custodian of Record

At the January 31, 2023 public meeting, the Government Records Council (“Council”) considered the January 24, 2023 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 portions of the Complainant’s August 11, 2020 OPRA requests based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6; Ciccarone v. N.J. Dep’t of Treasury, GRC Complaint No. 2013-280 (Interim Order, dated July 29, 2014). Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting or denying access within the statutorily mandated seven (7) business days or a reasonably necessary extension thereof, results in a “deemed” denial of the remainder of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, the GRC declines to order any further action because the Custodian disclosed the responsive records to the Complainant via e-mail on September 1, 2021.
2. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Custodian disclosed records within the last extended time frame set forth prior to the filing of this complaint. Additionally, the GRC has not ordered disclosure of any of those records to which the Complainant sought access. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

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

Final Decision Rendered by the
Government Records Council
On The 31st Day of January 2023

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: February 6, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 31, 2023 Council Meeting**

**James Kilkenny¹
Complainant**

GRC Complaint No. 2021-187

v.

**Port Authority of NY & NJ²
Custodial Agency**

Records Relevant to Complaint: Copy of the latest contract for parking, valet, and traffic between ABM and the Port Authority of New York and New Jersey (“PANYNJ”).

Custodian of Record: William Shalewitz

Request Received by Custodian: August 11, 2020

Response Made by Custodian: August 18, 2020

GRC Complaint Received: August 10, 2021

Background³

Request and Response:

On August 11, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 18, 2020, the Custodian responded in writing extending the response time frame through October 19, 2020. On October 19, 2020, the Custodian responded in writing again extending the response time frame through December 23, 2020. On an unknown date, the Custodian responded extending the response time frame through May 28, 2021. On May 28, 2021, the Custodian responded in writing extending the response time frame through July 30, 2021. On July 30, 2021, the Custodian responded in writing again extending the response time frame through October 8, 2021.

Denial of Access Complaint:

On August 10, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian took multiple extensions without justification for them. The Complainant contended that his OPRA request sought access to a simple record devoid of confidential or personal information thus

¹ Represented by Seth B. Kennedy, Esq., of Kroll, Heineman, Ptasiewicz & Parsons, LLP (Iselin, NJ).

² Represented by Caitlin Sullivan, Esq. (New York, NY).

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

requiring no redaction. The Complainant argued that notwithstanding the simplistic nature of the request and responsive record, PANYNJ took fourteen (14) months of extensions. The Complainant contended that the extensions were unreasonable and akin to a denial of access.

Statement of Information:

On August 26, 2022, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on August 11, 2020. The Custodian certified that his search included forwarding the OPRA request to the Procurement Department, who located the responsive records. The Custodian certified that no response was given, but that PANYNJ expects that Procurement will complete its review shortly and the responsive records will be disclosed in “early September 2021.”

Supplemental Response:

On September 1, 2021, the Custodian responded in writing to the Complainant disclosing the responsive contracts (1,157 pages) to the Complainant via e-mail.

Additional Submissions:

On September 2, 2021, Custodian’s Counsel e-mailed the GRC advising of the Custodian’s September 1, 2021 response.

Analysis

Timeliness

OPRA provides that a custodian may request an extension of time to respond to the complainant’s OPRA request, but the custodian must provide a specific date by which he/she will respond. Should the custodian fail to respond by that specific date, “access shall be deemed denied.” N.J.S.A. 47:1A-5(i).

Additionally, the Legislature amended OPRA on March 20, 2020, in response to the global pandemic. P.L. 2020, c.10. Based on that amendment, N.J.S.A. 47:1A-5(i) now provides that:

During a period declared pursuant to the laws of this State as a state of emergency, public health emergency, or state of local disaster emergency, the deadlines by which to respond to a request for, or grant or deny access to, a government record under paragraph (1) of this subsection or subsection e. of this section shall not apply, provided, however, that the custodian of a government record shall make a reasonable effort, as the circumstances permit, to respond to a request for access to a government record within seven business days or as soon as possible thereafter.

[Id. at (2) (emphasis added).]

In Rivera v. City of Plainfield Police Dep't (Union), GRC Complaint No. 2009-317 (May 2011), the custodian responded in writing to the complainant's request on the fourth (4th) business day by seeking an extension of time to respond and providing an anticipated date by which the requested records would be made available. The complainant did not consent to the custodian's request for an extension of time. The Council stated that:

The Council has further described the requirements for a proper request for an extension of time. Specifically, in Starkey v. NJ Dep't of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009), the Custodian provided the Complainant with a written response to his OPRA request on the second (2nd) business day following receipt of said request in which the Custodian requested an extension of time to respond to said request and provided the Complainant with an anticipated deadline date upon which the Custodian would respond to the request. The Council held that "because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5(g) [and] N.J.S.A. 47:1A-5(i)."

Further, in Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010), the Council held that the custodian did not unlawfully deny access to the requested records, stating in pertinent part that:

[B]ecause the Custodian provided a written response requesting an extension on the sixth (6th) business day following receipt of the Complainant's OPRA request and providing a date certain on which to expect production of the records requested, and, notwithstanding the fact that the Complainant did not agree to the extension of time requested by the Custodian, the Custodian's request for an extension of time [to a specific date] to respond to the Complainant's OPRA request was made in writing within the statutorily mandated seven (7) business day response time.

Moreover, in Werner v. N.J. Civil Serv. Comm'n, GRC Complaint No. 2011-151 (December 2012), the Council again addressed whether the custodian lawfully sought an extension of time to respond to the complainant's OPRA request. The Council concluded that because the custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated date by which the requested records would be made available, the custodian properly requested the extension pursuant to OPRA. See also Rivera, GRC 2009-317; Criscione, GRC 2010-68; and Starkey, GRC 2007-315, *et seq.*

Although extensions are rooted in well-settled case law, the Council need not find valid every request for an extension containing a clear deadline. In Ciccarone v. N.J. Dep't of Treasury, GRC Complaint No. 2013-280 (Interim Order, dated July 29, 2014), the Council found that the custodian could not lawfully exploit the process by repeatedly rolling over an extension once obtained. In reaching the conclusion that the continuous extensions resulted in a "deemed" denial of access, the Council looked to what is "reasonably necessary."

In the instant matter, the Custodian sought five (5) extensions for the Complainant’s August 11, 2020 OPRA request. The Custodian’s extensions are as follows:

Date of Request for Extension	New Deadline for Response	Reason for Extension
August 18, 2020	October 19, 2020	To “process the request.”
October 19, 2020	December 23, 2020	To “process the request.”
Unknown date	May 28, 2021	N/A
May 28, 2021	July 30, 2021	To “process the request.”
July 30, 2021	October 8, 2021	To “process the request.”

The Custodian extended the response time on five (5) occasions for a total of approximately 283 business days, accounting for public holidays and closures. As noted above, a requestor’s approval is not required for a valid extension. However, it should be noted that the Complainant did not object to any extension prior to filing this complaint.

To determine if the extended time for a response is reasonable, the GRC must first consider the complexity of the request as measured by the number of items requested, the ease in identifying and retrieving requested records, and the nature and extent of any necessary redactions. Ciccarone, GRC 2013-280. The GRC must next consider the amount of time the custodian already had to respond to the request. Id. Finally, the GRC must consider any extenuating circumstances that could hinder the custodian’s ability to respond effectively to the request.⁴ Id.

Regarding the request, the Complainant’s OPRA request sought “the latest contract for parking, valet, and traffic” between PANYNJ and ABM. The Complainant filed the instant complaint after receiving the fifth (5th) extension request. In the SOI, the Custodian explained PANYNJ’s search for and review of the responsive contract records. A potential stressor could have been the result of the ongoing public health emergency (“PHE”) due to COVID-19; however, the Custodian did not include in the SOI any arguments indicating such. The Custodian ultimately responded on September 1, 2021 disclosing 1,157 pages of records without redaction.

From the Custodian’s receipt of the Complainant’s clarification, he initially sought forty-two (42) business days to respond. The Custodian then sought four (4) additional extensions comprising approximately 241 business days. Thus, the Custodian sought, in addition to the original seven (7) business days, an extension of over a full calendar year.

In determining whether the extensions were ultimately unreasonable, the GRC looks to Ciccarone directly. In that case, the custodian sought extensions of time amounting to fifty-two (52) business days to locate and disclose thirty-four (34) pages of records, some with significant redactions. The Council held that a “deemed” denial of access occurred based on unreasonable and unwarranted extensions. The Council reasoned that while the parties agreed to twenty-five (25)

⁴ “Extenuating circumstances” could include, but not necessarily be limited to, retrieval of records that are in storage or archived (especially if located at a remote storage facility), conversion of records to another medium to accommodate the requestor, emergency closure of the custodial agency, or the custodial agency’s need to reallocate resources to a higher priority due to *force majeure*.

business days, the custodian's additional extensions of twenty-seven (27) business days was excessive.

The GRC sees the facts here as more egregious than those presented in Ciccarone. Specifically, the Custodian sought over a year of extensions for a rather simplistic OPRA request that produced one large document and several pages of attachments without redactions. That the records were "under review" provides no reasonable basis to extend the response time frame for an entire year. Further, there is no evidence in the record to support that the PHE or any other extenuating circumstances had an impact on PANYNJ's ability to disclose straightforward contract records.⁵ The GRC does recognize the number of pages disclosed in response to the request and notes that an extension to review same could have been reasonable. However, the length of the extensions here is nonetheless unsubstantiated by the evidence presented.

Accordingly, the Custodian did not bear his burden of proof that he timely responded to the portions of the Complainant's August 11, 2020 OPRA requests based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6; Ciccarone, GRC 2013-280. Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting or denying access within the statutorily mandated seven (7) business days or a reasonably necessary extension thereof, results in a "deemed" denial of the remainder of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, the GRC declines to order any further action because the Custodian disclosed the responsive records to the Complainant via e-mail on September 1, 2021.

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,

⁵ The GRC notes that the records sought are also "immediate" access records. N.J.S.A. 47:1A-5(e).

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.]

Here, the Complainant filed the instant complaint arguing that the Custodian unreasonably extended the time frame to respond to the subject OPRA request. The Custodian argued in the SOI that the responsive records were under review, but that they would be disclosed in September 2021 and prior to the expiration of the most recent extension of time. That disclosure ultimately occurred on September 1, 2021.

The GRC must initially note that because the Council has not ordered disclosure of any records, no change has occurred in the Custodian's conduct. However, the GRC must also address whether this complaint filing on August 10, 2021 was the causal nexus for the Custodian's September 1, 2021 disclosure. In reviewing all applicable evidence, it is clear that the Custodian intended to respond by disclosing records, regardless of the filing of the complaint. Specifically, the Custodian extended the time frame multiple times, with the final extension of time and disclosure date straddling the filing of this action. Thus, the evidence of record supports PANYNJ's intent to respond to the subject OPRA request regardless of the filing of this complaint. The GRC also notes that the Council, when presented with a similar set of facts, has determined that a complainant is not a prevailing party. See Wolosky v. Borough of Washington (Warren), GRC Complaint No. 2016-19 (September 2017). Thus, the Complainant is not a prevailing party and is not entitled to an award of reasonable attorney's fees.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters, 387 N.J. Super. 432. Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Custodian disclosed records within the last extended time frame set forth prior to the filing of this complaint. Additionally, the GRC has not ordered disclosure of any of those records to which the Complainant sought access. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the portions of the Complainant's August 11, 2020 OPRA requests based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6; Ciccarone v. N.J. Dep't of Treasury, GRC Complaint No. 2013-280 (Interim Order, dated July 29, 2014). Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting or denying access within the statutorily mandated seven (7) business days or a reasonably necessary extension thereof, results in a "deemed" denial of the remainder of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, the GRC declines to order any further action because the Custodian disclosed the responsive records to the Complainant via e-mail on September 1, 2021.

2. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Custodian disclosed records within the last extended time frame set forth prior to the filing of this complaint. Additionally, the GRC has not ordered disclosure of any of those records to which the Complainant sought access. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Prepared By: Frank F. Caruso
Executive Director

January 24, 2023