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

John Paff
Complainant
v.
Northern Valley Regional School District (Bergen)
Custodian of Record

Complaint No. 2012-110

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. Due to the specific facts in this case, the Custodian did not unlawfully deny access to the requested records because the Custodian's assessed $0.40 charge for eight (8) pages of responsive records was reasonable and lawful because the Custodian did not want to risk damaging original records. Further, the Custodian did not unlawfully deny access to the requested records because the records were provided to Complainant's Counsel within the seven (7) business day time period. *See* N.J.S.A. 47:1A-5(b), Paff v. Township of Teaneck (Bergen), GRC Complaint No. 2010-09 (Interim Order May 24, 2011) and Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (Interim Order April 8, 2010).

2. The Complainant has not achieved the desired outcome as a result because of 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). 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, the Custodian's assessed $0.40 copying charge was reasonable and lawful under OPRA. The Custodian provided the responsive records within the statutory timeframe, even though he was legally entitled to await payment of the $0.40 prior to doing so. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to 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 2, 2013

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

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

John Paff[1] **GRC Complaint No. 2012-110**
Complainant

v.

Northern Valley Regional School District (Bergen)[2]
Custodian of Records

Records Relevant to Complaint: Electronic copies of the following:

1. Executive session minutes from the three (3) most recent school board meetings for which minutes are available for public disclosure.
2. Resolutions as required by N.J.S.A. 10:4-13 that authorized the three (3) nonpublic meetings for the executive session minutes for request Item No. 1.
3. Resolutions as required by N.J.S.A. 10:4-13 that authorized the school board's three (3) most recently held nonpublic meetings, regardless of whether minutes of those meetings are publicly disclosable in either full or redacted form.[3]

Request Made: April 2, 2012
Response Made: April 9, 2012
GRC Complaint Filed: April 10, 2012[4]

Background[5]

Request and Response:

On April 2, 2012, the Complainant filed his Open Public Records Act ("OPRA") request with the Northern Valley Regional School District ("District") seeking the records listed above. On April 9, 2012, the fourth (4th) business day following receipt of such request, the Custodian sent notice to the Complainant that access to the responsive records is granted and a copying charge of $0.40 for eight (8) pages responsive records has been assessed. The Custodian also

[1] Represented by Walter M. Luers, Esq. of the Law Offices of Walter Luers, LLC (Clinton, NJ).
[2] Raymond R. Jacobus, Custodian of Records. Represented by James L. Plosia, Esq of Apruzzese, McDermott, Mastro & Murphy, P.C. (Liberty Corner, NJ).
[3] The Complainant states that if the Custodian cannot send copies of the requested records electronically, then copies via facsimile are acceptable.
[4] The GRC received the Denial of Access Complaint on said date.
[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.

requested that the Complainant sign an "Acknowledgement of Requestor" form to be forwarded to the Custodian along with the $0.40 fee in exchange for the responsive records.

Denial of Access Complaint:

On April 10, 2012, while still within the statutory seven (7) business day time frame for the Custodian to respond, the Complainant filed his Denial of Access Complaint with the Government Records Council ("GRC"). Complainant's Counsel states that although the Custodian requested that the Complainant sign an acknowledgement that he received the requested records, the Complainant did not receive any responsive records. Counsel also states that the Custodian did not e-mail or send via facsimile the requested records to the Complainant. Counsel asserts that the Custodian failed to justify the $0.40 charge. Counsel argues that because the Complainant specified the medium in which he wanted the records transmitted, the Custodian was obligated to honor that request by either transmitting the records in the medium requested or convert the records to the medium requested. *See* Wolosky v. Township of Frankford (Sussex), GRC Complaint No. 2008-254 (November 2009). Counsel also argues that since the Complainant requested the records to be e-mailed, the actual cost of providing the Complainant with said records is likely zero. *See* Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (July 2010). Counsel requests that the GRC 1) order the Custodian to provide the Complainant with copies of the requested records by facsimile or e-mail at no charge; and 2) find that the Complainant is a prevailing party and award him a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6.

Letter from Custodian's Counsel:

On April 13, 2012, Custodian's Counsel provided a letter to the GRC. Counsel states that the Custodian responded to the Complainant's OPRA request and asked the Complainant to confirm by signing an "Acknowledgement of Requestor" form that the Complainant was in fact the person who was making the request. Counsel also states that the Custodian assessed a $0.40 copying charge for the responsive records. Counsel argues that the Custodian did not refuse to honor the Complainant's request. Counsel also argues that OPRA's intent is to ensure that citizens are provided with rapid and affordable access to government records. Counsel further argues that the Complainant and his counsel have no interest in furthering the policy goals of OPRA. Counsel further argues that the Complainant and his counsel instituted an action over $0.40 in an attempt to obtain thousands of dollars in legal fees as a prevailing party over a $0.40 dispute. Counsel asserts that this is an abuse of the procedures established by the GRC. Counsel also asserts that if the District is required to litigate the issue over a $0.40 copying charge, it will do so, if only to avoid an obscene request by the Complainant to be reimbursed for thousands of dollars in legal fees.

Statement of Information:

On May 4, 2012, the Custodian filed his Statement of Information ("SOI"). The Custodian certifies that all records responsive to the Complainant's OPRA request were provided on April 11, 2012, to Complainant's Counsel. The Custodian encloses a letter from Custodian's Counsel to Complainant's Counsel dated April 11, 2012. In that letter Custodian's Counsel

states that the $0.40 copying charge for the records is appropriate. Counsel also states that in order to e-mail the records to the Complainant, the original minutes had to be copied prior to being scanned. Counsel further states that the District does not scan original records because the District does not want to risk marring the records. Lastly, Counsel states that while he is forwarding the eight (8) pages of the records responsive to the request, the $0.40 copying charge remains outstanding to the District.

Analysis[6]

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.

OPRA also provides "…the fee assessed for the duplication of a government record embodied in the form of printed matter shall be $ 0.05 per letter size page or smaller, and $ 0.07 per legal size page or larger…[a]ccess to electronic records and non-printed materials shall be provided free of charge." N.J.S.A. 47:1A-5(b).

In Paff v. Township of Teaneck (Bergen), GRC Complaint No. 2010-09 (Interim Order May 24, 2011), the custodian charged the complainant $6.00 for eight (8) pages of responsive minutes.[7] The custodian provided the complainant with redacted copies of the minutes. The Council held that "because the custodian had to make paper copies of the requested records in order to redact the requested minutes prior to providing same electronically, the custodian's charge of $6.00 for the cost of copying the records to perform redactions prior to providing the records to the complainant electronically is warranted…"

In Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (Interim Order April 8, 2010), the custodian charged the complainant $7.50 to scan and e-mail records. The Council held that because the "custodian does not provide any evidence to support his assertion that $7.50 is the actual cost of scanning and e-mailing records…the custodian's charge…is a violation of N.J.S.A. 47:1A-5(b)."

Here, the Complainant requested electronic copies of records. The Custodian responded to the Complainant's OPRA request and assessed a copying charge of $0.40 for eight (8) pages responsive. Custodian's Counsel asserted that the $0.40 charge was necessary because the original minutes had to first be copied because the Custodian did not want to risk damaging the original records. The District does not fax or scan the original records out of fear it could mar or

[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] At the time of Paff v. Township of Teaneck (Bergen), GRC Complaint No. 2010-09 (Interim Order May 24, 2011), OPRA provided that "…the fee assessed for the duplication of a government record embodied in the form of printed matter shall not exceed the following: first page through tenth page, $0.75 per page; eleventh page to twentieth page $0.50 per page; all pages over twenty, $0.25 per page…" N.J.S.A. 47:1A-5(b).

damage them. Thus, Counsel asserted that the copies of the responsive records were scanned and e-mailed to Complainant's Counsel on April 11, 2012.

In this situation, the responsive records existed in paper format because Custodian Counsel's assertion that the Custodian had to copy the *original* records first, so as to not risk damaging the original records. The Custodian was not printing the original records from the computer; rather, he was making paper copies of original records so that those copies could be scanned. The OPRA provision providing that electronic records shall be provided free of charge is applicable to records stored electronically; it does not pertain to situations that require converting the requested records to an electronic medium. N.J.S.A. 47:1A-5(b).

The instant complaint is similar to Paff v. Township of Teaneck (Bergen), GRC Complaint No. 2010-09 (Interim Order May 24, 2011). The custodian in Paff, *supra*, had to make a copy of the original minutes in order to make redactions before providing them electronically to the complainant. Here, Custodian's Counsel asserts that the Custodian did not want to risk damaging original records so he copied the original responsive records and those copies were scanned and e-mailed to Complainant's Counsel. Although the Custodian provided the records at no cost to Complainant's Counsel on April 11, 2012, the Custodian's charge of $0.40 for eight (8) pages of responsive records was reasonable because it was the lawful "fee assessed for the duplication of a government record embodied in the form of printed matter." N.J.S.A. 47:1A-5(b).

Moreover, the instant complaint is distinguishable from Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (Interim Order April 8, 2010). The custodian in Paff, *supra*, failed to provide any evidence to demonstrate that the $7.50 charge to scan and e-mail the requested records was necessary. In the present complaint, the Custodian has demonstrated that the $0.40 charge to photocopy the original records prior to scanning and e-mailing them to the Complainant was reasonable because the Custodian did not want to risk damaging the original records.

Therefore, due to the specific facts in this case, the Custodian did not unlawfully deny access to the requested records since the Custodian's assessed $0.40 charge for eight (8) pages of responsive records was reasonable and lawful because the Custodian did not want to risk damaging original records. Further, the Custodian did not unlawfully deny access to the requested records because the records were provided to Complainant's Counsel within the seven (7) business day time period. *See* N.J.S.A. 47:1A-5(b), Paff v. Township of Teaneck (Bergen), GRC Complaint No. 2010-09 (Interim Order May 24, 2011) and Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (Interim Order April 8, 2010).

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, after the filing of the Denial of Access Complaint, the Custodian provided the eight (8) pages of the responsive records to the Complainant at no cost. However, as previously indicated, the Custodian's initial charge of $0.40 was reasonable and lawful under OPRA and the responsive records were provided to Complainant's Counsel on April 11, 2012, the seventh (7th) business day following receipt of such request.

In this case, the Complainant has not achieved the desired outcome as a result because of the complaint did not bring about a change (voluntary or otherwise) in the Custodian's conduct. Teeters, *supra*. No factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, *supra*. Specifically, the Custodian's assessed $0.40 copying charge was reasonable and lawful under OPRA. The Custodian provided the responsive records within the statutory timeframe, even though he was legally entitled to await payment of the $0.40 prior to doing so. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to 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. Due to the specific facts in this case, the Custodian did not unlawfully deny access to the requested records because the Custodian's assessed $0.40 charge for eight (8) pages of responsive records was reasonable and lawful because the Custodian did not want to risk damaging original records. Further, the Custodian did not unlawfully

deny access to the requested records because the records were provided to Complainant's Counsel within the seven (7) business day time period. *See* N.J.S.A. 47:1A-5(b), Paff v. Township of Teaneck (Bergen), GRC Complaint No. 2010-09 (Interim Order May 24, 2011) and Paff v. Gloucester City (Camden), GRC Complaint No. 2009-102 (Interim Order April 8, 2010).

2. The Complainant has not achieved the desired outcome as a result because of 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). 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, the Custodian's assessed $0.40 copying charge was reasonable and lawful under OPRA. The Custodian provided the responsive records within the statutory timeframe, even though he was legally entitled to await payment of the $0.40 prior to doing so. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

Prepared By: Harlynne A. Lack, Esq.
Case Manager

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

April 23, 2013