



PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lieutenant Governor

State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

JACQUELYN A. SUÁREZ
Commissioner

FINAL DECISION

November 7, 2024 Government Records Council Meeting

Scott Madlinger
Complainant

Complaint No. 2022-242

v.

Berkeley Township (Ocean)
Custodian of Record

At the November 7, 2024, public meeting, the Government Records Council (“Council”) considered the October 29, 2024, 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 performed an insufficient search and thereby unlawfully denied access to the Complainant’s OPRA request seeking *E-ZPass* violations. See N.J.S.A. 47:1A-6; Schneble v. N.J. Dep’t of Env’tl. Prot., GRC Complaint No. 2007-220 (April 2008). Specifically, the Custodian’s failure to locate responsive records until after she conducted an additional search following receipt of the Denial of Access Complaint and a request for additional information from the GRC, resulted in an insufficient search. However, the GRC declines to order disclosure because the Custodian disclosed same to the Complainant on July 5, 2022, simultaneously with her response to the GRC’s request for additional information.
2. 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, 76 (2008). Specifically, following receipt of the complaint, the Custodian located responsive records that she previously claimed did not exist. 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 76. **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(c).**

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 7th Day of November 2024

John A. Alexy, 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 12, 2024

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 7, 2024 Council Meeting**

**Scott Madlinger¹
Complainant**

GRC Complaint No. 2022-242

v.

**Berkeley Township (Ocean)²
Custodial Agency**

Records Relevant to Complaint: Copies via e-mail of “all EZ Pass violations received during the time period 05/12/2021- 05/12/2022[.]”

Custodian of Record: Karen Stallings

Request Received by Custodian: May 12, 2022

Response Made by Custodian: May 20, 2022

GRC Complaint Received: June 2, 2022

Background³

Request and Response:

On May 12, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 20, 2022, at 2:30 p.m., the Custodian responded in writing to the Complainant’s request informing him that there are no records responsive to the request. On the same date at 2:56 p.m., the Complainant sent an e-mail to the Custodian which stated, “I will discuss with Lauren.” On the same date at 3:07 p.m., the Complainant sent an e-mail to Lauren Staiger at Rothstein, Mandell, Strohm, Halm & Cipriana, P.C. which stated, “I am aware of chatter in a township employee email log about an ez pass (sic) violation. I guess I will have to opira (sic) the full body emails to prove this one.”

Denial of Access Complaint:

On June 2, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that on May 20, 2022, the Custodian responded to his May 12, 2022 OPRA request. The Complainant stated that the Custodian informed him that she consulted with all departments that utilize municipal vehicles and that

¹ Represented by Walter M. Luers, Esq., of Cohn Lifland Pearlman Herrmann & Knopf, LLP (Saddle Brook, NJ).

² Represented by Robin La Bue, Esq., of Rothstein, Mandell, Strohm, Halm & Cipriana, P.C. (Toms River, 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.

Berkeley Township (“Township”) has no records responsive to the request. The Complainant stated that on that same date he sent Ms. Staiger an e-mail “that I was aware of chatter in township (sic) employee email log about ezpass (sic) violation.” The Complainant stated that he did not receive a reply. The Complainant further stated that, on May 21, 2022, he submitted an OPRA request to the Township for copies of e-mails discussing the *E-ZPass* violation. The Complainant stated that on June 1, 2022, the Custodian responded to his request by disclosing a copy of an e-mail revealing there was a December 17 (2021) violation; however, she did not attach a copy of the violation.⁴

The Complainant attached to the complaint a copy of a Township internal e-mail dated March 17, 2022, from Tamara Goble to Eric Zanetti, which stated in relevant part, “[p]lease see attached 1st and 2nd notice for a 12/17 EZ pass violation for the Bronco for handling.” This e-mail is followed by an e-mail string beginning on March 21, 2022, between Mr. Zanetti and Jane Casagrande, confirming that the *E-ZPass* violation was for a vehicle used by Geri Ambrosio. The Complainant also attached an e-mail dated March 22, 2022, from Mr. Zanetti to Ms. Ambrosio, stating, “[y]ou may be able to do it online but attached is a paper appeal as well.” The e-mail contains an attachment labeled 20220317095542877.pdf.

Statement of Information:

On June 8, 2022, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on May 12, 2022, and responded on May 20, 2022.

The Custodian certified that it is Township policy not to pay for *E-ZPass* violations, rather any such violation must be paid personally by the employee incurring the violation. The Custodian certified that any *E-ZPass* violations sent to the Township are forwarded to the head of the department using the cited vehicle, who in turn will give the violation notice to the responsible employee for payment. The Custodian certified that she is entitled to rely upon responses from the department heads regarding their receipt of *E-ZPass* violations responsive to the request, and that they denied having any such records.⁵ The Custodian further certified that she confirmed with the Finance Department that no *E-ZPass* violations were paid by the Township during the requested period.

The Custodian certified that the Township does not maintain or keep on file any records of an *E-ZPass* violation. The Custodian further certified that once the violation notice is given to the responsible employee for payment, it is no longer a government record. The Custodian argued that because there are no records responsive to the request, there was no denial of access and the GRC should dismiss the complaint.

⁴ The Complainant did not attach to the complaint a copy of the Custodian’s response to his referenced May 21, 2022 OPRA request.

⁵ The Custodian attached to the SOI several e-mails that she circulated to the Township’s department heads asking them to provide her with any records responsive to the request.

Additional Submissions:

On June 8, 2022, the GRC e-mailed the Custodian a request for additional information. The GRC informed the Custodian that, although she certified in the SOI that the Township did not pay for any *E-ZPass* violations, the Complainant was seeking copies of violations received, not violations paid. The GRC asked the Custodian to provide a certification clarifying the Township's process for documenting receipt of *E-ZPass* violations for Township vehicles.

On June 13, 2022, the Custodian replied to the GRC's request for additional information. The Custodian certified that the Township does not maintain *E-ZPass* accounts for Township vehicles. The Custodian certified that any received *E-ZPass* violations are delivered to the head of the department using the cited vehicle, who is then responsible for disposition of the violation. The Custodian certified that the Township does not retain a record of *E-ZPass* violations because they are not Township expenses. The Custodian further certified that for the instant complaint all department heads stated that they have no records responsive to the request.

On June 29, 2022, the GRC e-mailed the Custodian a second request for additional information. The GRC informed the Custodian that in her reply to the GRC's request for additional information dated June 8, 2022, she certified that the department heads stated they have no records responsive to the request. The GRC asked the Custodian to obtain and forward to the GRC certifications from employees Tamara Goble, Eric Zanetti and Jane Casagrande, confirming that they did not have any records responsive to the OPRA request in their possession, including their e-mail accounts, during the period May 12, 2021 through May 12, 2022. The GRC informed the Custodian that there is evidence in the record that these employees are the senders and/or recipients of e-mails referencing an *E-ZPass* violation. The GRC asked the Custodian to have the employees attach as an exhibit to their certifications copies of any e-mails dated March 17, 2022 and March 21, 2022, including attachments, referencing *E-ZPass* violations or having "EZ Pass Violation" in the subject line.

On July 5, 2022, the Custodian replied to the GRC's request for additional information by providing certifications from Eric Zanetti and Jane Casagrande. The Custodian stated that Tamara Goble is no longer employed by the Township.

Mr. Zanetti certified that he is the Township Tax Assessor, and that he received an e-mail from Tamara Goble containing an *E-ZPass* violation notice for an employee in his department. Mr. Zanetti certified that after he forwarded the notice to the employee, he deleted the e-mail because he believed that an *E-ZPass* violation "is a personal problem and is not a government record." Mr. Zanetti further certified that when the Custodian "inquired as to the existence of an EZ Pass Violation for this OPRA request, [he] responded that [he] did not maintain this government record." Mr. Zanetti certified that although he deleted the e-mail, it was "retrieved by . . . the IT Department and is attached hereto." The e-mail attached to the certification is from Ms. Goble to Mr. Zanetti dated March 17, 2022, and states in relevant part, "[p]lease see attached 1st and 2nd notice for a 12/17 EZ pass violation for the Bronco . . ." The referenced 1st and 2nd notices are a "First Notice" dated January 7, 2022, and a "Final Notice" dated February 10, 2022, from the New Jersey Turnpike Authority to the Township of Berkeley for *NJ E-ZPass* violation #T122277335556.

Ms. Casagrande certified that she is the Assistant Township Tax Assessor, and that she received an e-mail from Mr. Zanetti containing an *E-ZPass* violation notice. Ms. Casagrande certified that she “responded that another employee received the violation when driving a Township vehicle, and [the other employee] did not realize there was no EZ Pass in the vehicle.” Ms. Casagrande certified that she forwarded the violation to the employee and thereafter did not retain the e-mail and attachment because she believed an *E-ZPass* violation record was not a government record.

Analysis

Sufficiency of Search

It is the custodian’s responsibility to perform a complete search for the requested records before responding to an OPRA request, as doing so will help ensure that the custodian’s response is accurate and has an appropriate basis in law. In Schneble v. N.J. Dep’t of Env’tl. Prot., GRC Complaint No. 2007-220 (April 2008), the custodian initially stated that no records responsive to the complainant’s OPRA request existed. The custodian certified that after receipt of the complainant’s denial of access complaint, which contained e-mails responsive to the complainant’s request, the custodian conducted a second search and found records responsive to the complainant’s request. The GRC held that the custodian had performed an inadequate search and thus unlawfully denied access to the responsive records. See also Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (January 2011).

Here, the Custodian certified in the SOI that after receiving the subject OPRA request, she asked each of the Township’s department heads to inform her if they had responsive records. The Custodian certified that the department heads denied having any such records. As such, the Custodian responded to the Complainant that no records responsive to the request exist.

Thereafter on June 2, 2022, the Complainant filed a Denial of Access Complaint claiming that there are records responsive to his request, and he attached to the complaint copies of internal Township e-mails referencing an *E-ZPass* violation. Notwithstanding the complaint attachments, specifically an e-mail dated March 17, 2022, from Tamara Goble to Eric Zanetti stating “[p]lease see attached 1st and 2nd notice for a 12/17 EZ pass violation,” the Custodian certified that the department heads denied having any such records. In reliance upon responses from the department heads, the Custodian steadfastly maintained, there are no records responsive to the request. However, in reply to the GRC’s June 29, 2022 request for additional information, Mr. Zanetti certified that he received an e-mail from Ms. Goble containing an EZ pass violation notice, and he attached said e-mail to the certification. An attachment to that e-mail contains two (2) *E-ZPass* violation notices dated January 7, 2022 and February 10, 2022.

The two (2) *E-ZPass* violation notices attached to Ms. Goble’s March 17, 2022 e-mail are clearly government records. The notices were sent from the New Jersey Turnpike Authority to the Township of Berkeley, and 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 (Emphasis added). If not before, certainly once the Custodian received the complaint containing copies of e-mails referencing an *E-ZPass* violation,

she knew or should have known a more thorough search was indicated. However, rather than conduct such a search, the Custodian continued to insist that no records exist responsive to the request.

The facts of the instant complaint are similar to those in Schneble, GRC 2007-220, except that here the GRC had to prod the Custodian to locate the responsive records. Thus, the Custodian performed an inadequate search and unlawfully denied access to the responsive records.

Accordingly, the Custodian performed an insufficient search and thereby unlawfully denied access to the Complainant's OPRA request seeking *E-ZPass* violations. See N.J.S.A. 47:1A-6; Schneble, GRC 2007-220. Specifically, the Custodian's failure to locate responsive records until after she conducted an additional search following receipt of the Denial of Access Complaint and a request for additional information from the GRC, resulted in an insufficient search. However, the GRC declines to order disclosure because the Custodian disclosed same to the Complainant on July 5, 2022, simultaneously with her response to the GRC's request for additional information.

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 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.]

Here, the Complainant sought “all EZ Pass violations received during the time period 05/12/2021- 05/12/2022[.]” The Custodian responded by claiming that there are no records responsive to the request. The Complainant then filed the instant complaint on June 2, 2022, arguing that there are records responsive to his request and attaching copies of e-mails referencing an *E-ZPass* violation.

The GRC is satisfied that the evidence of record here supports an award of attorney's fees. The Custodian initially responded that no responsive records existed; however, after the instant

complaint was filed, the Custodian located and disclosed responsive records. Thus, a causal nexus exists between this complaint and the change in the Custodian's conduct. Mason, 196 N.J. at 76. Accordingly, the Complainant is a prevailing party entitled to attorney's fees.

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. at 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. at 76. Specifically, following receipt of the complaint, the Custodian located responsive records that she previously claimed did not exist. 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 76. **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(c).**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian performed an insufficient search and thereby unlawfully denied access to the Complainant's OPRA request seeking *E-ZPass* violations. See N.J.S.A. 47:1A-6; Schneble v. N.J. Dep't of Env'tl. Prot., GRC Complaint No. 2007-220 (April 2008). Specifically, the Custodian's failure to locate responsive records until after she conducted an additional search following receipt of the Denial of Access Complaint and a request for additional information from the GRC, resulted in an insufficient search. However, the GRC declines to order disclosure because the Custodian disclosed same to the Complainant on July 5, 2022, simultaneously with her response to the GRC's request for additional information.
2. 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, 76 (2008). Specifically, following receipt of the complaint, the Custodian located responsive records that she previously claimed did not exist. 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 76. **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(c).**

Prepared By: John E. Stewart

October 29, 2024