



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

December 13, 2022 Government Records Council Meeting

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

Complaint No. 2021-86

v.

Englewood Public School District (Bergen)
Custodian of Record

At the December 13, 2022 public meeting, the Government Records Council (“Council”) considered the December 6, 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 matter shall be closed, 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 13th Day of December 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: December 15, 2022



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
December 13, 2022 Council Meeting**

**Michael I. Inzelbuch, Esq. (on Behalf of L.R.)¹
Complainant**

GRC Complaint No. 2021-86

v.

**Englewood Public School District (Bergen)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of: “Any and all [Englewood Board of Education (“Board”)] Policy(ies) and/or regulation(s) as to observations of [Englewood Public School District (“District”)] Programs – prior to COVID and currently.”

Custodian of Record: Cheryl Balletto
Request Received by Custodian: February 22, 2021
Response Made by Custodian: May 11, 2021
GRC Complaint Received: April 20, 2021

Background

August 30, 2022 Council Meeting:

At its August 30, 2022 public meeting, the Council considered the August 23, 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, found that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Notwithstanding the active PHE at the time of the request, the Custodian failed to provide sufficient evidence that she made a “reasonable effort” to provide a response from on or around March 11, 2021 through May 11, 2021. See N.J.S.A. 47:1A-5(i)(2). As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31,

¹ The Complainant represents L.R.

² Represented by Jason L. Tarella, Esq., of Inglesino, Webster, Wyciskala & Taylor, LLC (Parsippany, NJ).
Michael I. Inzelbuch, Esq. (on Behalf of L.R.) v. Englewood Public School District (Bergen), 2021-86 – Supplemental Findings and Recommendations of the Executive Director

2007). However, the GRC declines to order disclosure of responsive records since the evidence of record demonstrates that the Custodian responded to the Complainant on May 11, 2021.

2. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to provide a timely response to the Complainant's OPRA request. However, the Custodian demonstrated that she ultimately responded to the Complainant's request on May 11, 2021, providing responsive records. Additionally, the evidence of record does not indicate that the Custodian's violation 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. 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, 432 (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, the Custodian failed to provide a timely response until after the complaint filing and did not demonstrate an intent to provide records, notwithstanding. 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. at 432, and Mason, 196 N.J. at 71. **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 August 31, 2022, the Council distributed its Interim Order to all parties. On October 13, 2022, the Government Records Council ("GRC") advised the parties that the fee agreement time frame expired. The GRC further advised that the Complainant's Counsel had twenty (20) business days to submit a fee application, which was the end of business on November 14, 2022. The Complainant's Counsel did not submit a fee application within the appropriate time frame to do so.

Analysis

Compliance

At its August 30, 2022 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 August 31, 2022, 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 September 29, 2022.

On October 13, 2022, following the expiration of the time frame to reach a settlement, the GRC advised the parties that Complainant’s Counsel had twenty (20) business days to submit a fee application in accordance with N.J.A.C. 5:105-2.13. As of November 14, 2022, the Council has received neither a fee agreement between the parties nor an application for an award of attorney’s fees from the Complainant or Complainant’s Counsel.

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 Executive Director recommends that 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). Accordingly, the matter shall be closed, as no further analysis is necessary.

Prepared By: Samuel A. Rosado
Staff Attorney

December 6, 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

August 30, 2022 Government Records Council Meeting

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

Complaint No. 2021-86

v.

Englewood Public School District (Bergen)
Custodian of Record

At the August 30, 2022 public meeting, the Government Records Council (“Council”) considered the August 23, 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 Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Notwithstanding the active PHE at the time of the request, the Custodian failed to provide sufficient evidence that she made a “reasonable effort” to provide a response from on or around March 11, 2021 through May 11, 2021. See N.J.S.A. 47:1A-5(i)(2). As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007). However, the GRC declines to order disclosure of responsive records since the evidence of record demonstrates that the Custodian responded to the Complainant on May 11, 2021.
2. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to provide a timely response to the Complainant’s OPRA request. However, the Custodian demonstrated that she ultimately responded to the Complainant’s request on May 11, 2021, providing responsive records. Additionally, the evidence of record does not indicate that the Custodian’s violation 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. 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, 432 (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, the Custodian failed to provide a timely response until after the complaint filing and did not demonstrate an intent to provide records, notwithstanding. 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. at 432, and Mason, 196 N.J. at 71. **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 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: August 31, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Michael I. Inzelbuch, Esq. (on Behalf of L.R.)¹
Complainant**

GRC Complaint No. 2021-86

v.

**Englewood Public School District (Bergen)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of: “Any and all [Englewood Board of Education (“Board”)] Policy(ies) and/or regulation(s) as to observations of [Englewood Public School District (“District”)] Programs – prior to COVID and currently.”

Custodian of Record: Cheryl Balletto

Request Received by Custodian: February 22, 2021

Response Made by Custodian: May 11, 2021

GRC Complaint Received: April 20, 2021

Background³

Request:

On February 21, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On April 20, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that as of April 20, 2021, the Custodian has not responded to his OPRA request.

Response:

On May 11, 2021, the fifty-fifth (55th) business day after receipt, the Custodian responded to the Complainant in writing providing six (6) records responsive to the request. The Custodian stated that at the time she received the request the State was under a public health emergency

¹ The Complainant represents L.R.

² Represented by Jason L. Tarella, Esq., of Inglesino, Webster, Wyciskala & Taylor, LLC (Parsippany, NJ).

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

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(“PHE”). The Custodian further stated that on February 18, 2021, District staff with access to responsive records were forced to quarantine and could not return to the office until the end of the quarantine period. The Custodian therefore stated that additional time was needed to provide the responsive records.

Statement of Information:

On May 11, 2021, the Custodian filed a Statement of Information (“SOF”). The Custodian certified that she received the Complainant’s OPRA request on February 22, 2021. The Custodian certified that her search included reviewing the Board’s Policies and Regulations that pertained to the Complainant’s request. The Custodian certified that the full text of the policies and regulations was searched using “observe,” “observation,” “review,” and “monitor.” The Custodian certified that she responded in writing on May 11, 2021, providing responsive records.

The Custodian asserted that on February 18, 2021, a member of the District’s business office tested positive for COVID-19, and a second worker tested positive on February 20, 2021. The Custodian asserted that as a result, the business office was closed to all personnel and no one was allowed to enter the office building for three (3) weeks. The Custodian asserted that the entire District remained closed for in-person education until April 19, 2021 and during the time leading up to re-opening the District needed to dedicate resources to that effect. The Custodian asserted that the District’s business office was closed to the public and remained so as of May 11, 2021.

The Custodian asserted that on March 20, 2020, OPRA was amended in response to the global pandemic. P.L. 2020, c.10. The Custodian stated that Governor Murphy declared a State of Emergency and a Public Health Emergency (“PHE”) on March 9, 2020 in Executive Order No. 103 (Gov. Murphy 2020) (“EO 103”). The Custodian further added that the GRC issued a statement on the amendment and outlined some of the circumstances arising out of COVID-19. See Special Statement of the Government Records Council 2020-01. The Custodian asserted that circumstances outlined above limited the available resources to timely respond to the Complainant’s OPRA request. The Custodian argued that although an extension was not provided to the Complainant, the circumstances ultimately justified same.

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).⁴ 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

⁴ A custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

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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 dated October 31, 2007).

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)(2) 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. (Emphasis added).]

Although adjudicated during the pendency of this matter, the GRC finds Dunwell (O.B.O. Borough of Alpha) v. Twp. of Phillipsburg (Warren), GRC Complaint No. 2020-64 (February 2022) pertinent. There, the complainant asserted that the custodian failed to timely provide immediate access records under OPRA. The custodian certified that at the time she received the OPRA request, the municipality was operating with reduced staff and subsequently shutdown temporarily due to the pandemic and PHE and could not provide a response until the fifth (5th) business day after receipt. The Council held that although the request was submitted prior to the enactment of N.J.S.A. 47:1A-5(i)(2), the custodian provided sufficient facts and circumstances to reasonably justify the delay in providing access to the immediate access records.

In the instant matter, the Custodian acknowledged receiving the OPRA request on February 22, 2021. The Custodian certified that on February 18, 2021 and February 20, 2021, two (2) District office employees tested positive for COVID-19, resulting in a shutdown of the office and a three (3) week quarantine. The Custodian argued that no District personnel were permitted to enter until the end of the quarantine period. The Custodian certified that the quarantine period presented an operational barrier to provide responsive records during that time.

A review of the evidence, however, demonstrates that the Custodian violated N.J.S.A. 47:1A-5(i). Although the OPRA request was made while a public health emergency ("PHE") was in effect, and thus the language under N.J.S.A. 47:1A-5(i)(2) applied, the statute still required a "reasonable effort" to provide a response to an OPRA request within the allotted period. The Custodian certified that a positive test on February 18, 2021 required all District personnel in the office to quarantine for three (3) weeks. However, the end of that quarantine period would have been on or around March 11, 2021. The Custodian provided no facts or explanations justifying the lack of response or status updates from on or around March 11, 2021 to May 11, 2021. Moreover, the District's pending re-opening on April 19, 2021 provides no insight into why the Custodian could not have produced the six (6) pages of records earlier than May 11, 2021. Thus, the Custodian failed to show the reasonable efforts made to respond to the request "as soon as possible" N.J.S.A. 47:1A-5(i)(2).

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Notwithstanding the active PHE at the time of the request, the Custodian failed to provide sufficient evidence that she made a "reasonable effort" to provide a response from on or around March 11, 2021 through May 11, 2021. See N.J.S.A. 47:1A-5(i)(2). As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. However, the GRC declines to order disclosure of responsive records since the evidence of record demonstrates that the Custodian responded to the Complainant on May 11, 2021.

Knowing & Willful

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . ." N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically, OPRA states ". . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . ." N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the instant matter, the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to provide a timely response to the Complainant's OPRA request. However, the Custodian demonstrated that she ultimately responded to the Complainant's request on May 11, 2021, providing responsive records. Additionally, the evidence of record does not indicate that the Custodian's violation 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, 432 (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 held that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” Id. at 603 (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.

[196 N.J. 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 Mason, the plaintiff submitted an OPRA request on February 9, 2004. The defendant responded on February 20, eight (8) business days later, or one day beyond the statutory limit. Id. at 79. As a result, the Court shifted the burden to the defendant to prove that the plaintiff’s lawsuit, filed on March 4, was not the catalyst behind defendant’s voluntary disclosure. Id. Because defendant’s February 20 response included a copy of a memo dated February 19 -- the seventh (7th) business day -- which advised that one of the requested records should be available on February 27 and the other one week later, the Court determined that the plaintiff’s lawsuit was not the catalyst for the release of the records and found that she was not entitled to an award of prevailing party attorney fees. Id. at 80.

In determining whether the Complainant is a prevailing party, the GRC acknowledges that the Custodian’s failure to respond in writing in a timely manner resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). Thus, the burden of proving that this complaint was not the catalyst for providing the responsive records to the Complainant shifts to the Custodian pursuant to Mason, 196 N.J. at 79.

In the instant matter, the Complainant alleged that the Custodian failed to respond to his February 22, 2021 OPRA request. The Custodian contended that the District received the request on February 22, 2021, and at the time of the request the District’s office was closed due to employees testing positive for COVID-19. The Custodian certified that the quarantine period was to last three (3) weeks from February 18, 2021. However, the Custodian did not provide a response after the quarantine period ended in March through April 20, 2021, the date of the complaint filing. The Custodian would not provide any response until May 11, 2021, or the date of the SOI.

A review of the facts demonstrates that the Custodian did not meet her burden under Mason 169 N.J. at 79-80. Although the Custodian attested to the hardships in providing a complete response to the OPRA request, she failed to provide any response until well after the complaint filing, and on the same day as the SOI. The Custodian also provided no indication to the Complainant that a response was forthcoming until after the complaint was filed.

Therefore, 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, the Custodian failed to provide a timely response until after the complaint filing and did not demonstrate an intent to provide records, notwithstanding. 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 did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Notwithstanding the active PHE at the time of the request, the Custodian failed to provide sufficient evidence that she made a “reasonable effort” to provide a response from on or around March 11, 2021 through May 11, 2021. See N.J.S.A. 47:1A-5(i)(2). As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007). However, the GRC declines to order disclosure of responsive records since the evidence of record demonstrates that the Custodian responded to the Complainant on May 11, 2021.
2. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) by failing to provide a timely response to the Complainant’s OPRA request. However, the Custodian demonstrated that she ultimately responded to the Complainant’s request on May 11, 2021, providing responsive records. Additionally, the evidence of record does not indicate that the Custodian’s violation 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. 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, 432 (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, the Custodian failed to provide a timely response until after the complaint filing and did not demonstrate an intent to provide records, notwithstanding. 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. at 432, and Mason, 196 N.J. at 71. **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: Samuel A. Rosado
Staff Attorney

August 23, 2022