



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

November 13, 2018 Government Records Council Meeting

William R. Juliana
Complainant

Complaint No. 2016-114

v.

Township of Washington (Gloucester)
Custodian of Record

At the November 13, 2018 public meeting, the Government Records Council (“Council”) considered the November 7, 2018 Supplemental 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 the Council should dismiss the complaint because the parties have agreed to dismiss the matter, thereby negating the need to address the prevailing party fees in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

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 13th Day of November, 2018

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: November 15, 2018



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Council Staff
November 13, 2018 Council Meeting**

**William R. Juliana¹
Complainant**

GRC Complaint No. 2016-114

v.

**Township of Washington (Gloucester)²
Custodial Agency**

Records Relevant to Complaint:

“All requests for records in this OPRA request relate to 55 Sherry Road, Turnerville [sic], NJ from 2005 to present time.

1. All records relating to permits applied for by the owner or owners of 55 Sherry Road or anyone acting on their behalf for any and all concrete driveway, walkway, building additions or enhancements.
2. All records relating to permits granted to the owner or owners of 55 Sherry Road or anyone acting on their behalf for any and all concrete driveway, walkway, building additions or enhancements.
3. All records relating to permits applied for by the owner or owners of 55 Sherry Road or anyone acting on their behalf for any and all brickwork of any kind relating to fencing, walls, walkways, driveways or other uses.
4. All records relating to permits granted to the owner or owners of 55 Sherry Road or anyone acting on their behalf for any and all brickwork of any kind relating to fencing, walls, walkways, driveways or other uses.
5. Copies of all ordinances, building code sections or other rules and regulations enforced by the Township of Washington relating to concrete driveway, walkway, building additions or other concrete enhancements.
6. Copies of all ordinances, building code sections or other rules and regulations enforced by the Township of Washington relating to brickwork of any kind relating to fencing, walls, walkways, driveways or other uses.”

Custodian of Record: Jill S. McCrea

Requests Received by Custodian: February 29, 2016

Responses Made by Custodian: N/A

GRC Complaints Received: April 18, 2016

¹ Represented by Tal B. Kramer, Jr., Esq., of Freidel & Kramer, PC (Turnersville, NJ).

² Represented by Joe Alacqua, Esq. (Township of Washington, NJ).

Background

September 25, 2018 Council Meeting:

At its September 25, 2018 public meeting, the Council considered the Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt said findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with the Council's July 31, 2018 Interim Order, because he responded within the extended time frame disclosing the records and simultaneously provided certification of compliance to the Council Staff.
2. The original Custodian unlawfully denied access to the requested records, since she had certified that no response was provided prior to the Complainant filing his Denial of Access Complaint. However, the current Custodian ultimately provided the requested records to the Complainant in accordance with the Council's July 31, 2018 Interim Order. Additionally, the evidence of record does not indicate that the former Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the actions of the former Custodian 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. Pursuant to the Council's July 31, 2018 Interim Order, the Complainant has 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, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant filing 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 current Custodian disclosed responsive records to the Complainant in accordance with the Council's Order whereas no evidence of such records were provided at the time of the request or when the former Custodian submitted her Statement of Information. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is 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. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Procedural History:

On September 27, 2018 the Council distributed its Interim Order to all parties. On October 22, 2018, the Complainant's Counsel provided the Council a Stipulation of Dismissal signed by both parties.

Analysis

Prevailing Party Attorney's Fees

At its September 25, 2018 meeting, the Council determined that the Complainant was a prevailing party entitled to an award of reasonable attorney's fees. The Council thus ordered that the "parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days." The Council further ordered that the parties notify of any settlement prior to the expiration of the twenty (20) business day time frame. Finally, the Council ordered that, should the parties not reach an agreement, the Complainant's Counsel would be required to "submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13."

On September 27, 2018, the Council distributed its Interim Order to all parties; thus, the parties' response was due by close of business on October 26, 2018. On October 22, 2018, the Council received a written Stipulation of Dismissal signed by both parties.

Accordingly, the Council should dismiss the complaint because the parties have agreed to dismiss the matter, thereby negating the need to address the prevailing party fees in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Conclusions and Recommendations

The Council Staff respectfully recommends that the Council should dismiss the complaint because the parties have agreed to dismiss the matter, thereby negating the need to address the prevailing party fees in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Prepared By: Samuel A. Rosado
Staff Attorney

November 7, 2018



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

September 25, 2018 Government Records Council Meeting

William J. Juliana
Complainant

Complaint No. 2016-114

v.

Township of Washington (Gloucester)
Custodian of Record

At the September 25, 2018 public meeting, the Government Records Council (“Council”) considered the September 18, 2018 Supplemental Findings and Recommendations of the Council Staff 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 complied with the Council’s July 31, 2018 Interim Order, because he responded within the extended time frame disclosing the records and simultaneously provided certification of compliance to the Council Staff.
2. The original Custodian unlawfully denied access to the requested records, since she had certified that no response was provided prior to the Complainant filing his Denial of Access Complaint. However, the current Custodian ultimately provided the requested records to the Complainant in accordance with the Council’s July 31, 2018 Interim Order. Additionally, the evidence of record does not indicate that the original Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the actions of the original Custodian 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. Pursuant to the Council’s July 31, 2018 Interim Order, the Complainant has 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, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant filing 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 current Custodian disclosed responsive records to the Complainant in accordance with the Council’s Order whereas no evidence of such records were provided at the time of the request or when the original Custodian submitted her Statement of Information. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is 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. **Based on this determination, the parties**



shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

Interim Order Rendered by the
Government Records Council
On The 25th Day of September, 2018

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: September 27, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
September 25, 2018 Council Meeting**

**William R. Juliana¹
Complainant**

GRC Complaint No. 2016-114

v.

**Township of Washington (Gloucester)²
Custodial Agency**

Records Relevant to Complaint:

“All requests for records in this OPRA request relate to 55 Sherry Road, Turnerville [sic], NJ from 2005 to present time.

1. All records relating to permits applied for by the owner or owners of 55 Sherry Road or anyone acting on their behalf for any and all concrete driveway, walkway, building additions or enhancements.
2. All records relating to permits granted to the owner or owners of 55 Sherry Road or anyone acting on their behalf for any and all concrete driveway, walkway, building additions or enhancements.
3. All records relating to permits applied for by the owner or owners of 55 Sherry Road or anyone acting on their behalf for any and all brickwork of any kind relating to fencing, walls, walkways, driveways or other uses.
4. All records relating to permits granted to the owner or owners of 55 Sherry Road or anyone acting on their behalf for any and all brickwork of any kind relating to fencing, walls, walkways, driveways or other uses.
5. Copies of all ordinances, building code sections or other rules and regulations enforced by the Township of Washington relating to concrete driveway, walkway, building additions or other concrete enhancements.
6. Copies of all ordinances, building code sections or other rules and regulations enforced by the Township of Washington relating to brickwork of any kind relating to fencing, walls, walkways, driveways or other uses.

Custodian of Record: Leo F. Selb, Jr.³

Request Received by Custodian: February 29, 2016

Response Made by Custodian: N/A

GRC Complaint Received: April 18, 2016

¹ Represented by Talbot B. Kramer, Jr., Esq., of Freidel & Kramer, PC (Turnersville, NJ).

² Represented by Joe Alacqua, Esq. (Washington, NJ).

³ The Custodian of Record at the time of the request was Jill McCrea.

Background

July 31, 2018 Council Meeting:

At its July 31, 2018 public meeting, the Council considered the July 24, 2018 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Since there is no evidence identifying the Township employee who logged the receipt of the Complainant's OPRA request, the Council is unable to determine who violated N.J.S.A. 47:1A-5(h) and N.J.S.A. 47:1A-5(i). See Kovacs v. Union Cnty. Dep't of Corr., GRC Complaint No. 2014-353 (September 2015).
2. The Custodian may have unlawfully denied access to records responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6. The Custodian shall provide evidence to support that she provided responsive records to the Complainant. Additionally, the Custodian shall address each request item and identify which of those records provided correlate to which OPRA request item. Finally, if records for a particular item do not exist, the Custodian must certify to this fact.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Council Staff.⁵**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On August 2, 2018, the Council distributed its Interim Order to all parties. That same day, the Custodian requested an extension of time to respond. The Government Records Council ("GRC") responded and granted the extension request to until August 23, 2018. Thereafter, on August 22, 2018, the Custodian sought an additional extension to until August 28, 2018, which

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁵ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant, but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

the GRC granted. On August 24, 2018, the Custodian responded to the Council's Interim Order certifying his compliance with the Council's Interim Order and providing the Complainant with the requested records.

Analysis

Compliance

At its July 31, 2018 meeting, the Council ordered the Custodian to provide responsive records to the Complainant and to submit certified confirmation of compliance to the Council Staff. On August 2, 2018, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on August 9, 2018.

On August 2, 2018, the Custodian sought an extension of time to respond to the Council's Interim Order. The GRC granted the extension to until August 23, 2018. On August 22, 2018, the Custodian sought an additional extension of time to until August 28, 2018, which was granted. On August 24, 2018, the Custodian provided the Council Staff with evidence demonstrating he provided the Complainant with the requested records, as well as a certified confirmation of compliance. The Complainant included a copy of a CD containing the responsive records, an index of redactions, and certification of compliance.

Therefore, the Custodian complied with the Council's July 31, 2018 Interim Order, because he responded within the extended time frame disclosing the records and simultaneously provided certification of compliance to the Council Staff.

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)).

The original Custodian unlawfully denied access to the requested records, since she had certified that no response was provided prior to the Complainant filing his Denial of Access Complaint. However, the current Custodian ultimately provided the requested records to the Complainant in accordance with the Council's July 31, 2018 Interim Order. Additionally, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the actions of the original Custodian 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.” Mason, 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.]

The Complainant filed the instant complaint to request that the GRC order the Custodian to provide a complete response to his OPRA request and to disclose responsive records. The original Custodian argued that there was no record of response provided to the Complainant prior to the complaint filing. In its July 31, 2018 Interim Order, the Council ordered the current Custodian to conduct a more thorough search for responsive records. Thereafter, the Custodian disclosed additional responsive records to the Complainant, with an accompanying certification. Thus, the evidence of record supports that the Complainant is a prevailing party entitled to an award of attorney's fees.

Therefore, pursuant to the Council's July 31, 2018 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct.” Teeters, 387 N.J. Super. at 432. Additionally, a factual causal nexus

exists between the Complainant filing Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 51. Specifically, the current Custodian disclosed responsive records to the Complainant in accordance with the Council's Order whereas no evidence of such records were provided at the time of the request or when the original Custodian submitted her Statement of Information. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is 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. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian complied with the Council's July 31, 2018 Interim Order, because he responded within the extended time frame disclosing the records and simultaneously provided certification of compliance to the Council Staff.
2. The original Custodian unlawfully denied access to the requested records, since she had certified that no response was provided prior to the Complainant filing his Denial of Access Complaint. However, the current Custodian ultimately provided the requested records to the Complainant in accordance with the Council's July 31, 2018 Interim Order. Additionally, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the actions of the original Custodian 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. Pursuant to the Council's July 31, 2018 Interim Order, the Complainant has 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, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant filing 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 current Custodian disclosed responsive records to the Complainant in accordance with the Council's Order whereas no evidence of such records were provided at the time of the request or when the original Custodian submitted her Statement of Information. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is 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. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree**

on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

Prepared By: Samuel A. Rosado
Staff Attorney

September 18, 2018



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

July 31, 2018 Government Records Council Meeting

William R. Juliana
Complainant

Complaint No. 2016-114

v.

Township of Washington (Washington)
Custodian of Record

At the July 31, 2018 public meeting, the Government Records Council ("Council") considered the July 24, 2018 Findings and Recommendations of the Council Staff 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. Since there is no evidence identifying the Township employee who logged the receipt of the Complainant's OPRA request, the Council is unable to determine who violated N.J.S.A. 47:1A-5(h) and N.J.S.A. 47:1A-5(i). See Kovacs v. Union Cnty. Dep't of Corr., GRC Complaint No. 2014-353 (September 2015).
2. The Custodian may have unlawfully denied access to records responsive to the Complainant's OPRA request. N.J.S.A. 47:12A-6. The Custodian shall provide evidence to support that she provided responsive records to the Complainant. Additionally, the Custodian shall address each request item and identify which of those records provided correlate to which OPRA request item. Finally, if records for a particular item do not exist, the Custodian must certify to this fact.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,¹ to the Council Staff.²**

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant, but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 31st Day of July, 2018

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: August 2, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
July 31, 2018 Council Meeting**

**William R. Juliana¹
Complainant**

GRC Complaint No. 2016-114

v.

**Township of Washington (Gloucester)²
Custodial Agency**

Records Relevant to Complaint:

“All requests for records in this OPRA request relate to 55 Sherry Road, Turnerville [sic], NJ from 2005 to present time.

1. All records relating to permits applied for by the owner or owners of 55 Sherry Road or anyone acting on their behalf for any and all concrete driveway, walkway, building additions or enhancements.
2. All records relating to permits granted to the owner or owners of 55 Sherry Road or anyone acting on their behalf for any and all concrete driveway, walkway, building additions or enhancements.
3. All records relating to permits applied for by the owner or owners of 55 Sherry Road or anyone acting on their behalf for any and all brickwork of any kind relating to fencing, walls, walkways, driveways or other uses.
4. All records relating to permits granted to the owner or owners of 55 Sherry Road or anyone acting on their behalf for any and all brickwork of any kind relating to fencing, walls, walkways, driveways or other uses.
5. Copies of all ordinances, building code sections or other rules and regulations enforced by the Township of Washington relating to concrete driveway, walkway, building additions or other concrete enhancements.
6. Copies of all ordinances, building code sections or other rules and regulations enforced by the Township of Washington relating to brickwork of any kind relating to fencing, walls, walkways, driveways or other uses.

Custodian of Record: Jill McCrea³

Request Received by Custodian: February 29, 2016

Response Made by Custodian: N/A

GRC Complaint Received: April 18, 2016

¹ Represented by Talbot B. Kramer, Jr., Esq., of Freidel & Kramer, PC (Turnersville, NJ).

² Represented by Joe Alacqua, Esq. (Washington, NJ).

³ The current Custodian of Record is Leo F. Selb, Jr.

Background⁴

Request and Response:

On February 27, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. There is no evidence in the record indicating that the Custodian responded to the OPRA request prior to the complaint filing.

Denial of Access Complaint:

On April 18, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he received no response from the Custodian since filing his OPRA request. The Complainant attached a copy of a certified mail receipt, which contained a signature from someone at the Township of Washington (“Township”). The Complainant also included a copy of a tracking number result from USPS.com, indicating that the request was scanned as delivered on February 29, 2016. The Complainant contended that the Custodian’s lack of response is evidence of negligence, a breach of duty, and malicious intent. The Complainant asserted that the records should be readily available.

Statement of Information:

On June 2, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that while, the request was logged as received, it did not contain a “department routing description.” The Custodian certified that staff were unable to locate the request and the package it was mailed in within the Custodian’s office.

The Custodian then certified that the Township’s Zoning secretary produced a file containing the request and responsive records. The Custodian certified that the responsive documents were sent to the requestor after they were recovered.

Analysis

Failure to Forward/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).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

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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

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.

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 dated October 31, 2007).

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) (emphasis added).

In the current matter, the Complainant provided evidence indicating that his OPRA request was delivered to the Township on February 29, 2016 but received no response from the Custodian after twenty-five (25) days. The Custodian certified that the Complainant’s request was logged as received, but did not contain routing information and was unable to locate the request in her office.

However, the evidence in the record does not identify the Township employee who initially logged the Complainant’s OPRA request as received. In Kovacs v. Union Cnty. Dep’t of Corr., GRC Complaint No. 2014-353 (September 2015), the custodian was unable to identify the employee who responded to the complainant’s OPRA request. Therefore, the Council was unable to identify the individual who violated N.J.S.A. 47:1A-5(h).

Therefore, since there is no evidence identifying the Township employee who logged the receipt of the Complainant’s OPRA request, the Council is unable to determine who violated N.J.S.A. 47:1A-5(h) and N.J.S.A. 47:1A-5(i). See Kovacs, GRC 2014-353.

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.

In the instant matter, the Custodian certified that she could not locate the Complainant’s OPRA request in her office. However, the Custodian stated that the Township’s Zoning secretary produced a file containing the Complainant’s request, as well as responsive documents. The Custodian further stated that the responsive records were sent to the requestor. However, the Custodian does not indicate at what date she sent the records, the number of records provided, and whether the records were responsive to some or all of the individual items in the Complainant’s request.

Accordingly, the Custodian may have unlawfully denied access to records responsive to the Complainant’s OPRA request. N.J.S.A. 47:12A-6. The Custodian shall provide evidence to support that she provided responsive records to the Complainant. Additionally, the Custodian shall address each request item and identify which of those records provided correlate to which OPRA request item. Finally, if records for a particular item do not exist, the Custodian must certify to this fact.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. Since there is no evidence identifying the Township employee who logged the receipt of the Complainant's OPRA request, the Council is unable to determine who violated N.J.S.A. 47:1A-5(h) and N.J.S.A. 47:1A-5(i). See Kovacs v. Union Cnty. Dep't of Corr., GRC Complaint No. 2014-353 (September 2015).
2. The Custodian may have unlawfully denied access to records responsive to the Complainant's OPRA request. N.J.S.A. 47:12A-6. The Custodian shall provide evidence to support that she provided responsive records to the Complainant. Additionally, the Custodian shall address each request item and identify which of those records provided correlate to which OPRA request item. Finally, if records for a particular item do not exist, the Custodian must certify to this fact.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁶ to the Council Staff.⁷**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁷ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant, but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Prepared By: Samuel A. Rosado
Staff Attorney

July 24, 2018