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DEPARTMENT OF COMMUNITY AFFAIRS
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JACQUELYN A. SUÁREZ
Commissioner

FINAL DECISION

November 7, 2024 Government Records Council Meeting

This Budz 4 U, LLC
Complainant

Complaint No. 2024-202

v.

Borough of Haledon (Passaic)
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’s failure to provide a completed Statement of Information to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(g). Moreover, the Custodian’s failure to respond additionally obstructed the GRC in its efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b).
2. The Custodian did not bear his burden of proof that he 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).
3. The Custodian unlawfully denied access the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Thus, the Custodian shall disclose the requested Board minutes and recordings for the April 4, 2024, and May 2, 2024 meetings. Wolosky v. Vernon Twp. Bd. of Educ., GRC Complainant No. 2009-57 (December 2009); Burlett v. Monmouth Cnty. Bd. of Freeholders, GRC Complaint No. 2004-75 (August 2004); Miller v. Westwood Reg’l Sch. Dist. (Bergen), GRC Complaint No. 2009-49 (February 2010).
4. **The Custodian shall comply with conclusion No. 3 above within twenty (20) business days from receipt of the Council’s Final Decision. In the circumstance where the records ordered for disclosure are not provided to the Complainant,**

the Council's Final Decision may be enforced in the Superior Court of New Jersey. N.J. Court Rules, R. 4:67-6; N.J.A.C. 5:105-2.9(c).

5. 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 (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 unlawfully denied access to the responsive recordings and minutes. 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.**

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**

**This Budz 4 U, LLC¹
Complainant**

GRC Complaint No. 2024-202

v.

**Borough of Haledon (Passaic)²
Custodial Agency**

Records Relevant to Complaint: Pickup of copies of the Planning Board (“Board”) meeting minutes and audio recordings for April 4, 2024 and May 2, 2024 related to an application for This Budz 4 U, LLC.

Custodian of Record: Mounir Almaita

Request Received by Custodian: June 12, 2024

Response Made by Custodian: June 25, 2024

GRC Complaint Received: August 8, 2024

Background³

Request and Response:

On June 12, 2024, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On the same day, the Custodian confirmed receipt and noted that the seventh (7th) business day to respond was June 24, 2024. On June 25, 2024, the eighth (8th) business day after receipt of the OPRA request, the Custodian responded in writing extending the time frame to respond through July 8, 2024. On July 8, 2024, the Custodian responded in writing again extending the time frame to respond through July 17, 2024. On July 22, 2024, the Custodian responded in writing again extending the time frame to respond through July 31, 2024.

On July 25, 2024, Building Secretary Angelique Jones e-mailed Complainant’s Counsel apologizing for the delay in disclosing the meeting recordings. Ms. Jones noted that the computer used to record the meetings “has been with IT.” Ms. Jones stated that the recordings should be available in the next week. On the same day, Complainant’s Counsel responded stating that he needed the recordings, but could wait longer for the minutes.

¹ Represented by Daniel R. Lagana, Esq., of Cleary, Giacobbe, Alfieri, Jacobs, LLC (Oakland, NJ).

² No legal representation listed on record.

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.

On August 6, 2024, the Custodian responded to the Complainant again extending the time frame to respond until August 15, 2024.

Denial of Access Complaint:

On August 8, 2024,⁴ the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted after making multiple informal attempts to obtain the requested records, Complainant’s Counsel submitted an OPRA request. The Complainant stated the Custodian took multiple extensions and ultimately failed to respond after the expiration of the July 31, 2024 extension.

Supplemental Response (cont’d):

On August 15, 2024, the Custodian responded to the Complainant again extending the time frame to respond until August 26, 2024.

Statement of Information:

On August 19, 2024, the GRC sent the Custodian a request to file the Statement of Information (“SOI”) for both complaints.

Supplemental Response (cont’d):

On September 4, 2024, the Custodian responded to the Complainant again extending the time frame to respond until September 13, 2024.

Statement of Information (cont’d):

On September 17, 2024, the GRC sent a “No Defense” letter to the Custodian, requesting a completed SOI within three (3) business days of receipt, noting that failure to submit an SOI could lead to an adjudication based solely on the Complainant’s submission. N.J.A.C. 5:105-2.4(f).⁵

Analysis

Failure to Submit SOI

In furtherance of the GRC’s obligation to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to government records[,]” pursuant to N.J.S.A. 47:1A-7(b), it requires a custodian to submit a completed SOI.

The New Jersey Administrative Code provides:

⁴ Complainant’s Counsel e-mailed this complaint to the GRC Inbox on August 6, 2024, prior to the Custodian’s extension of the same date.

⁵ The GRC notes that it received a “Read” receipt from the Custodian confirming receipt of the initial SOI request.

Custodians shall submit a completed and signed SOI for each complaint to the Council's staff and the complainant not later than 10 business days from the date of receipt of the SOI form from the Council's staff. Custodians must sign the SOI . . . Failure to comply with this time period may result in the complaint being adjudicated based solely on the submissions of the complainant.

[N.J.A.C. 5:105-2.4(g).]

In Alterman, Esq. v. Sussex Cnty. Sheriff's Office, GRC Complaint No. 2013-353 (September 2014), the custodian failed to provide a completed SOI to the GRC within the allotted deadline. Thus, the Council noted the custodian's failure to adhere to N.J.A.C. 5:105-2.4(a). See Kovacs v. Irvington Police Dep't (Essex), GRC Complaint No. 2014-196 (January 2015); Howell v. Twp. of Greenwich (Warren), GRC Complaint No. 2015-249 (November 2016).

In the instant matter, the GRC sent an SOI request to the Custodian on August 19, 2024, 2024. On September 17, 2024, after the expiration of the ten (10) business day deadline, the GRC sent the Custodian a "No Defense" letter providing him an additional three (3) business days to submit the requested SOI. The transmission also included a copy of the original SOI letter providing detailed instructions on how to properly submit an SOI. The GRC never received a completed SOI from the Custodian.

Accordingly, the Custodian's failure to provide a completed SOI to the GRC, despite more than one request, is a violation of N.J.A.C. 5:105-2.4(g). Moreover, the Custodian's failure to respond obstructed the GRC in its efforts to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian" N.J.S.A. 47:1A-7(b).

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).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, the Complainant submitted the subject OPRA request on June 12, 2024. The Custodian confirmed receipt and noted that the final business day to respond was June 24, 2024. Notwithstanding this notice, the Custodian did not respond proffering his first extension of time until June 25, 2024, the eighth (8th) business day after receipt of the OPRA request. The evidence

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.

of record submitted by the Complainant supports these facts. Thus, the subject OPRA request was considered “deemed” denied at the time that the Custodian sought his first extension.

Therefore, the Custodian did not bear his burden of proof that he 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.

Finally, the GRC does not reach the issue of whether the extension was reasonable because the Complainant’s OPRA request was already “deemed” denied at the time that the Custodian sought her first extension.

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.

Regarding meeting minutes, the Council has required disclosure thereof once the minutes are approved for accuracy and content. See Wolosky v. Vernon Twp. Bd. of Educ., GRC Complainant No. 2009-57 (December 2009). However, the Council has also held that draft meeting minutes are exempt from disclosure under OPRA. See Libertarians for Transparent Gov’t v. Gov’t Records Council, 453 N.J. Super. 83 (App. Div. 2018) (certif. denied, 233 N.J. 484 (2018); Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006- 51 (August 2006).

Regarding meeting recordings, in Burlett v. Monmouth Cnty. Bd. of Freeholders, GRC Complaint No. 2004-75 (August 2004) and Miller v. Westwood Reg’l Sch. Dist. (Bergen), GRC Complaint No. 2009-49 (February 2010), the Council had held that audio recordings of public session meetings were disclosable because they represented a verbatim account of the meeting, regardless of the whether minutes had been approved for accuracy and content.

Here, the Complainant sought minutes and recordings for Board meetings held on April 4, 2024, and May 2, 2024. After receiving several extensions, the Complainant filed the instant complaint. During the pendency of this complaint, the Custodian continued to take extensions and no evidence in the current record exists showing that any records were disclosed. Also of note, the Custodian failed to submit an SOI explaining why those records were not yet disclosed. There is no evidence in the record suggesting any of the requested records are exempt and thus should not have been disclosed. Based on the lack of evidence and existing case law, the GRC must find the Custodian unlawfully denied access to the requested records.

Accordingly, the Custodian unlawfully denied access the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Thus, the Custodian shall disclose the requested Board minutes and recordings

for the April 4, 2024, and May 2, 2024 meetings. See Wolosky, GRC 2009-57; Burlett, GRC 2004-75; Miller, GRC 2009-49.

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.]⁷

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

⁷ The GRC notes that during the pendency of this complaint, the prevailing party fee language in N.J.S.A. 47:1A-6 was amended to be permissive rather than mandatory per P.L. 2024, c.16. However, that statutory change is not retroactively applicable to pending complaints and will not be considered here.

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 his complaint after the Custodian denied access to the requested Board meeting minutes and recordings. The Custodian failed to submit an SOI; thus, leaving the GRC to adjudicate this complaint “based solely on the submissions of the complainant.” N.J.A.C. 5:105-2.4(g). Upon review, the GRC has determined that the Custodian unlawfully denied access to the requested records and is ordering disclosure thereof. Based on this, the Complainant, who is represented by Counsel, is a prevailing party entitled to a fee award.

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 unlawfully denied access to the responsive recordings and minutes. 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's failure to provide a completed Statement of Information to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(g). Moreover, the Custodian's failure to respond additionally obstructed the GRC in its efforts to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . ." N.J.S.A. 47:1A-7(b).
2. The Custodian did not bear his burden of proof that he 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).
3. The Custodian unlawfully denied access the Complainant's OPRA request. N.J.S.A. 47:1A-6. Thus, the Custodian shall disclose the requested Board minutes and recordings for the April 4, 2024, and May 2, 2024 meetings. Wolosky v. Vernon Twp. Bd. of Educ., GRC Complainant No. 2009-57 (December 2009); Burlett v. Monmouth Cnty. Bd. of Freeholders, GRC Complaint No. 2004-75 (August 2004); Miller v. Westwood Reg'l Sch. Dist. (Bergen), GRC Complaint No. 2009-49 (February 2010).
4. **The Custodian shall comply with conclusion No. 3 above within twenty (20) business days from receipt of the Council's Final Decision. In the circumstance where the records ordered for disclosure are not provided to the Complainant, the Council's Final Decision may be enforced in the Superior Court of New Jersey. N.J. Court Rules, R. 4:67-6; N.J.A.C. 5:105-2.9(c).**
5. 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 (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 unlawfully denied access to the responsive recordings and minutes. 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.

Prepared By: Frank F. Caruso
Executive Director

October 29, 2024