



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

September 30, 2014 Government Records Council Meeting

Matthew M. Fredericks, Esq.
Complainant
v.
State Ethics Commission
Custodian of Record

Complaint No. 2014-3

At the September 30, 2014 public meeting, the Government Records Council (“Council”) considered the September 23, 2014 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 lawfully denied access to the requested preliminary investigation records because same are exempt from disclosure under State Ethics Commission regulations. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a); N.J.A.C. 19:61-3.1. *See also Rodriguez v. State Ethics Comm’n*, GRC Complaint No. 2014-186 (July 2014). Further, the Custodian could not have unlawfully denied access to the results of the investigation because, at the time of the OPRA request, the preliminary investigation was not completed and no report existed. *See Pusterhofer v. N.J. Dep’t of Educ.*, GRC Complaint No. 2005-49 (July 2005).
2. 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, the Custodian did not unlawfully deny access to the requested SEC preliminary investigation records. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee. *See N.J.S.A. 47:1A-6*, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the



Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 30th Day of September, 2014

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: October 3, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 30, 2014 Council Meeting**

**Matthew M. Fredericks, Esq.¹
Complainant**

GRC Complaint No. 2014-3

v.

**State Ethics Commission²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of all records related to a State Ethics Commission (“SEC”) complaint filed by the Complainant in January 2013, against New Jersey Department of Environmental Protection (“DEP”) Deputy Commissioner Irene Kropp, including the results of the investigation.

Custodian of Record: Diane L. Camiso, Esq.
Request Received by Custodian: December 9, 2013
Response Made by Custodian: December 13, 2013
GRC Complaint Received: January 7, 2014

Background³

Request and Response:

On December 9, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 13, 2013, the Custodian responded in writing denying access to the responsive records pursuant to N.J.S.A. 47:1A-9(a) and N.J.A.C. 19:61-3.1.

Denial of Access Complaint:

On January 7, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed that the requested records are exempt under N.J.A.C. 19:61-3.1, which provides that “[a]ny preliminary investigation of an alleged ethics violation, whether conducted by Commission staff or a State agency, shall be confidential.” The Complainant stated that N.J.A.C. 19:61-2.5, provides that:

¹ The Complainant represents Strategic Environmental Partners, LLC.

² Represented by Deputy Attorney General Ray Lamboy.

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.

(a) . . . all final orders, decisions and formal Commission opinions shall be maintained by the Commission as documents available to the public . . . (b) Any person shall, upon request, be afforded an opportunity to examine a document, or a photocopy of any document, so maintained at the Commission offices, between 9:00 A.M. and 4:00 P.M. on business days.

Id.

Accordingly, the Complainant contended that the records sought pertained to a finalized investigation and should be disclosed. Further, the Complainant argued that it appears that the SEC openly discusses dismissed complaints, per a Star Ledger article of September 19, 2013, but will not disclose records for complaints that have merit. The Complainant asserted that the SEC must be made to disclose all complaints regardless of the outcome.

Supplemental Submission

On January 31, 2014, the Complainant supplemented his Denial of Access Complaint. The Complainant stated that N.J.A.C. 19:61-1.10 defines “preliminary investigation” as “the investigative process undertaken by the [SEC] and/or its staff . . . with regard to an allegation *prior to review of and final action on the allegation by the [SEC] at a public meeting*” Id. (emphasis added). The Complainant alleged that the records sought did not fall within this definition.

The Complainant further argued that the public had the right to know whether the SEC followed its procedures set forth by regulation. N.J.A.C. 19:61-3.1. The Complainant contended that after filing a complaint, the SEC failed to avail his client of an interview as provided for in N.J.A.C. 19:61-3.1(b), even after he made several attempts to obtain status updates and discuss the complaint.

Finally, the Complainant argued that there is no provision in N.J.A.C. 19:61-3.1, or any other statute or regulation, that permitted the SEC from keeping confidential the outcome of a contested case. Thus, the records sought reflecting the disposition of his complaint against Commissioner Bob Martin and Deputy Commissioner Knopp must be disclosed.

Statement of Information:

On February 10, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that the Complainant filed his OPRA request after the federal courts granted SEC’s motion to quash a subpoena for the same exact records on December 2, 2013. The Custodian certified that she received the Complainant’s OPRA request on December 9, 2013 and responded in writing on December 13, 2013.

The Custodian first contended that because all records relevant to an SEC investigation are confidential, it was unnecessary to submit a document index. Paff v. Dep’t of Labor, 379 N.J. Super. 346, 355 (App. Div. 2005). The Custodian further contended that it made no difference

whether the Complainant filed the ethics complaint; he could not waive the SEC's confidentiality.

The Custodian certified that the New Jersey Conflicts of Interest Law was enacted to establish and maintain uniform ethical standards to guide the conduct of public officials. N.J.S.A.52:13D-12 et seq. Further, the Custodian certified that the Conflicts of Interest Law empowered the SEC with the authority to initiate, receive, review, and investigate complaints alleging ethics violations by public officials. Id. at 52:13D-21(h). The Custodian asserted that allegations of ethics violations are highly sensitive in that they could affect confidence of the general public as well as privacy rights of the accused person; thus, the SEC promulgated N.J.A.C. 19:61-3.1. The Custodian certified that this regulation provides for the confidentiality of an ethics investigation and procedures for protecting same. N.J.A.C. 19:61-3.1(a)(3); (c)(1); (c)(2)-(3); (c)(5). The Custodian certified that disclosure of any records relevant to the matter identified in the Complainant's OPRA request would violate the SEC's own regulations. Further, the Custodian certified that there is no finalized decision because the matter is still pending before the SEC.

Finally, the Custodian noted that the Star Ledger article referred to in the Complainant's Denial of Access Complaint related to a Joint Legislative Committee on Ethical Standards and not the SEC. The Custodian stated that the SEC must follow its own standards and regulations.

Additional Submissions:

On March 6, 2014, the Complainant stated, via letter, that N.J.A.C. 19:61-2.5 provided that, among other records, pleadings related to a complaint "shall be maintained by the [SEC] as documents available to the public." Id. The Complainant asserted that under this regulation, the SEC should, at the very least, provide the relevant pleadings of Commissioner Martin and Deputy Commissioner Kropp submitted in response to the ethics complaint. The Complainant further alleged that the SEC is taking advantage of a loophole in the Conflicts of Interest Law by using the lack of adjudication deadlines/time frames to withhold access to records. The Complainant contended that the lack of time limits on adjudication could permit the SEC to deny access to investigation records in perpetuity until long after the subject person has retired. The Complainant alleged that the regulation is a clear attempt by the SEC to avoid taking action on a complaint and underscores the need for transparency in this case.

On March 7, 2014, the Custodian's Counsel refuted, via letter, the Complainant's assertion that N.J.A.C. 19:61-2.5 required disclosure of pleadings. Counsel asserted that N.J.A.C. 19:61-2.5 must be read in conjunction with N.J.A.C. 19:61-3.1. Counsel stated that the SEC reviews allegations of violations through a preliminary investigation that may include an interview with the accused individual. N.J.A.C. 19:61-3.1(b). Counsel noted that SEC regulations provide that such investigation is confidential. N.J.A.C. 19:61-3.1(c)(1)-(3). Counsel stated that if further action were warranted, a complaint is set forth hearing at the Office of Administrative Law or before the SEC. N.J.A.C. 19:61-3.1(h). It is this complaint and pleadings that become public records subject to disclosure per N.J.A.C. 19:61-2.5(a). Thus, Counsel contended that the Complainant's ethics "complaint" is nothing more than an allegation of an

ethics violation. Finally, Counsel reiterated that the Complainant cannot use the SEC or GRC as a means to pursue discovery in support of his client's law suit in federal court.

Analysis

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 provides that:

The provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; *regulation promulgated under the authority of any statute or Executive Order of the Governor*; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

N.J.S.A. 47:1A-9(a)(emphasis added).

To this end, the SEC's regulations provide that "[a]ny preliminary investigation of an alleged ethics violation, whether conducted by [SEC] staff or a State agency, shall be confidential." N.J.A.C. 19:61-3.1(a). The SEC's regulations define a "preliminary investigation" as:

[T]he investigative process undertaken by the Commission and/or its staff and/or a State agency's ethics liaison officer or State agency's ethics committee with regard to an allegation prior to review of and final action on the allegation by the Commission at a public meeting, pursuant to either N.J.A.C. 19:61-3.1(h) or (i).

N.J.A.C. 19:61-1.10

Further, the SECs regulations provide that "[t]he contents of the [SEC's] investigative file are confidential and shall not be released except upon the authorization of the [SEC], or pursuant to court order or administrative rule." N.J.A.C. 19:61-3.1(c)(3). The regulations also require the SEC to consider requests for information after "the final determination of a matter by the Commission and the expiration of any time for appeal on completed matters." N.J.A.C. 19:61-3.1(c)(5).

Here, the Complainant sought all records related to an SEC complaint he filed, including the results of the investigation. After being denied and filing this complaint, the Complainant argued that SEC regulations required the disclosure of the records sought. To the contrary, the

Custodian argued in the SOI that SEC regulations exempt all preliminary investigation records. The Custodian also certified that the matter was not finalized at the SEC level; thus, the exemptions applied. Subsequent to Complainant's argument that, at the very least, pleadings of the accused parties should be provided in accordance with N.J.A.C. 19:61-2.5, the Custodian refuted same by noting that a complaint is not initiated until the SEC has determined whether the allegations have merit through the preliminary investigation. The Custodian reiterated that the preliminary investigation was not complete and thus no complaint and pleadings exist yet.

The crux of this complaint rests on whether the SEC's preliminary investigation resulted in a formal complaint at the Office of Administrative Law ("OAL") or with the SEC under N.J.A.C. 19:61-3.1(h), as SEC regulations do not allow for disclosure of the contents of a preliminary investigation file but do allow for disclosure of certain records once a complaint has been finalized. Thus, there is a clear distinction between the two (2) processes and the SEC's regulations impact the disclosability of records in each process.

After a review of the parties' submissions and SEC's regulations, the GRC is satisfied that the Custodian lawfully denied access to the requested records. Specifically, the Custodian certified in the SOI (which was reiterated by Counsel in his March 7, 2014 letter) that the investigation of the Complainant's allegations was still preliminary. Moreover, the absence of a resulting official complaint sent to the OAL or SEC hearing under N.J.A.C. 19:61-3.1(h) also supports the Custodian's certification that no results disclosable under N.J.S.A. 19:61-2.5, were issued at the time of the request. Although the Complainant took issue with what he considered a loophole in the SEC's regulations,⁴ same plainly operate to exempt access to the contents of an SEC preliminary investigation file.

Therefore, the Custodian lawfully denied access to the requested preliminary investigation records because same are exempt from disclosure under SEC regulations. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a); N.J.A.C. 19:61-3.1. See also Rodriguez v. State Ethics Comm'n, GRC Complaint No. 2014-186 (July 2014). Further, the Custodian could not have unlawfully denied access to the results of the investigation because, at the time of the OPRA request, the preliminary investigation was not completed and no report existed. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

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.

⁴ The GRC notes that its authority is limited to adjudicating Denial of Access Complaints and thus it cannot address the Complainant's disagreement with the SEC's regulations. N.J.S.A. 47:1A-7(b).

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 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, 196 N.J. at 71, (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, 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, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, 387 N.J. Super. at 429; *see, e.g.*, Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney’s fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney’s fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney’s fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature’s revisions therefore: (1) mandate, rather than permit, an award of attorney’s fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

Mason at 73-76 (2008).

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* (1984).

Id. at 76.

In this matter, the Complainant, who filed this complaint on behalf of his client, disputed that the Custodian lawfully denied to his OPRA request; as a result, he requested that the GRC order the Custodian to disclose the responsive records. However, the Custodian did not unlawfully denied access to same pursuant to SEC regulations, which exempt disclosure of preliminary investigation records.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters, 387 N.J. Super. at 432. Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 51. Specifically, the Custodian did not unlawfully deny access to the requested SEC preliminary investigation records. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian lawfully denied access to the requested preliminary investigation records because same are exempt from disclosure under State Ethics Commission regulations. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a); N.J.A.C. 19:61-3.1. *See also* Rodriguez v. State Ethics Comm'n, GRC Complaint No. 2014-186 (July 2014). Further, the Custodian could not have unlawfully denied access to the results of the investigation because, at the time of the OPRA request, the preliminary investigation was not completed and no report existed. *See* Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
2. 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, the Custodian did not unlawfully deny access to the requested SEC preliminary investigation records. Therefore, the

Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51.

Prepared By: Frank F. Caruso
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Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

September 23, 2014