



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

January 30, 2015 Government Records Council Meeting

John Paff  
Complainant

Complaint No. 2014-112

v.

Town of Guttenberg (Hudson)  
Custodian of Record

At the January 30, 2015 public meeting, the Government Records Council (“Council”) considered the January 20, 2015 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. Because the Guttenberg Housing Authority was created by Town ordinance in accordance with the “Local Housing Authorities Law,” the Custodian should have handled this request in accordance with N.J.S.A. 47:1A-5(h). Based on the foregoing, the Custodian violated N.J.S.A. 47:1A-5(h) by failing to either direct the Complainant to the proper custodian of record or to forward the OPRA request to the Guttenberg Housing Authority. Further, because it is now clear that the Complainant must submit his OPRA request to the Guttenberg Housing Authority, the GRC declines to order any further action because doing so is unnecessary.
2. The Custodian’s response was insufficient because he failed to state definitively that the records responsive to the Complainant’s OPRA request did not exist. N.J.S.A. 47:1A-5(g); Shanker v. Borough of Cliffside Heights (Bergen), GRC Complaint No. 2007-245 (March 2009). However, the GRC declines to order disclosure of any records because it is clear that the Custodian possesses no responsive records. See Paff v. City of Hudson City (Hudson), GRC Complaint No. 2012-262 (August 2013).
3. The Custodian violated N.J.S.A. 47:1A-5(h) and his response was insufficient under N.J.S.A. 47:1A-5(g). However, the GRC declined to order disclosure of records because the evidence herein supports that the Custodian has no responsive records in his possession. 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. Therefore, the Custodian’s actions do 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, the GRC has declined to grant the Complainant's requested relief based on the evidence of record. 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 30<sup>th</sup> Day of January, 2015

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: February 4, 2015**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
January 30, 2015 Council Meeting**

**John Paff<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-112**

**v.**

**Town of Guttenberg (Hudson)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of:

1. The most recent civil complaint filed in Gonzalez v. Criscione, (Housing Authority) Docket Number 2:12-CV-03620.
2. The settlement agreement in Gonzalez, that sets forth the terms and amount of settlement.

**Custodian of Record:** Alberto Cabrera

**Request Received by Custodian:** December 9, 2013

**Response Made by Custodian:** December 12, 2013

**GRC Complaint Received:** March 11, 2014

**Background<sup>3</sup>**

**Request and Response:**

On December 6, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 12, 2013, the Custodian responded in writing to deny the Complainant’s OPRA request, stating, “this case has no relevance” to the Town of Guttenberg (“Town”).

**Denial of Access Complaint:**

On March 11, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that the purpose of OPRA “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.” Times of Trenton Publ’g Corp. v. Lafayette

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<sup>1</sup> Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Clinton, NJ).

<sup>2</sup> Represented by Charles P. Daglian, Esq. (Jersey City, NJ).

<sup>3</sup> 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.

Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005)(quoting Asbury Park Press v. Ocean Cnty. Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)).

The Complainant stated that housing authorities are created pursuant to the “Local Housing Authorities Law,” which provides that:

[T]he governing body of any county or municipality may, *by ordinance*, or by resolution in the case of a county whose charter does not provide for the adoption of ordinances, create a body corporate and politic to be known as the “Housing Authority of . . . ,” inserting the name of the county or municipality. *The authority shall constitute an agency and instrumentality of the municipality or county creating it.*

N.J.S.A. 40A:12A-17(a)(emphasis added).

Furthermore, the Complainant stated that the statute mandates that five (5) of the seven (7) members of the housing authority are appointed by the governing body, the mayor appoints one (1) member and the Commissioner of the New Jersey Department of Community Affairs appoints the remaining member. Also, the Complainant noted that prior court decisions have determined that a housing authority is “an instrumentality of the municipality.” Hous. Auth. of the City of Newark v. Sagner, 142 N.J. Super. 332, 340 (App. Div. 1976).

The Complainant argued that the Guttenberg Housing Authority (“GHA”) is an “instrumentality” of the Town. The Complainant asserted that the Custodian’s denial would be proper were the Town a stranger to the GHA. However, the Complainant asserted that because the GHA is an instrumentality of the Town, the Custodian was required to, at the very least, forward the OPRA request to the GHA’s custodian of record or direct the Complainant to said custodian. N.J.S.A. 47:1A-5(h). The Complainant thus argued that the Custodian’s denial was inconsistent with OPRA and a violation of the Complainant’s right to prompt access.

The Complainant requested that the GRC: 1) determine that the Custodian violated OPRA by failing to fulfill the Complainant’s OPRA request; 2) order the Custodian to either obtain and disclose responsive records or, at the very least, abide by N.J.S.A. 47:1A-5(h); and 3) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees.

#### Statement of Information:

On March 19, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he responded to the Complainant’s OPRA request on December 12, 2013, advising the Complainant that the Gonzalez case had no relevance to the Town.

The Custodian certified that he denied access to the Complainant’s OPRA request because GHA is a separate agency. Further, the Custodian certified that the Town had no records responsive to the request and thus could not provide same.

## Analysis

### Forwarding or Directing an OPRA Request

OPRA provides that “[a]ny officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record.” N.J.S.A. 47:1A-5(h). Further, it is a custodian’s duty either to direct the Complainant to the proper custodian of record or forward the Complainant’s OPRA request to the proper custodian of record when that agency’s files are not maintained by the agency in receipt of the request. Id.

In Fallstick v. Haddon Twp. and Haddown Twp. Bus. P’ship, Inc., GRC Complaint No. 2004-73 (October 2004), the complainant filed an OPRA request with the Haddon Township custodian requesting to inspect minutes of the marketing committee meetings of the Haddon Township Business Partnership (“HTBP”) and copies of letters from property owners to business owners. The complainant asserted that the Township should have had the requested records on file because of an ordinance designating HTBP as the manager of services and programs in the Township’s Business District. The Council held that the HTBP was a public agency subject to OPRA but that the custodian was not obligated to respond to an OPRA request for records maintained by HTBP.

Similarly, in Kumka (Northern Valley Suburbanite) v. City of Englewood (Bergen), GRC Complaint No. 2007-07 (January 2010), the Council held that a request made to the City of Englewood’s custodian for records maintained by the Englewood Economic Development Corporation (“EEDC”) should have been forwarded to the EEDC, or the complainant should have been directed to the proper custodian. *See also* Weippert v. Borough of Netcong (Morris), GRC Complaint No. 2013-358 (July 2014).

The “Local Housing Authorities Law” indicates that all housing authorities are created by either the municipality or the county. N.J.S.A. 40A:12A-17(a). In the instance of the GHA, the agency was created by ordinance in accordance with the “Local Housing Authorities Law.” Guttenberg Ordinance No. 2-42. To this end, the Complainant has alleged in the Denial of Access Complaint that, at the very least, the Custodian was required to abide by N.J.S.A. 47:1A-5(h). In the SOI, the Custodian only argued that the GHA is a separate agency. However, similar to both Fallstick, and Kumka, the GHA was created by municipal ordinance and is thus an instrumentality of the Town. Based on the foregoing, the Custodian had an obligation to either forward the request to the GHA or direct the Complainant to same and failed to do so.<sup>4</sup>

Thus, because the GHA was created by Town ordinance in accordance with the “Local Housing Authorities Law,” the Custodian should have handled this request in accordance with N.J.S.A. 47:1A-5(h). Based on the foregoing, the Custodian violated N.J.S.A. 47:1A-5(h) by failing to either direct the Complainant to the proper custodian of record or to forward the OPRA request to the GHA. Further, because it is now clear that the Complainant must submit his OPRA

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<sup>4</sup> The GRC notes that the requirements of N.J.S.A. 47:1A-5(h) may not necessarily apply in instances where a custodian for an agency receives an OPRA request for records maintained by another agency with no connection to the former (*i.e.* a request made to the New Jersey State Police for records maintained by a local police department).

request to the GHA, the GRC declines to order any further action because doing so is unnecessary.

### **Sufficiency of Response**

Moreover, OPRA provides that if a “. . . 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.” N.J.S.A. 47:1A-5(g)(emphasis added). The Council has held that for a denial of access to be in compliance with OPRA, the custodian must definitively state that records did not exist at the time of the initial response. *See* Shanker v. Borough of Cliffside Heights (Bergen), GRC Complaint No. 2007-245 (March 2009); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-175 (September 2011).

Here, the Custodian initially responded to the Complainant stating that the “case has no relevance” to the Town. Subsequent to the filing of the Denial of Access Complaint, the Custodian certified in the SOI that he did not possess any responsive records because the Town and GHA were separate agencies. Obviously, the Custodian’s SOI response more definitively indicated the fact that no records existed than his initial response to the Complainant.

Therefore, the Custodian’s response was insufficient because he failed to definitively state that the records responsive to the Complainant’s OPRA request did not exist. N.J.S.A. 47:1A-5(g); Shanker, GRC 2007-245. However, the GRC declines to order disclosure of any records because it is clear that the Custodian possesses no responsive records. *See* Paff, GRC 2012-262.

### **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 “. . . [i]f 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 (*id.*; Marley v.

Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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)).

In this matter, the Custodian violated N.J.S.A. 47:1A-5(h), and his response was insufficient under N.J.S.A. 47:1A-5(g). However, the GRC declined to order disclosure of records because the evidence herein supports that the Custodian has no responsive records in his possession. 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. Therefore, the Custodian's actions do 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 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 (7<sup>th</sup> 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 requested that the GRC order the Custodian to disclose responsive records or, as an alternative, comply with his obligation to forward the request to the GHA or direct the Complainant to same. N.J.S.A. 47:1A-5(h).

Notwithstanding the Custodian’s violation of N.J.S.A. 47:1A-5(h) and insufficient response, the GRC declined to grant any relief in this case. First, the evidence of record is clear that the Complainant must submit his request directly to the GHA. Thus, requiring the Custodian to perform his duties under N.J.S.A. 47:1A-5(h) was unnecessary. Second, the GRC declined to order disclosure of records based on the Custodian’s SOI certification that no records existed in



his possession. Accordingly, the Complainant could not have prevailed in this complaint and is not 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, 387 N.J. Super. 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. 51. Specifically, the GRC has declined to grant the Complainant's requested relief based on the evidence of record. 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. Because the Guttenberg Housing Authority was created by Town ordinance in accordance with the "Local Housing Authorities Law," the Custodian should have handled this request in accordance with N.J.S.A. 47:1A-5(h). Based on the foregoing, the Custodian violated N.J.S.A. 47:1A-5(h) by failing to either direct the Complainant to the proper custodian of record or to forward the OPRA request to the Guttenberg Housing Authority. Further, because it is now clear that the Complainant must submit his OPRA request to the Guttenberg Housing Authority, the GRC declines to order any further action because doing so is unnecessary.
2. The Custodian's response was insufficient because he failed to state definitively that the records responsive to the Complainant's OPRA request did not exist. N.J.S.A. 47:1A-5(g); Shanker v. Borough of Cliffside Heights (Bergen), GRC Complaint No. 2007-245 (March 2009). However, the GRC declines to order disclosure of any records because it is clear that the Custodian possesses no responsive records. *See* Paff v. City of Hudson City (Hudson), GRC Complaint No. 2012-262 (August 2013).
3. The Custodian violated N.J.S.A. 47:1A-5(h) and his response was insufficient under N.J.S.A. 47:1A-5(g). However, the GRC declined to order disclosure of records because the evidence herein supports that the Custodian has no responsive records in his possession. 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. Therefore, the Custodian's actions do 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, the GRC has declined to grant the

Complainant's requested relief based on the evidence of record. 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.

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Deputy Executive Director

January 20, 2015