



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

May 28, 2013 Government Records Council Meeting

John P. Schmidt
Complainant

Complaint No. 2012-118

v.

Borough of Lindenwold (Camden)
Custodian of Record

At the May 28, 2013 public meeting, the Government Records Council (“Council”) considered the May 21, 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’s interpretation of the Complainant’s OPRA request was reasonable based on the wording of the Complainant’s request. Further, the Custodian diligently provided the records she believed to be responsive to the request. Moreover, if the Complainant was not satisfied with the records he received, then he should have clarified his request with the Custodian. Thus, the Custodian did not unlawfully deny access to the requested records. N.J.S.A. 47:1A-6.
2. In this case, the Complainant has not achieved the desired outcome 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). 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 reasonably interpreted the Complainant’s request and provided the records she reasonably believed were responsive to the request. The Custodian did not unlawfully deny the Complainant access to the requested records. 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 28th Day of May, 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: June 11, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 28, 2013 Council Meeting**

**John P. Schmidt¹
Complainant**

GRC Complaint No. 2012-118

v.

**Borough of Lindenwold (Camden)²
Custodian of Records**

Records Relevant to Complaint: Electronic copies of the following:

1. Executive session minutes for the Borough of Lindenwold (“Borough”) for the five (5) most recent meetings for which minutes are publicly disclosable either in full or in a redacted version.
2. Resolutions as required by N.J.S.A. 10:4-13 that authorized each nonpublic session for which minutes were furnished in response to request Item No. 1.
3. Resolutions as required by N.J.S.A. 10:4-13 that authorized the five (5) most recently held nonpublic sessions regardless of whether minutes for those executive sessions are publicly disclosable.

Request Made: March 28, 2012

Response Made: April 4, 2012

GRC Complaint Filed: April 13, 2012³

Background⁴

Request and Response

On March 28, 2012, the Complainant submitted his Open Public Records Act (“OPRA”) request with the Borough seeking the above-listed records. On April 4, 2012, the second (2nd) business day following receipt of such request, the Custodian provided the resolutions for the February 22, 2012, March 5, 2012, March 7, 2012, March 14, 2012 and March 28, 2012 Borough

¹ Represented by Walter M. Luers, Esq. of the Law Offices of Walter Luers, LLC (Clinton, NJ).

² Deborah Jackson, Custodian of Records. Represented by David A. Capozzi, Esq. of the Law Offices of David A. Capozzi, P.C. (Haddon Heights, 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.

Council meetings.⁵ The Custodian also states that the executive session minutes will be provided once those minutes are approved by the Borough Council.

Denial of Access Complaint

On April 13, 2012, the Complainant filed his Denial of Access Complaint with the Government Records Council (“GRC”). Complainant’s Counsel states that request Item No. 1 sought executive session minutes which are publicly disclosable either in full or in redacted version. Counsel asserts that the Custodian was required to search her records of the Borough Council’s executive session minutes, identify the five (5) most recently held executive session meetings for which minutes were publicly available, either in full or redacted form, and disclose those minutes to the Complainant. Counsel also states that request Item No. 2 sought the resolutions that correspond to the executive session minutes that should have been disclosed in response to request Items No. 1. Counsel requests that the Custodian provide the Complainant with copies of the records responsive to request Items No. 1 and No. 2 and find that the Complainant is a prevailing party and award him a reasonable attorney’s fee.

Statement of Information

On August 10, 2012, the Custodian filed her Statement of Information (“SOI”).⁶ The Custodian certifies that the executive session meeting minutes responsive to request Item No. 1 were not prepared or approved at the time of the Complainant’s OPRA request. The Custodian also certifies that she prepared the responsive executive session minutes and said minutes were subsequently approved by the Borough Council. The Custodian further certifies that she provided the redacted executive session minutes from the February 22, 2012, March 5, 2012, March 7, 2012, March 14, 2012 and March 28, 2012 meetings to the Complainant on May 7, 2012.⁷ The Custodian certifies that the resolutions responsive to request Item Nos. 2 and 3 were provided to the Complainant along with her April 4, 2012 response.

Custodian’s Counsel asserts that the Complainant did not object to the Custodian’s April 4, 2012 response and instead elected to file a complaint with the GRC. Counsel states that on May 7, 2012, the executive session minutes responsive to request Item No. 1 were created and approved by the Borough Council, and subsequently provided to the Complainant on the same date. Counsel also states that the Complainant did not respond or object to Custodian’s May 7, 2012 letter.

Counsel argues that the Complainant sought executive session minutes responsive to request Item No. 1 which did not exist at the time of the request. Counsel also argues that the sole issue before the GRC is whether the Custodian violated OPRA by providing the executive session meeting minutes for the five (5) most recently held meetings (February 22, 2012, March

⁵ The Custodian certified in the Statement of Information that she received the Complainant’s OPRA request on April 2, 2012.

⁶ This complaint was referred to mediation on April 26, 2012. However, mediation did not resolve this complaint and it was referred back to the GRC for adjudication on July 17, 2012. The Complainant chose not to amend his Denial of Access Complaint.

⁷ The Custodian provides a copy of this letter to the Complainant dated May 7, 2012 along with the SOI. This letter states that these minutes were approved on May 2, 2012.

5, 2012, March 7, 2012 March 14, 2012 and March 28, 2012) as opposed to the “five (5) most recently held non-public sessions *for which minutes are publicly disclosable either in full or in a redacted version.*” Counsel disputes Complainant’s assertion that the Custodian should have disclosed the executive session minutes from the five (5) most recently held meetings where Council already approved of the minutes.

Counsel contends that the Complainant’s argument must fail for two (2) reasons. First, Counsel argues that the Complainant’s request sought resolutions authorizing the executive session meetings and the minutes that correspond to those resolutions. Counsel states that the Complainant received on April 4, 2012, a list of resolutions for the February 22, 2012, March 5, 2012, March 7, 2012, March 14, 2012 and March 28, 2012 meetings. Counsel argues that the Complainant did not respond to the Custodian’s April 4, 2012 letter. Counsel also argues that the Custodian interpreted the request to have been satisfied pending the production of the executive session minutes responsive to request Item No 1. Second, Counsel argues that the executive session minutes are public records subject to disclosure. Counsel contends that since the executive session minutes fall within OPRA and are subject to disclosure, it is clearly reasonable to assume that all minutes are available. Counsel further argues that if the Complainant wanted the executive session minutes from the past five (5) sessions where minutes were already approved, then he should have articulated that in his request. Counsel argues that the Custodian acted in a conscientious and diligent manner and provided the records responsive to the request. Counsel asserts that if the Complainant was unsatisfied with the original production, he should have contacted the Custodian to correct her misunderstanding. Counsel argues that the Custodian reasonably interpreted request Item No. 1 because the Complainant’s request sought the minutes for the five (5) most recently held non-public meetings sessions.

Counsel asserts that the core purpose of OPRA is to ensure government records are readily accessible to citizens. Mason v. City of Hoboken, 196 N.J. 51 (2008). Counsel also asserts that the spirit and intent of OPRA is to “foster cooperation” between requestors and public agencies. Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009). Counsel contends that the Complainant attempts to play a game of “gotcha” because he relies on a technicality to argue that the Custodian refused him records. Counsel also argues that the allegation in the Denial of Access Complaint frustrates the purpose and spirit of OPRA. Counsel also asserts that the Complainant is not a prevailing party because the complaint has not brought about a change in the Custodian’s conduct because her conduct was diligent and conscientious. Counsel further asserts that the Denial of Access Complaint has no basis in the law.

Analysis⁸

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

⁸ 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.

“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 provides that:

“[i]f the 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. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5(g).

OPRA also provides that:

“a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request.” N.J.S.A. 47:1A-5(i).

The NJ Supreme Court in Mason v. City of Hoboken, 196 N.J. 51, 65 (2008) held “OPRA’s purpose is “to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.” (citing Asbury Park Press v. Ocean County Prosecutor’s Office, 374 N.J. Super. 312, 329 (Law Div. 2004)).

Here, on the second (2nd) day following receipt of the Complainant’s request, the Custodian provided the Complainant with resolutions for the February 22, 2012, March 5, 2012, March 7, 2012, March 14, 2012 and March 28, 2012 Borough Council meetings. The Custodian also stated that the executive session minutes in response to request Item No. 1 will be provided once approved. The Custodian certifies that on May 2, 2012, she provided the executive session minutes for the February 22, 2012, March 5, 2012, March 7, 2012, March 14, 2012 and March 28, 2012 Borough Council meetings.

Complainant’s Counsel asserted in his Denial of Access Complaint that the Custodian was required to search her records of the Borough Council’s executive session minutes, identify the five (5) most recently held executive session meetings for which minutes were publicly available, either in full or redacted form, and disclose those minutes to the Complainant. Counsel also stated that request Item No. 2 sought the resolutions that correspond to the executive session minutes that should have been disclosed in response to request Item No. 1. Conversely, Custodian’s Counsel asserted in the SOI that the Complainant did not respond to the Custodian’s April 4, 2012 response. Counsel also asserted that the Custodian interpreted the request to have been satisfied pending the production of the executive session minutes responsive to request Item No. 1. Counsel also argued that if the Complainant wanted the executive session minutes from the past five (5) sessions where minutes were approved then he should have articulated that in his request.

Custodian’s Counsel argued that if the Complainant was unsatisfied with the original production, he should have contacted the Custodian to correct her misunderstanding. Counsel also argued that the Custodian reasonably interpreted Item No. 1 because the Complainant’s request sought the minutes for the five (5) most recently held non-public meetings. Counsel

further argued that the Complainant's assertions in his Denial of Access Complaint frustrate the purpose and spirit of OPRA. Counsel contended that the Complainant attempts to play a game of "gotcha" because he relies on a technicality to argue that the Custodian refused him records.

The Custodian's interpretation of the Complainant's OPRA request was reasonable based on the wording of the Complainant's request. Further, the Custodian diligently provided the records she believed to be responsive to the request. Moreover, if the Complainant was not satisfied with the records he received, then he should have clarified his request with the Custodian. Thus, the Custodian did not unlawfully deny access to the requested records. N.J.S.A. 47:1A-6.

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.

In this case, the Complainant has not achieved the desired outcome because 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 reasonably interpreted the Complainant’s request and provided the records she reasonably

believed were responsive to the request. The Custodian did not unlawfully deny the Complainant access to the requested records. 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. The Custodian's interpretation of the Complainant's OPRA request was reasonable based on the wording of the Complainant's request. Further, the Custodian diligently provided the records she believed to be responsive to the request. Moreover, if the Complainant was not satisfied with the records he received, then he should have clarified his request with the Custodian. Thus, the Custodian did not unlawfully deny access to the requested records. N.J.S.A. 47:1A-6.
2. In this case, the Complainant has not achieved the desired outcome 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). 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 reasonably interpreted the Complainant's request and provided the records she reasonably believed were responsive to the request. The Custodian did not unlawfully deny the Complainant access to the requested records. 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: Harlynn A. Lack, Esq.
Case Manager

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

May 21, 2013