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DEPARTMENT OF COMMUNITY AFFAIRS
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JACQUELYN A. SUÁREZ
Commissioner

FINAL DECISION

January 28, 2025 Government Records Council Meeting

Isidro Cruz
Complainant

Complaint No. 2023-149

v.

Borough of Roselle Park (Union)
Custodian of Record

At the January 28, 2025, public meeting, the Government Records Council (“Council”) considered the January 21, 2025, 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’s January 18, 2023 response was insufficient because he failed to address each request item. N.J.S.A. 47:1A-5(g); see Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008); Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013). Specifically, the Custodian failed to indicate whether responsive S&I contracts existed.
2. Notwithstanding the Custodian’s insufficient response, he has borne his burden of proof that he lawfully denied access to the Complainant’s OPRA request seeking an S&I contract. Specifically, the Custodian definitively stated, and the record reflects, that no such records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. 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 requested contract at issue in this complaint does not exist. 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 28th Day of January 2025

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: January 30, 2025

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 28, 2025 Council Meeting**

**Isidro Cruz¹
Complainant**

GRC Complaint No. 2023-149

v.

**Borough of Roselle Park (Union)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of signed contracts between the Borough of Roselle Park (“Borough”) and S&I Solutions Network Communications, LLC (“S&I”) from January 2013 through contract expiration.³

Custodian of Record: Andrew J. Casais

Request Received by Custodian: January 6, 2023

Response Made by Custodian: January 18, 2023

GRC Complaint Received: June 29, 2023⁴

Background⁵

Request and Response:

On January 5, 2023, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 9, 2023, the Custodian confirmed receipt of the OPRA request and stated that the response deadline was January 18, 2023. On January 18, 2023, the Custodian responded in writing disclosing a 2013 resolution, notice of award, and equal employment opportunity statement.

On February 9, 2023, Complainant’s Counsel sent a letter to the Custodian seeking an update on when the Complainant can expect to receive responsive contracts. On February 28, 2023,

¹ Represented by Barry E. Rosenberg, Esq., of Abrams, Gran, Hendricks, Reina & Rosenberg, P.C. (Bound Brook, NJ).

² No legal representation listed on record.

³ The Complainant sought additional records that are not at issue in this complaint.

⁴ This complaint was initially submitted via e-mail on March 14, 2023, and the GRC mistakenly identified it a duplicate filing of a simultaneously filed complaint (which became Cruz v. Borough of Roselle Park (Union), GRC Complaint No. 2023-59). After receiving further clarification from the Complainant’s Counsel beyond the sixty (60) calendar day statute of limitations, the GRC agreed to accept this complaint filed within time of its own volition.

⁵ 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.

Complainant's Counsel e-mailed the Custodian again seeking an update on the expected disclosure date of any responsive contracts.

Denial of Access Complaint:

On June 29, 2023, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that although he received some records responsive to the subject OPRA request, the Custodian did not disclose responsive S&I contracts as requested. The Complainant noted that Counsel twice attempted to obtain an update from the Custodian to no avail.

Statement of Information:

On July 11, 2023, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on January 6, 2023. The Custodian certified that his search included searching for relevant resolutions from 2013 and then searching for purchase orders and contracts associated therewith from the Finance Department. The Custodian certified no formal response was given as it relates to the requested contracts. The Custodian affirmed he was attaching seventy-nine (79) pages of records⁶ to the SOI, which he deemed responsive to the subject OPRA request.

The Custodian averred the events of this complaint amounted to a series of missteps and mistakes by him borne out of a "certain level of disorganization" within the Borough Clerk's Office. The Custodian asserted that his office experienced staffing shortages beginning in May 2023, which significantly affected his ability to address OPRA requests. The Custodian acknowledged he received Complainant Counsel's follow-up communications; however, his reading of them led him to believe the Borough had responded to the OPRA request. The Custodian stated that, based on his belief, he disregarded the letters without checking the Borough's OPRA log. The Custodian noted during discussions involving a separate complaint that it became evident he needed to provide additional records and intended to provide same outside of the complaint process.

Additional Submissions:

On July 26, 2023, the Complainant e-mailed the Custodian asserting he never received the 2013 S&I contract, which he believed was referred to as Exhibit A in the records disclosed to him. The Complainant asked the Custodian to search for the contract and advise him when he can expect to receive it. On the same day, the Custodian responded advising that all records included in the SOI represent all he was able to locate within the Borough's files from 2013. The Custodian further acknowledged he already performed a search for the signed contract and was unable to locate it. The Custodian stated it is possible the Borough "did not execute a '*per se*' contract with S&I, instead opting to use the [p]urchase [o]rders as a binding agreement for the purchase of the goods/services."

⁶ The universe of disclosed records were two (2) resolutions and purchase orders associated with them.

On August 3, 2023, the Complainant e-mailed the Custodian expressing his disappointment that no contracts exist. On the same day, the Custodian responded noting that he could not speak to the Borough's administrative processes in 2013. The Custodian stated that he is confident that he provided all responsive records that existed.

Analysis

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).

Upon review, the GRC is satisfied the January 18, 2023 response was insufficient. On that day, the Custodian responded to the Complainant's OPRA request, potentially through a staff member, providing a few pages of records. However, without either party submitting the January 18, 2023 written response letter (if one exists), there is no evidence in the record that the response addressed the “contract” portion of the OPRA request. This is inferred through Complainant Counsel's February 2023 communications seeking an update on the disclosure of the contract. It was not until after the SOI that the Custodian finally addressed the contract issue by stating that he could not locate one. The Custodian also surmised the contract was effectively executed through the disclosed purchase orders. The facts here are on point with those in Paff; thus, it follows there was an insufficient response in the instant complaint.

Therefore, the Custodian's January 18, 2023 response was insufficient because he failed to address each request item. N.J.S.A. 47:1A-5(g); see Paff, GRC 2007-272; Lenchitz, GRC 2012-265. Specifically, the Custodian failed to indicate whether responsive S&I contracts existed.

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.

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Here, the Complainant sought an S&I contract and filed this complaint after the Custodian failed to provide it. In the SOI, the Custodian disclosed several records but did not directly address the nonexistence of the requested contract until a July 26, 2023 e-mail, nearly a month after the Denial of Access Complaint was filed. Therein, he advised the

Complainant of his attempts to locate the contract without avail and his supposition that the Borough utilized purchase orders in lieu of an executed contract at that time. The Custodian reiterated this fact and assumption in an August 3, 2023 e-mail. The Complainant has not provided any evidence to refute this fact or assumption.

Accordingly, notwithstanding the Custodian's insufficient response, he has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request seeking an S&I contract. Specifically, the Custodian definitively stated, and the record reflects, that no such records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

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.]

Here, the Complainant filed the instant complaint contending that he did not receive the contract sought in his OPRA request. In the SOI, while the Custodian disclosed multiple records he deemed responsive to the request, the contract was not among them. In correspondence following the SOI, the Custodian confirmed that he attempted to locate the contract the Complainant sought but could not locate it. Based on these facts, the GRC has found that no lawful denial of access occurred here. Based on the limited scope of the Complainant's stated claim, the Custodian's conduct has not changed because no responsive contracts exist.

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 requested contract at issue in this complaint does not exist. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's January 18, 2023 response was insufficient because he failed to address each request item. N.J.S.A. 47:1A-5(g); see Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008); Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013). Specifically, the Custodian failed to indicate whether responsive S&I contracts existed.
2. Notwithstanding the Custodian's insufficient response, he has borne his burden of proof that he lawfully denied access to the Complainant's OPRA request seeking an S&I contract. Specifically, the Custodian definitively stated, and the record reflects, that no such records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. 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 requested contract at issue in this complaint does not exist. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Prepared By: Frank F. Caruso
Executive Director

January 21, 2025