



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS

101 SOUTH BROAD STREET

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

December 19, 2017 Government Records Council Meeting

Talbot B. Kramer Jr., Esq.

(o/b/o William Juliana)

Complainant

v.

Township of Washington (Gloucester)

Custodian of Record

Complaint No. 2016-107 and 2016-108

At the December 19, 2017 public meeting, the Government Records Council (“Council”) considered the December 12, 2017 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 requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA requests, 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 them 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). However, the GRC declines to order disclosure of records because the Complainant received them on October 20, 2015.
2. Although the Custodian failed to respond timely to the Complainant’s two (2) OPRA requests, she ultimately provided the responsive records. 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.
3. The Complainant has not achieved the desired result because the complaints 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 the Denial of Access Complaints and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian’s technical violation did not result in a change in her conduct. 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. 432, and Mason, 196 N.J. 51; Paff v. Bergen Cnty. & Capt. William



Edgar, 2017 N.J. Super. Unpub. LEXIS 627, 22-24 (App. Div. 2017); Carter v. Franklin Fire Dist. No. 2 (Somerset), GRC Complaint No. 2012-101 (April 2013).

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 19th Day of December, 2017

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: December 21, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 19, 2017 Council Meeting**

**Talbot B. Kramer Jr., Esq.¹
(On Behalf of William Juliana)
Complainant**

GRC Complaint No. 2016-107 & 2016-108²

v.

**Township of Washington (Gloucester)³
Custodial Agency**

Records Relevant to Complaint:

OPRA request No. 1: Electronic copies via e-mail of “all documents” generated from January 1, 2010, to present related to 55 Sherry Road:

1. Plans, applications, and submissions regarding the building of a large shed/garage in backyard.
2. All documents relating to approvals/inspections for electrical wiring and plumbing.
3. All documents relating to permits, plans, and approvals for concrete driveway, walkways, and brick wall construction.
4. Documentation of construction requirements for “such project.”
5. All construction plans for any work on the property.
6. All Township of Washington (“Township”) approvals for any work on the property.
7. All records of Township inspections for building code approvals or violations on the property.
8. Property survey inspection or other diagrams relating to the property.

OPRA request No. 2: Electronic copies via e-mail of “all documents” generated from January 1, 2010, to present related to 59 Sherry Road:

1. Permits and all required paperwork for replacement/construction of the front porch and concrete work on the property.
2. All documents relating to construction requirements for any project listed above.
3. All construction plans and approvals for construction or other work on or at the property.
4. All reports of inspections.
5. Any property surveys, diagrams, or other documents showing the structures and other features.

¹ As noted in the caption, the Complainant represents Mr. Juliana.

² The GRC has consolidated these complaints for adjudication due to the commonality of the parties and issues herein.

³ Represented by Stuart A. Platt, Esq. (Washington Township, NJ). Previously represented by Joe Alacqua, Esq. (Washington Township, NJ).

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Custodian of Record: Jill S. McCrea
Request Received by Custodian: September 29, 2015
Response Made by Custodian: Unknown
GRC Complaint Received: April 18, 2016

Background⁴

Request and Response:

On September 23, 2015, the Complainant submitted two (2) Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records. On an unknown date, an employee in the Custodian’s office sent responsive records for both OPRA requests to the Complainant via U.S. mail. On October 20, 2015, the Complainant received responsive records via U.S. mail.

Denial of Access Complaint:

On April 18, 2016, the Complainant filed two (2) Denial of Access Complaints with the Government Records Council (“GRC”). The Complainant asserted that the Custodian’s failure to disclose readily available records resulted in a violation of OPRA. The Complainant noted that the Custodian did not provide any explanation for the delay in disclosure.

Statement of Information:

On June 2, 2016, the Custodian filed a Statement of Information (“SOI”) for both complaints. The Custodian certified that she received both OPRA requests on September 29, 2015. The Custodian certified that her search included forwarding the OPRA requests to the Zoning Officer. The Custodian certified that prior to responding, an employee in her office made numerous attempts to contact the Complainant. The Custodian affirmed that the employee spoke with someone in the Complainant’s office, who advised to mail the responsive records. The Custodian certified that the employee sent the responsive records for both OPRA requests to the Complainant on an unknown date but that the employee did not date the Township’s OPRA log sheet.

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

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.
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N.J.S.A. 47:1A-5(g).⁵ 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).

In these complaints, the Complainant contended that the Custodian failed to respond timely to the subject OPRA requests. Specifically, the Complainant stated that the Township received both OPRA requests on September 29, 2015, but he did not receive a response until October 20, 2017. In the SOIs, the Custodian certified that she received both OPRA requests on September 29, 2015. However, the Custodian was not able to certify to the date a response was sent to the Complainant. Thus, the evidence of record indicates that a timeliness violation occurred.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA requests, 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 them pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. However, the GRC declines to order disclosure of records because the Complainant received them on October 20, 2015.

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,

⁵ 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.

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with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian failed to respond timely to the Complainant's two (2) OPRA requests, she ultimately provided the responsive records. 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 (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. Further, the Supreme Court expressed 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.

More recently, in Paff v. Bergen Cnty. & Capt. William Edgar, 2017 N.J. Super. Unpub. LEXIS 627, 22-24 (App. Div. 2017), the Court found that defendants timely disclosed records with appropriate redactions but failed to provide a specific lawful basis for the redactions. The Court was thus tasked with determining whether plaintiff was a prevailing party based on a technical violation of OPRA. The Court held that it could “locate no authority . . . imposing attorney's fees” because of the technical violation. The Court therefore held that the plaintiff was not entitled to attorney's fees. *See also* Carter v. Franklin Fire Dist. No. 2 (Somerset), GRC Complaint No. 2012-101 (April 2013) (holding that the GRC “did not order disclosure of any records and the Custodian's technical violation of OPRA did not represent a change in the Custodian's conduct.”).

The Complainant, an attorney representing a client, filed the instant complaints on April 18, 2016, contending that the Custodian failed to respond timely the two (2) OPRA requests. Therein, the Complainant argued that he believed the Custodian's untimely responses and disclosure of records violated OPRA. In the SOI, the Custodian's certified statements supported

that a timeliness violation occurred. The GRC therefore finds that the Custodian violated OPRA. However, the GRC is not ordering any further action by the Custodian. Further, technical violations of OPRA do not represent a change warranting an award of prevailing party attorney's fees. Paff, 2017 N.J. Super. Unpub. at 22-24; Carter, GRC 2012-101.

Therefore, the Complainant has not achieved the desired result because the complaints 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 the Denial of Access Complaints and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Custodian's technical violation did not result in a change in her conduct. Therefore, the Complainant is not a prevailing party and is not entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51; Paff, 2017 N.J. Super. Unpub. at 22-24; Carter, GRC 2012-101.

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 requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA requests, 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 them 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). However, the GRC declines to order disclosure of records because the Complainant received them on October 20, 2015.
2. Although the Custodian failed to respond timely to the Complainant's two (2) OPRA requests, she ultimately provided the responsive records. 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.
3. The Complainant has not achieved the desired result because the complaints 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 the Denial of Access Complaints and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian's technical violation did not result in a change in her conduct. 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. 432, and Mason, 196 N.J. 51; Paff v. Bergen Cnty. & Capt. William Edgar, 2017 N.J. Super. Unpub. LEXIS 627, 22-24 (App. Div. 2017); Carter v. Franklin Fire Dist. No. 2 (Somerset), GRC Complaint No. 2012-101 (April 2013).

Prepared By: Frank F. Caruso
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December 12, 2017