



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

TAHESHA L. WAY
Lieutenant Governor

JACQUELYN A. SUÁREZ
Acting Commissioner

FINAL DECISION

April 30, 2024 Government Records Council Meeting

Rachel Leigh Adelman, Esq.
(o/b/o Bound Brook Education Association)
Complainant

Complaint No. 2022-38

v.

Borough of Bound Brook (Somerset)
Custodian of Record

At the April 30, 2024 public meeting, the Government Records Council (“Council”) considered the April 23, 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 did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing 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 October 31, 2007).
2. The Custodian’s February 25, 2022 response to the Complainant’s February 9, 2022 OPRA request was insufficient because she failed to address each individual request item. N.J.S.A. 47:1A-5(g); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). However, the GRC declines to order any further action because the Custodian certified that she disclosed the only record that existed on February 25, 2022.
3. 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 provided the Complainant with records responsive to the request. 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 v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). **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.

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

Final Decision Rendered by the
Government Records Council
On The 30th Day of April 2024

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: May 2, 2024

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 30, 2024 Council Meeting**

Rachel Leigh Adelman, Esq.
(o/b/o Bound Brook Education Association)¹
Complainant

GRC Complaint No. 2022-38

v.

Borough of Bound Brook (Somerset)²
Custodial Agency

Records Relevant to Complaint: Copies via U.S. mail or e-mail of:

1. “All recordings/logs/documents/etc. relating to calls made to 9-1-1 or the Bound Brook Police Department for the date of October 15, 2021 between the times of 10:20 A.M. and 11:10 A.M. regarding a medical emergency involving a student taking place at Lafayette Elementary School, 50 W High St, Bound Brook, NJ 08805. The records requested included (sic) but are not limited to all calls made from [a specific telephone number], any calls originating from Bound Brook Public School and/or its employees, or all calls made reporting the emergency, requesting medical assistance, or cancelling the call for the medical emergency.”
2. “All reports made by police officers relating to the student medical emergency taking place on October 15, 2021 between the times of 10:20 A.M. and 11:10 A.M., including but not limited to any reports made regarding any calls made reporting the emergency or any reports made regarding any calls cancelling the 9-1-1 call.”
3. “Any and all other documents related to the student medical emergency taking place on October 15, 2021 between the times of 10:20 A.M. and 11:10 A.M., including but not limited to any reports made regarding any calls made reporting the emergency or any reports made regarding any calls cancelling the 9-1-1 call.”

Custodian of Record: Jasmine D. Mathis
Request Received by Custodian: February 9, 2022
GRC Complaint Received: February 24, 2022
Response Made by Custodian: February 25, 2022

¹ The Complainant, of Oxfeld Cohen, P.C. (Newark, NJ), represents the Bound Brook Education Association.

² Represented by Alice M. Bergen, Esq., of DeCotis, FitzPatrick, Cole & Giblin, LLP (Paramus, NJ).

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Background³

Request:

On February 9, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On February 24, 2022 at 10:19 a.m., the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that on February 9, 2022, the OPRA request was sent to the Custodian via e-mail and certified mail and a response was never received from the Custodian.

Additional Submission:

On February 24, 2022 at 10:26 a.m., the Complainant e-mailed the Custodian. The Complainant referenced her February 9, 2022 e-mail and attached OPRA request that was contained within the resubmitted e-mail string.

Response:

On February 25, 2022, the Custodian responded in writing to the OPRA request. The Custodian disclosed a responsive computer-aided dispatch (“CAD”) report for incident number 21275020. The Custodian also informed the Complainant that Somerset County Communications keeps 911 recordings on file and that there were no telephone calls made to the Borough of Bound Brook (“Borough”) Police Department concerning the emergency identified.

Additional Submissions:

On February 25, 2022, following receipt of the Custodian’s response, the Complainant e-mailed the Custodian, stating that it is the Complainant’s belief that there were at least three (3) calls to the Borough Police Department relating to the incident for which she was seeking the records. The Complainant wanted the Custodian to confirm that no such records exist.

On February 28, 2022, the Custodian e-mailed the Complainant in reply to the Complainant’s February 25, 2022 e-mail. The Custodian informed the Complainant that there are “no other documented calls, reports, documents, etc. regarding the incident in question on 10-15-21 between the hours of 10:20-11:10am.” The Custodian attached to the e-mail a copy of the police journal for October 15, 2021 as further confirmation.⁴

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.

⁴ The police journal is a listing of police activity by date, time, and type of activity. Between the hours of 10:20 and 11:10 a.m. on October 15, 2021, the journal displayed two (2) CAD entries. Only one (1) such entry was responsive

Statement of Information:

On March 25, 2022, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that the Complainant’s request was received on February 9, 2022, at which time she forwarded the request to the records clerk at the Borough Police Department. The Custodian further certified that the police records clerk replied to her via e-mail on February 10, 2022; however, she inadvertently overlooked the reply.

The Custodian certified that on February 24, 2022, the Complainant copied her on the Denial of Access Complaint that was submitted to the GRC. The Custodian further certified that seven (7) minutes later the Complainant sent her a reminder e-mail regarding the OPRA request. The Custodian certified that she then realized she inadvertently failed to respond to the Complainant’s request. The Custodian certified that she determined a four (4) page CAD report for incident number 21275020 was responsive to the request, and she responded on February 25, 2022, disclosing the report with a juvenile’s name and date of birth redacted.

The Custodian certified that, although the Complainant did request calls made to 911 and all recordings related to the incident, the Department of Public Health and Safety, Division of 911 Communications for the County of Somerset has a sixty-two (62) day retention period for 911 calls and a thirty-one (31) day retention period for police dispatch recordings. The Custodian certified that when the Complainant’s OPRA request was filed on February 9, 2022, nearly four (4) months had elapsed since the October 15, 2021 incident; therefore, no responsive records would exist for 911 calls and police dispatch recordings.⁵

The Custodian certified that the complaint should be dismissed because the subject matter of the complaint has been resolved. The Custodian cited De Vesa v. Dorsey, 134 N.J. 420, 428 (1993), as holding that “. . . controversies which have become moot or academic prior to judicial resolution ordinarily will be dismissed.” The Custodian further cited Bart v. Peterson Hous. Auth., 403 N.J.Super. 609, 618 (App. Div. 2018) as holding that there is no denial of access under OPRA when the requestor has the records at issue. Finally, the Custodian argued that no counsel fees should be awarded because access to the requested records has been achieved.

Analysis

Timeliness

Unless a shorter time period is otherwise provided, a custodian must 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 accordingly 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.

to the Complainant’s request. The incident report corresponding to the entry is the record that was disclosed to the Complainant on February 25, 2022.

⁵ The GRC notes that there were 116 days from the date of the incident to the date of the OPRA request. Rachel Leigh Adelman, Esq. (o/b/o Bound Brook Education Association) v. Borough of Bound Brook (Somerset), 2022-38 – Findings and Recommendations of the Executive Director

47:1A-5(g).⁶ 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 complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Here, after the Custodian received Complainant's OPRA request on February 9, 2022, she forwarded the request to the records clerk at the Borough Police Department. The police records clerk replied to the Custodian the following day; however, the Custodian admittedly overlooked the reply from the police records clerk. Only when the Custodian received a reminder from the Complainant and a copy of the Denial of Access Complaint on February 24, 2022, did she then realize she failed to respond to the Complainant's request. Although the evidence of record reveals that the Custodian responded to the request promptly thereafter on February 25, 2022, the response was not sent to the Complainant until the eleventh (11th) business day⁷ following receipt of the request, resulting in a "deemed" denial.

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. 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.

Sufficiency of Response

OPRA provides that if a "custodian is unable to comply with a request for access, the custodian *shall indicate the specific basis therefor . . .* on the request form and promptly return it to the requestor." N.J.S.A. 47:1A-5(g) (emphasis added). In Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the Council held that ". . . [t]he Custodian's response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g)." See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013).

Here, the Custodian responded to the Complainant's February 9, 2022 OPRA request by disclosing a responsive CAD report on February 25, 2022. However, the response failed to address each request item. Instead, the Custodian attached the CAD report to her e-mail response but did not indicate the request item or items to which said record was responsive. Consequently, the Complainant was unnecessarily prompted to e-mail the Custodian on the same date to ask the Custodian to confirm that no other records exist. The Custodian did provide such confirmation via e-mail on February 28, 2022; however, the additional communications would not have been necessary if the Custodian in her response addressed each request item indicating whether records

⁶ 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.

⁷ February 21, 2022 was a state holiday.

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responsive to the each of the items was denied or did not exist. Thus, the Custodian's response, as in Paff, GRC 2007-272, was insufficient.

Therefore, the Custodian's February 25, 2022 response to the Complainant's February 9, 2022 OPRA request was insufficient because she failed to address each individual request item. N.J.S.A. 47:1A-5(g); Paff, GRC 2007-272. However, the GRC declines to order any further action because the Custodian certified that she disclosed the only record that existed on February 25, 2022.

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 instant matter, the Complainant sought records with respect to a medical emergency which took place at a date certain within a specified time period. The Custodian failed to timely respond to the Complainant's request which resulted in a “deemed” denial and prompted the Complainant to file a Denial of Access Complaint. A day after the complaint was filed, the Custodian disclosed a responsive record to the Complainant. Moreover, Bart, 403 N.J.Super. 609 does not apply here because the Complainant did not have the records at issue prior to the request. 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 provided the Complainant with records responsive to the request. 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. 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 October 31, 2007).
2. The Custodian's February 25, 2022 response to the Complainant's February 9, 2022 OPRA request was insufficient because she failed to address each individual request item. N.J.S.A. 47:1A-5(g); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). However, the GRC declines to order any further action because the Custodian certified that she disclosed the only record that existed on February 25, 2022.
3. 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 provided the Complainant with records responsive to the request. 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 v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). **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: John E. Stewart

April 23, 2024