



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

May 31, 2022 Government Records Council Meeting

Alex Hecht
Complainant

Complaint No. 2021-36

v.

NJ Transit
Custodian of Record

At the May 31, 2022 public meeting, the Government Records Council (“Council”) considered the April 19, 2022 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 requested respondent bidder list is exempt from disclosure under the “advantage to competitors and bidders” exemption. N.J.S.A. 47:1A-1.1; O’Neill Elec. Co., Inc. v. Bd. of Chosen Freeholders of Cnty. of Warren, 297 N.J. Super. 473 (App. Div. 1997); Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (Final Decision dated March 29, 2011). Thus, the Custodian lawfully denied access to the requested record. N.J.S.A. 47:1A-6.
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 Council has found that the requested bidder respondent list is exempt from disclosure under OPRA. 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 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**

**Findings and Recommendations of the Executive Director
May 31, 2022 Council Meeting**

Alex Hecht¹
Complainant

GRC Complaint No. 2021-36

v.

N.J. Transit²
Custodial Agency

Records Relevant to Complaint: Onsite inspection of a list of names and addresses for respondents to the Bayonne 34th Street Request for Qualifications (“RFQ”).³

Custodian of Record: Elizabeth A. Da Silva
Request Received by Custodian: October 28, 2020
Response Made by Custodian: November 6, 2020
GRC Complaint Received: February 8, 2021

Background⁴

Request and Response:

On October 28, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 6, 2020, the Custodian responded in writing obtaining an extension of time through November 27, 2020 to adequately respond to the subject OPRA request. On November 25, 2020, the Custodian responded in writing obtaining an extension of time through December 18, 2020 to adequately respond to the subject OPRA request. On December 18, 2020, the Custodian responded in writing obtaining an extension of time through January 8, 2021 to adequately respond to the subject OPRA request.

On January 6, 2021, the Custodian responded in writing denying access to the Complainant’s OPRA request under the “inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material” exemption. N.J.S.A. 47:1A-1.1; *Libertarians for Transparent Gov’t v. Gov’t Records Council*, 453 N.J. Super. 83, 92 (App. Div. 2018).

¹ Represented by Brent Garren, Esq. (New York, NY).

² Represented by Deputy Attorney General Patricia A. Krogman.

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.

Denial of Access Complaint:

On February 8, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian unlawfully denied access to the responsive list under the ACD exemption. The Complainant argued that the requested list is not comprised of opinions, recommendations, or advice about agency policy. The Complainant further contended that the list at issue here is inapposite to the records at issue in both Libertarians, 453 N.J. Super. 83, and Educ. Law Ctr. v. Dep’t of Educ., 198 N.J. 274 (2009). The Complainant further argued that the list sought did not reflect N.J. Transit’s deliberative process, nor was the list created by, or included input from, N.J. Transit.

Statement of Information:

On March 5, 2021, the Custodian filed a Statement of Information (“SOI”) attaching a certification from Director Sean Massey. The Custodian certified that she received the Complainant’s OPRA request on October 28, 2020. The Custodian certified that her search included contacting procurement and real estate employees to obtain the list sought. The Custodian certified that following multiple extensions, she responded in writing on January 6, 2021 denying the subject OPRA request under the ACD exemption. N.J.S.A. 47:1A-1.1; Libertarians, 453 N.J. Super. 83.

The Custodian argued that the list sought by the Complainant was more properly denied under the “advantage to competitors and bidders” exemption. N.J.S.A. 47:1A-1.1. The Custodian averred that the RFQ in question, which was issued in June 2019, related to development of land owned by N.J. Transit adjacent to the 4th Street Light Rail Station in Bayonne. Massey Cert. ¶ 3-4. The Custodian noted that while the RFQ process was completed in November 2019, N.J. Transit maintained the option of issuing a “Request for Proposal” (“RFP”), which has not yet occurred because the process has been suspended. Massey Cert. ¶ 5-7. The Custodian argued that N.J. Transit’s next step is currently open to multiple outcomes, including a new RFQ or issuing an RFP. The Custodian thus argued that disclosure of the list would provide further respondents with an advantage. Massey Cert. ¶ 6-7.

The Custodian asserted that the advantages include revealing the total interest in the project based on the number of respondents. Massey Cert. ¶ 8. The Custodian noted that for example, if a respondent knew whether it was the only interested firm, or one of many, it could tailor its RFP to fit that scenario to its own benefit. The Custodian further argued that respondents could seek to form separate agreements with other respondents. Id. ¶ 9. The Custodian further posited that a respondent could also use the list to familiarize itself with other respondents’ work to gain a competitive edge here. Id. ¶ 10. The Custodian argued that each of the forgoing scenarios would undermine the RFQ process to the detriment of N.J. Transit.

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a

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

OPRA provides that the definition of a government record “shall not include . . . [ACD] material.” When the exception is invoked, a governmental entity may “withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” Educ. Law Ctr. v. Dep’t of Educ., 198 N.J. 274, 285 (2009) (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)). The New Jersey Supreme Court has also ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr., 198 N.J. 274.

A custodian claiming an exception to the disclosure requirements under OPRA on that basis must initially satisfy two conditions: 1) the document must be pre-decisional, meaning that the document was generated prior to the adoption of the governmental entity's policy or decision; and 2) the document must reflect the deliberative process, which means that it must contain opinions, recommendations, or advice about agency policies. See Educ. Law Ctr., 198 N.J. at 286. The key factor in this determination is whether the contents of the document reflect “formulation or exercise of . . . policy-oriented judgment or the process by which policy is formulated.” Id. at 295 (adopting the federal standard for determining whether material is “deliberative” and quoting Mapother v. Dep’t of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)). Once the governmental entity satisfies these two threshold requirements, a presumption of confidentiality is established, which the requester may rebut by showing that the need for the materials overrides the government's interest in confidentiality. Id. at 286-87.

OPRA further provides that: “[a] government record shall not include the following information which is deemed to be confidential . . . information which, if disclosed, would give an advantage to competitors or bidders . . .” N.J.S.A. 47:1A-1.1. In situations where a requestor sought access to bids during the selection process, the Council has determined that same are exempt from disclosure under this exemption. See Renna v. Cnty. of Union, GRC Complaint No. 2003-100 (February 2004); Fisher v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2006-193 (Interim Order dated June 27, 2007); Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (Final Decision dated March 29, 2011).

Initially, it appears that N.J. Transit abandoned the ACD exemption in favor of the “advantage to competitors and bidders” exemption. It should be noted that given any compelling argument, it is not likely that the ACD exemption would apply to the list based on the SOI and attached certification. Notwithstanding, the GRC will not address this issue because the Custodian is no longer relying on the exemption.

As for the “advantage” exemption, the GRC notes that the disclosability of the list under same appears to be a matter of first impression. Notwithstanding, the GRC can find some guiding precedent in a decision on the disclosability of a bidder list rendered by the Appellate Division.

Specifically, in a case decided under the Right to Know Law (“RTKL”), N.J.S.A. 47:1A-1 to 1A-4, which preceded OPRA, the Appellate Division upheld summary dismissal of a complaint by a contractor who sought the disclosure of a list of contractors who bid on projects for Warren County. O’Neill Elec. Co., Inc. v. Bd. of Chosen Freeholders of Cnty. of Warren, 297 N.J. Super. 473 (App. Div. 1997). There, the court held that the record was not disclosable under the RTKL because it did not fit within the definition of a “government record.” The court went on to also hold that the record could not be disclosed under common law because:

[A]ccess to a bidders list facilitates collusive or bid-rigging arrangements and that withholding disclosure makes this more difficult. The Attorney General persuasively argues that:

“to the extent that a prospective bidder can ascertain the identity of his competitors or, better yet from the [bidder's perspective], ascertain that he has no competitors, the bidder can adjust his bid so as to obtain the award of the contract at a higher price than would be required if the bidder were faced with uncertainty as to the nature of his competition.’ The potential bidder could thereby ‘adjust’ his bid if aware that there was little or perhaps no competition.”

[Id.] at 479.

The court was deliberate to note that this evidence existed in the testimony of the defendants’ purposing agent and amicus Attorney General’s brief.

OPRA subsequently replaced RTKL in July 2002 and significantly broadened the definition of a “government record.” N.J.S.A. 47:1A-1.1. However, the new statutory provisions also contemplated multiple exemptions that would allow an agency to deny access to a requested record, one being the “advantage to competitors and bidders” exemption. Id. This exemption has incurred limited analysis by both the GRC and courts. However, these limited decisions similarly relied heavily on certified statements regarding the harm from disclosure, especially where the process has not resulted in a contract award. See e.g. Commc’ns Workers of Am. v. Rousseau, 417 N.J. Super. 341 (App. Div. 2010); Bond, GRC 2009-324. These decisions also mirror the O’Neill court’s common law treatment of bidder respondent lists.

Here, the Complainant sought on-site inspection of a bidder respondent list, to which the Custodian denied access initially citing the ACD exemption. This Denial of Access Complaint ensued, wherein the Complainant argued that the ACD exemption did not apply because the list was no pre-decisional. In the SOI, the Custodian argued that the “advantage” exemption was the appropriate exemption under which the record should have been denied. The Custodian, relying on certified statements from Director Massey, contended that disclosure of the list would result in a competitive advantage because the RFQ in question was suspended with various future outcomes. The Custodian argued that nondisclosure of the list would minimize the risk of collusion or bid manipulation should N.J. Transit reissue a new RFQ or RFP for the project.

The arguments presented by the Custodian are like those contemplated by the O’Neill court and GRC when addressing, and ultimately upholding, a denial under the “advantage” exemption. In addition to the fact that the RFQ process was suspended with future potential action, it is obvious that an individual armed with the requested list could utilize same to its advantage. This could include colluding with other interested parties, targeted submission of a bid based on the competition level, and information sharing with a particular bidder to increase the success of their bid. The facts here thus support that the denial was lawful.

Accordingly, the requested respondent bidder list is exempt from disclosure under the “advantage to competitors and bidders” exemption. N.J.S.A. 47:1A-1.1; O’Neill, 297 N.J. Super. 473; Bond, GRC 2009-324. Thus, the Custodian lawfully denied access to the requested record. N.J.S.A. 47:1A-6.

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, the Complainant contended that the Custodian unlawfully denied him access to the requested bidder respondent list and requested that the GRC order disclosure of same. However, the Custodian lawfully denied access to said record under the “advantage” exemption. N.J.S.A. 47:1A-1.1. Thus, this complaint did not bring about a change in the Custodian's conduct and, in the absence of a causal nexus for relief, the Complainant is not a prevailing party.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters, 387 N.J. Super. 432. Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Council has found that the requested bidder respondent list is exempt from disclosure under

OPRA. 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 requested respondent bidder list is exempt from disclosure under the “advantage to competitors and bidders” exemption. N.J.S.A. 47:1A-1.1; O'Neill Elec. Co., Inc. v. Bd. of Chosen Freeholders of Cnty. of Warren, 297 N.J. Super. 473 (App. Div. 1997); Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (Final Decision dated March 29, 2011). Thus, the Custodian lawfully denied access to the requested record. N.J.S.A. 47:1A-6.
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 Council has found that the requested bidder respondent list is exempt from disclosure under OPRA. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Prepared By: Frank F. Caruso
Executive Director

April 19, 2022⁵

⁵ This complaint was prepared for adjudication at the Council's the April 26, 2022 meeting, but could not be adjudicated due to lack of quorum.