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CHARLES A. RICHMAN
Commissioner

FINAL DECISION

September 29, 2015 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2014-376

v.

West Milford Board of Education (Passaic)
Custodian of Record

At the September 29, 2015 public meeting, the Government Records Council (“Council”) considered the September 22, 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. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request, pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian was less than conscientious in the performance of her duties under OPRA and failed to meet her burden of proving that the denial of access was lawful pursuant to N.J.S.A. 47:1A-6. However, the Council declines to order disclosure of the responsive record because the Custodian provided same to the Complainant on November 11, 2014.
3. Although the Custodian failed to respond in a timely manner to the Complainant’s OPRA request, she did respond on the eighth (8th) business day following receipt of the request by disclosing the record responsive to the request. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. The Complainant has not achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). The Council finds that a factual causal nexus does not exist 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 had already commenced the process of responding to the Complainant's requests on November 10, 2014, which was the seventh (7th) business day following receipt of the requests, and there was nothing in the evidence of record to indicate that she would not continue the process unless prompted to do so by the filing of a complaint. Additionally, there is no evidence in the record to contradict the Custodian's certification that she intended to complete the process of responding to the Complainant's requests on November 10, 2014. 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. 423, and Mason, 196 N.J. 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 29th Day of September, 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: October 5, 2015

**ESTATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 29, 2015 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2014-376

v.

**West Milford Board of Education (Passaic)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of any and all e-mails and/or correspondences sent to and received from Ms. Laura Tallia regarding the following words (and any reasonably construed variation thereof): “attendance,” “custodian,” “floating,” “holiday,” “Easter,” “Floating Holiday,” “school,” “outlook,” “vacation,” “sick,” “personal,” “maintenance,” “absence,” “overtime,” “compensation,” and “calendar,” from April 1, 2014, to October 30, 2014.³

Custodian of Record: Barbara Francisco
Request Received by Custodian: October 30, 2014
Response Made by Custodian: November 11, 2014
GRC Complaint Received: November 12, 2014

Background⁴

Request and Response:

On October 30, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 11, 2014, the eighth (8th) business day following receipt of said request, the Custodian responded in writing, disclosing the records responsive to the request.

Denial of Access Complaint:

On November 12, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”).⁵ The Complainant asserts that he e-mailed his request

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

² Represented by James Eric Andrews, Esq., of Schenck, Price, Smith & King, LLP (Florham Park, NJ).

³ The Complainant stated that he would accept faxed copies of any records that could not be transmitted electronically. The Complainant provided the Custodian with a fax number.

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.

to the Custodian on October 30, 2014. The Complainant states that it is the eighth (8th) business day following receipt of said request and that the Custodian did not respond within the statutorily mandated seven (7) business days.

The Complainant demands that the Council:

- Find that the Custodian violated OPRA by not responding to the request within seven (7) business days.
- Find that the Custodian knowingly and willfully violated OPRA and therefore should be subjected to a civil penalty pursuant to N.J.S.A. 47:1A-11.
- Order the Custodian to disclose the requested records immediately.
- Determine that the Complainant is a prevailing party and award attorney's fees and costs.
- Grant the Complainant all further relief that the Council finds to be equitable and just.

Statement of Information:

On November 26, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on October 30, 2014, and responded in writing on November 11, 2014.

The Custodian certifies that while she was on vacation, she received from the Complainant two OPRA requests that were transmitted via e-mail on October 30, 2014. The Custodian further certifies that when she returned from vacation on November 10, 2014, she found that the Board of Education's ("Board's") website was not in operation throughout the business day; however, the Custodian certified that she was able to respond to the first request at 5:51 p.m. that evening. The Custodian certifies that because she needed information from a co-worker's computer files to respond to the second request, she responded to that request the following day.⁶

The Custodian certifies that the following records were responsive to the Complainant's request: (1) an e-mail dated February 27, 2014, from L. Tallia to B. Francisco, (2) a memorandum dated March 6, 2014, from E. Sandve to Custodian Maintenance and Trans. Mechanics, and (3) an e-mail dated April 24, 2014, from L. Tallia to G. Ryerson. The Custodian certifies that the latter two items were outside the scope of the request; however, she disclosed those items in order to provide all relevant information to the Complainant.

⁵ The Complainant verified/submitted the complaint via e-mail on November 11, 2014, at 7:12 a.m.

⁶ The second request formed the basis of the instant complaint. The request to which the Custodian responded on November 10, 2014, at 5:51 p.m. is therefore not pertinent to the denial of the records relevant to the complaint. However, both parties presented the GRC with submissions acknowledging the fact that the Complainant submitted two (2) OPRA requests on October 30, 2014. Given the facts of this complaint and the prayer for relief, which includes a demand that the Council find the Custodian knowingly and willfully violated OPRA and that the Complainant is a prevailing party entitled to attorney's fees and costs, the Council would be remiss in not considering the facts surrounding the submission and response of the two requests in adjudicating this complaint.

Additional Submissions:

On December 3, 2014, the Complainant's Counsel submitted a letter brief in rebuttal to the SOI. Counsel asserts that although the Custodian knew that she would be out of the office on vacation, she failed to appoint a designee to handle OPRA requests in her absence, which is unlawful. In support of his assertion, Counsel cites Colasante v. County of Bergen, GRC Complaint No. 2010-18 (Interim Order July 31, 2012), wherein the Council rejected an argument that the custodian's vacation constituted extraordinary circumstances because the agency could have formally or informally appointed a temporary custodian during such time.

Counsel argues that the Custodian's SOI presents *prima facie* evidence that her denial was deliberate and intentional because it involved conscious forethought to abdicate her duties and responsibilities as a custodian, which was demonstrated by her creation of an out-of-office automated reply message. Counsel characterized the Custodian's utilization of an automated reply message as a "tactical ruse to *unreasonably* hamper access to records under the OPRA." The Complainant's Counsel further argues that the Custodian, upon her return to the office on November 10, 2014, could have requested an extension of time to respond to the request but failed to do so. Counsel also argues that the Custodian's statement in the SOI that the Board's website was shut down on November 10, 2014, is unpersuasive because she had six other business days during which the website was not shut down. Counsel states that the Custodian provided no collaboration that the website was shut down, and her averment that the website was not in operation is "woefully inadequate." Counsel further states that the Custodian's failure to address the request until the seventh (7th) business day is "unjustified and grossly unreasonable."

Counsel also states that an unfair labor practice complaint is pending now before the New Jersey Public Employment Relations Commission ("PERC"), where the Complainant serves as the union representative and the Custodian serves as the Board's representative. Counsel contends that the requested records are directly related to said complaint and that it was advantageous to the Custodian to withhold the records. As such, Counsel concludes that the records were intentionally denied.

The Complainant's Counsel contends that the filing of the complaint was the catalyst for disclosure of the records and, as such, warrants an award of attorney's fees. Counsel further contends that the Custodian failed to contact the Complainant when she learned on the seventh business day following receipt of the request that she knew the Board's website was not operating. However when the complaint was filed on the following day, Counsel contends that the Custodian was prompted to search for and disclose the requested records.

In addition to the relief sought in the complaint, the Custodian's Counsel asks the Council to find that a custodian's use of an automated out-of-office type e-mail message is an insufficient response to an OPRA request.

On May 5, 2015, the Custodian's Counsel submitted a letter brief in response to the Complainant's December 3, 2014, rebuttal brief. Counsel states that his letter brief relies on the facts set forth in the Custodian's April 8, 2015, certification, which is attached to the letter brief.

The Custodian's Counsel asserts that the Custodian activated an out-of-office automatic reply for the purpose of alerting senders of all e-mails that she would have limited access to her messages while she was not in the office. Counsel states that on October 30, 2014, while the Custodian was on vacation, the Complainant transmitted two OPRA requests which the Custodian viewed and therefore knew required her attention when she returned to the office.

The Custodian's Counsel states that the Custodian knew that her first day back at work would be the seventh (7th) business day following receipt of the requests and that she planned to respond to the requests on that day. Counsel further states that when the Custodian returned to her office, she responded to one of the two requests, but because the computer system was not in operation, she was unable to obtain a responsive document from a co-worker in order to respond to the other request on that same date.⁷ Counsel states that on the following day the Custodian responded to the Complainant's second request, and the Complainant filed the instant complaint.

Counsel contends that the Custodian's employment of the out-of-office automatic reply was not to subvert the law but rather to let callers know that she was away on vacation. Counsel admits that the Custodian could have requested an extension of time. Counsel also admits that the Custodian failed to respond to the request within the statutorily-mandated seven business day period; however, he argues that the Custodian did not purposely fail to respond within the mandated period to avoid producing the requested records.

Counsel states that the Complainant failed to set forth the Custodian's motivation to knowingly and willfully violate the law other than to allege the Complainant's request was related to an unfair labor practice complaint filed with PERC. Counsel argues that an examination of the record that was disclosed reveals that it contained no substantive material, the denial of which would provide an advantage for the Custodian over the Complainant in the PERC matter. As such, Counsel argues that there is no evidence to support the claim that it was the Custodian's intention to avoid compliance with the request.

The Custodian's Counsel also contends that the Complainant's request for attorney's fees should be denied because there is no evidence to support the Complainant's assertion that the complaint served as a catalyst that caused the Custodian to change her position voluntarily and provide the requested document, thereby entitling the Complainant to prevailing party attorney's fees. Counsel also argues that if fees are awarded, they should be limited solely to the costs associated with the filing of the complaint because the rebuttal brief was of no consequence to the relief the Complainant initially sought and subsequently received on November 11, 2014, which was well before the rebuttal brief was filed.

⁷ The Custodian avers in her April 8, 2015, certification (paragraphs 7 and 8) the following: "Upon my return to my office on November 10, 2014, it was my intention to respond to the OPRA requests, but access to my incoming/outgoing email account was unavailable due to technical difficulties with the email system. By the end of the day on November 10, 2014, I was able to access and send the documents responsive to one of Mr. Verry's email requests because the responsive documents were stored on my email system, but was not able to access the responsive document to the second email request, which was stored on the email system under the control of the Administrative Assistant to the Supervisor of Operations."

On May 29, 2015, the Complainant's Counsel submitted another letter brief in reply to the Custodian's May 5, 2015, submission. Counsel argues that, "[Custodian's] Certification provides ample credible evidence to collaborate [Complainant's] position that she *consciously* chose to ignore [OPRA] while she was on vacation. Furthermore, contrary to [Custodian's] position, [Complainant] provided sufficient evidence (confirmed by [Custodian's] Certification) that [Custodian] did not release the responsive records within the seventh (7th) business day and, therefore confirms [Custodian] 'ignored the law by not responding to [Mr. Verry's] OPRA requests in a timely fashion' (Francisco Brief at 1)" (Emphasis in original).

Counsel points out that the Custodian admitted she reviewed the Complainant's two OPRA requests while she was on vacation and that she knew the requests required a response by November 10, 2014. Counsel then states that the Custodian was aware that she would be providing the document after the seven business day deadline. Counsel argues that the Complainant contends that the Custodian became aware of this only after he filed the complaint. Counsel further argues that the Custodian did not seek an extension of time because she had no intention of releasing the record; therefore seeking an extension of time would have been purposeless.

Counsel argues that, "**but not for** [the complaint], [the Custodian] never would have released the responsive records..." (Emphasis in original). Counsel also states that the Complainant made numerous unrelated OPRA requests from August 2014 to October 2014, and that during that period another staff member responded to several of the requests.⁸ Counsel makes other arguments that had previously been raised, either in the Complaint or in his December 3, 2014, submission.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁹ Thus, a custodian's failure to respond in writing to a complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

⁸ Although the other requests referenced by Counsel are not relevant to the instant complaint, Counsel is attempting to make the argument that a designee was readily available to respond to the Complainant's October 30, 2014, requests while the Custodian was on vacation. However, Counsel offers no proof that the designee was working and available to respond to the Complainant's requests on the dates relevant to this complaint.

⁹ A custodian's written response, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

Here, the Custodian certified that she reviewed the Complainant's e-mailed OPRA request while she was away from the office and realized that she would be back from vacation in time to respond to the request within the statutorily-mandated period. The Custodian certified that upon her return to the office on the seventh (7th) business day following receipt of the request, she learned that access to her email account was unavailable due to technical difficulties with the system. The Custodian certified that because she needed information from a co-worker's computer files in order to respond to the request, she responded on the following day. The evidence of record confirms that the Custodian did respond to the Complainant's request on the following day, November 11, 2014, which was the eighth (8th) business day following receipt of said request.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

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.

As a threshold issue, the GRC will address the Custodian's response to the OPRA request because there is some ambiguity surrounding it. The complaint alleges that the request was submitted to the Custodian on October 30, 2014, and as of the date of the complaint the Custodian had not responded. Subsequently, the Complainant, through Counsel, seems to contend that the Custodian responded to the request on October 30, 2014, via an out-of-office auto reply, which Counsel asserts was an insufficient response.¹⁰ The GRC concludes that the out-of-office auto reply was used as an office tool to notify e-mail senders of the recipient's status and did not constitute a response to an OPRA request. The evidence of record reveals that the OPRA response was made via e-mail on November 11, 2014, when the responsive record was disclosed to the Complainant.

In this matter, the Custodian certified that she reviewed the Complainant's e-mailed OPRA request while she was away from the office and realized she would be back from vacation in time to respond to the request within the statutorily-mandated period. The evidence of record reveals that when the Custodian returned to her office on the seventh (7th) business day following receipt of the request, she found that there was a technical issue hindering access to the Board's e-mail system. The Custodian was therefore unable to access the responsive document, which

¹⁰ See the December 3, 2014, letter brief, submitted by the Complainant's Counsel, in rebuttal to the SOI (at 8), wherein he asks the Council to hold that "...use of an automated out-of-office type e-mail message is an *insufficient* response to an OPRA request..." (Emphasis in original).

was stored on the email system that was under control of the Administrative Assistant to the Supervisor of Operations. The Custodian certified that because she could not access the record, she waited until the following day to respond to the request. The evidence of record reveals that the Custodian did respond to the request on November 11, 2014, by disclosing the record responsive to the request.

The Complainant contends that the Custodian, upon realizing that she could not access the responsive record, should have requested an extension of time. In that regard, the Complainant is correct. Once the Custodian realized that she would not be able to respond to the Complainant in a timely manner, she should have notified the Complainant regarding the nature of the problem and requested an extension of time to respond. The Council, citing N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), has repeatedly held that a custodian must respond in writing to a complainant's request, either granting access, denying access, seeking clarification, or *requesting an extension of time* within the statutorily mandated seven (7) business day period (Emphasis added).

In this matter, the Custodian has failed to act in a conscientious manner as the custodian of records. The evidence of record reveals that she went on vacation when she knew, or should have known, that OPRA requests would be submitted to her office. Notwithstanding this knowledge, the evidence of record reveals that she neglected to appoint anyone to act in her stead while she was out of the office. Instead, she assumed that she would be able to respond to OPRA requests because she would be back to the office within the statutorily-mandated response period. Such an assumption must necessarily contemplate that in some instances the Custodian might not respond to a request until the last permissible business day under OPRA. OPRA provides that a custodian shall grant or deny 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) (Emphasis added). Best practices dictate that a custodian consider appointing a designee to respond to any requests *as soon as possible* whenever the custodian is unavailable to do so personally. Here, although the Custodian assumed she would be back from vacation in time to respond to any OPRA requests by the seventh business day, she failed to anticipate potential impediments outside of her control. In this case, the Custodian's lack of contingency planning resulted in an unlawful denial of access.

Accordingly, the Custodian was less than conscientious in the performance of her duties under OPRA and failed to meet her burden of proving that the denial of access was lawful pursuant to N.J.S.A. 47:1A-6. However, the Council declines to order disclosure of the responsive record because the Custodian provided same to the Complainant on November 11, 2014.

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 (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Here, although the Custodian failed to respond in a timely manner to the Complainant’s OPRA request, she did respond on the eighth (8th) business day following receipt of the request by disclosing the record responsive to the request. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney’s Fees

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a “prevailing party” if he 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 analyzing this issue, the Council turns at the outset to the first prong of the Mason test to determine if the necessary factual causal nexus exists between the complaint and the relief ultimately achieved, *i.e.*, whether the Complainant achieved the desired result because the complaint brought about a change in the Custodian's conduct.

The Complainant's Counsel argued that the filing of the complaint was the catalyst for disclosure of the records. Counsel asserted that the Custodian failed to contact the Complainant when she learned on the seventh business day following receipt of the request that the Board's website was not operating; however, after the complaint was filed on the following day, the Custodian was prompted to search for and disclose the requested records. Counsel concluded therefore that, but not for the complaint, the Custodian never would have released the responsive records.

Conversely, the Custodian's Counsel argued that the Complainant's request for attorney's fees should be denied because there is no evidence to support the Complainant's assertion that the complaint served as a catalyst that caused the Custodian to change her position voluntarily and provide the requested document.

The evidence of record reveals that the Complainant filed two OPRA requests on October 30, 2014. The Custodian certified that she remotely reviewed the requests and intended to respond to the requests on November 10, 2014, when she returned to her office; November 10, 2014, was the seventh (7th) business day following receipt of the requests. The evidence of record further reveals that when the Custodian returned to her office on the seventh (7th) business day following receipt of the request, she found that there was a technical issue hindering access to the Board's e-mail system. The Custodian certified that by the end of the day she was able to access and send the records responsive to one of the two requests because the responsive records were stored on her e-mail system. It is undisputed between the parties that the Custodian did indeed respond to one of the two requests on November 10, 2014. The Custodian certified that she could not respond to the other request on November 10, 2014, which was the request that formed the basis of this complaint, because she was unable to access the responsive record, which was stored on the e-mail system under control of the Administrative Assistant to the Supervisor of Operations. For this reason, the Custodian certified that she responded to the request on the following day, and the evidence of record revealed that the Custodian did, in fact, respond to the request on November 11, 2014.

There is nothing in the evidence of record to indicate that the Custodian's actions suggested she never would have released the responsive records but for the filing of a complaint, as asserted by the Complainant's Counsel. To the contrary, the evidence of record revealed that the Custodian had already started the process of responding to the Complainant's requests on November 10, 2014. There was nothing in the evidence to indicate that she would not continue the process the following day, much less that she "never would have released the responsive records" but for the filing of the complaint. Accordingly, the Council is not convinced that the Complainant demonstrated that there was a factual causal nexus between the filing of the complaint and the relief ultimately achieved.

Accordingly, the Complainant has not achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. 423. The Council finds that a factual causal nexus does not exist between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Custodian had already commenced the process of responding to the Complainant’s requests on November 10, 2014, which was the seventh (7th) business day following receipt of the requests, and there was nothing in the evidence of record to indicate that she would not continue the process unless prompted to do so by the filing of a complaint. Additionally, there is no evidence in the record to contradict the Custodian’s certification that she intended to complete the process of responding to the Complainant’s requests on November 10, 2014. 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. 423, and Mason, 196 N.J. 51.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request, pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian was less than conscientious in the performance of her duties under OPRA and failed to meet her burden of proving that the denial of access was lawful pursuant to N.J.S.A. 47:1A-6. However, the Council declines to order disclosure of the responsive record because the Custodian provided same to the Complainant on November 11, 2014.
3. Although the Custodian failed to respond in a timely manner to the Complainant’s OPRA request, she did respond on the eighth (8th) business day following receipt of the request by disclosing the record responsive to the request. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. The Complainant has not achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). The Council finds that a factual causal nexus does not exist 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 had already commenced the process of responding to the Complainant's requests on November 10, 2014, which was the seventh (7th) business day following receipt of the requests, and there was nothing in the evidence of record to indicate that she would not continue the process unless prompted to do so by the filing of a complaint. Additionally, there is no evidence in the record to contradict the Custodian's certification that she intended to complete the process of responding to the Complainant's requests on November 10, 2014. 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. 423, and Mason, 196 N.J. 51.

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