



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

April 30, 2013 Government Records Council Meeting

Jeff Carter
Complainant

Complaint No. 2012-101

v.

Franklin Fire District No. 2 (Somerset)
Custodian of Record

At the April 30, 2013 public meeting, the Government Records Council (“Council”) considered the April 23, 2013 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 his burden of proof that he 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, supra. See also Keelen v. City of Long Branch (Monmouth), GRC Complaint No. 2007-141 (October 2007) and Charles v. Plainfield Municipal Utilities Authority (Union), GRC Complaint No. 2009-113 (May 2010).
2. Since the Custodian certified in the Statement of Information that no responsive records exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification, the Custodian did not unlawfully deny access to the requested records. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). See also Kossup v. City of Newark (Essex), GRC Complaint No. 2009-135 (February 2010)(holding that although the custodian failed to respond to the complainant’s OPRA request, he did not unlawfully deny access to any records because the OPRA manager certified in the SOI that no records existed).
3. Although the Custodian’s failure to timely respond to the Complainant’s OPRA request resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian did not unlawfully deny access to the responsive records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. See Nolan v. West Milford Municipal Utilities Authority (Passaic), GRC Complaint No. 2011-229 (August 2012). Therefore, it is



concluded that the Custodian's untimely response did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

4. 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 (2008). Specifically, no responsive records exist and the Custodian's technical violation did not result in a change in the Custodian's conduct. 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, *supra*, and Mason, *supra*.

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, 2013

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 3, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 30, 2013 Council Meeting**

**Jeff Carter¹
Complainant**

GRC Complaint No. 2012-101

v.

**Franklin Fire District No. 2 (Somerset)²
Custodian of Records**

Records Relevant to Complaint: Electronic copies via e-mail of all “Request Authorization for Records Disposal” (“Authorization”) forms from January 1, 2005 to March 19, 2012.

Request Made: March 19, 2012

Response Made: None.

GRC Complaint Filed: April 5, 2012³

Background⁴

Request and Response:

On March 19, 2012, the Complainant submitted his Open Public Records Act (“OPRA”) request to the Custodian. There is no evidence indicating that the Custodian responded to the Complainant’s OPRA request.

Denial of Access Complaint:

On April 5, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant indicates that he received no response to his OPRA request. The Complainant claims that the facts overwhelmingly prove that the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances by ignoring the Complainant’s OPRA request. The Complainant requests that GRC find and order: (1) that the Custodian violated OPRA by not responding; (2) that the Custodian immediately disclose the responsive records; (3) that the Custodian knowingly and willfully violated OPRA warranting the imposition of a civil penalty pursuant to N.J.S.A.

¹ Represented by John Bermingham, Esq. (Mount Bethel, PA).

² William Kleiber, Custodian of Records. Represented by Eric M. Perkins, Esq. (Skillman, NJ).

³ The GRC received the Denial of Access Complaint on said date.

⁴ 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.

47:1A-11; and (4) that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees pursuant to N.J.S.A. 47:1A-6.

Statement of Information:

On May 8, 2012, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies that he received the Complainant's OPRA request on March 19, 2012 and did not respond to the OPRA request because no responsive records exist.

The Custodian indicates that he previously responded to numerous other complaints filed by the Complainant in which the Custodian certified the Franklin Fire District No. 2 ("FFD") never destroyed records. The Custodian believes that because the Complainant was aware of these responses, there was no need to respond here due to the Complainant's prior knowledge that no responsive records existed.

Additional Submissions:

On June 19, 2012, the Complainant submitted a letter to the GRC arguing that the Custodian's SOI certification proves that the Custodian knowingly and willfully failed to respond to the OPRA request at issue. The Complainant argues that the Custodian acknowledged that he responded to several complaints in the past and thus had a positive element of wrongdoing when he did not respond to the request at issue herein. The Complainant further contends that had he not filed this complaint, he would still have no knowledge of whether records existed. The Complainant contends that the GRC should hold that the Custodian knowingly and willfully did not respond to the Complainant's OPRA request because not doing so would set a precedent giving custodians the ability to ignore OPRA requests without repercussions. The Complainant further contends that the GRC should not look at this one case in a vacuum; but should take into account the totality of the many other complaints⁵ filed against the Custodian.

Finally, the Complainant argues that, because he has never submitted a request for the records at issue herein, the Custodian's unsubstantiated certified statement that the Complainant already had the information in his possession is false. The Complainant further argues that even if he had made such a request, the Custodian is still required to respond to subsequent requests for similar records. The Complainant thus questions how the Custodian could certify that the Complainant was in possession of the responsive information when he certifies that no records exist. The Complainant thus reiterates his request for relief as stated in the Denial of Access Complaint to exclude his request for the GRC to order disclosure of responsive records.

⁵ The Complainant refers to multiple complaints filed before the GRC against the Custodian that are in various stages of adjudication.

Analysis⁶

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).⁷ 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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

OPRA requires that a custodian respond in writing to an OPRA request in a timely manner regardless of whether records exist. See Keelen v. City of Long Branch (Monmouth), GRC Complaint No. 2007-141 (October 2007) and Charles v. Plainfield Municipal Utilities Authority (Union), GRC Complaint No. 2009-113 (May 2010).

Here, the Complainant filed this complaint arguing that the Custodian never responded to his OPRA request. The Custodian certified in the SOI that no responsive records existed and thus the Custodian did not respond. The Custodian further argued that the Complainant received his response by way of the Custodian's certification in previous complaints that no records were destroyed. However, despite the requirement that a custodian respond in writing to an OPRA request in a timely manner regardless of whether records exist, the Custodian here did not comply.

Therefore, the Custodian did not bear his burden of proof showing 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. See N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, supra. See also Keelen, supra, and Charles, supra.

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.

⁶ There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

⁷ It is the GRC's position that 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.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian certified in the SOI that no records responsive to the complainant's request existed. The complainant submitted no evidence to refute the custodian's certification in this regard. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

Here, although the Custodian failed to respond to the Complainant's OPRA request, the Custodian certified in the SOI that no records responsive to said OPRA request exist. The Complainant subsequently sent a letter to the GRC on June 19, 2012 disputing the fact that the Complainant did not respond but not disputing that no records responsive existed; thus, no competent, credible evidence exists to refute said certification.

Therefore, since the Custodian certified in the SOI that no responsive records exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification, the Custodian did not unlawfully deny access to the requested records pursuant to Pusterhofer, *supra*. See also Kossup v. City of Newark (Essex), GRC Complaint No. 2009-135 (February 2010)(holding that although the custodian failed to respond to the complainant's OPRA request, he did not unlawfully deny access to any records because the OPRA manager certified in the SOI that no records existed).

Knowing & Willful

OPRA states that:

"[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ..." N.J.S.A. 47:1A-11(a).

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

"... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]..." N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995));

the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996).

Although the Custodian's failure to respond to the Complainant's OPRA request resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian did not unlawfully deny access to the responsive records pursuant to Pusterhofer, *supra*. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. *See Nolan v. West Milford Municipal Utilities Authority (Passaic)*, GRC Complaint No. 2011-229 (August 2012). Therefore, the Custodian's untimely response did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

"[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or
- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a "prevailing party" if he/she 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 (2008), the Supreme 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." Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 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, but also over 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, *supra*, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, *supra*, 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.” (Footnote omitted.) Mason at 73-76 (2008).

The Court in Mason, *supra*, at 76, held that “requestors 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* (1984).”

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

Here, no evidence indicates that the Custodian responded or intended to respond to the Complainant's OPRA request. In the SOI the Custodian certified that no records existed and thus he did not respond. Further, the GRC did not order disclosure of any records and the Custodian's technical violation of OPRA did not represent a change in the Custodian's conduct. Therefore, the Complainant is not a prevailing party entitled to an award of reasonable attorney's fees.

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, supra. Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, supra. Specifically, no responsive records exist and the Custodian's technical violation did not result in a change in the Custodian's conduct. 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, supra, and Mason, supra.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he 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, supra. See also Keelen v. City of Long Branch (Monmouth), GRC Complaint No. 2007-141 (October 2007) and Charles v. Plainfield Municipal Utilities Authority (Union), GRC Complaint No. 2009-113 (May 2010).
2. Since the Custodian certified in the Statement of Information that no responsive records exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification, the Custodian did not unlawfully deny access to the requested records. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). See also Kossup v. City of Newark (Essex), GRC Complaint No. 2009-135 (February 2010)(holding that although the custodian failed to respond to the complainant's OPRA request, he did not unlawfully deny access to any records because the OPRA manager certified in the SOI that no records existed).
3. Although the Custodian's failure to timely respond to the Complainant's OPRA request resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian did not unlawfully deny access to the responsive records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. See Nolan v. West Milford Municipal Utilities Authority (Passaic), GRC Complaint No. 2011-229 (August 2012). Therefore, it is

concluded that the Custodian's untimely response did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

4. 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 (2008). Specifically, no responsive records exist and the Custodian's technical violation did not result in a change in the Custodian's conduct. 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, *supra*, and Mason, *supra*.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

April 23, 2013