



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**May 22, 2018 Government Records Council Meeting**

Michael I. Inzelbuch, Esq.  
(o/b/o T.V.)  
Complainant

Complaint No. 2016-243

v.  
Marlboro Township  
Public School District (Monmouth)  
Custodian of Record

At the May 22, 2018 public meeting, the Government Records Council (“Council”) considered the May 15, 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:

1. The Custodian has borne her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, there was no “deemed” denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).
2. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, no violation of OPRA occurred and no further action is recommended. 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. at 432, and Mason, 196 N.J. at 51.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.



Final Decision Rendered by the  
Government Records Council  
On The 22<sup>nd</sup> Day of May, 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: May 25, 2018**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff  
May 22, 2018 Council Meeting**

**Michael I. Inzelbuch, Esq.<sup>1</sup>  
(On Behalf of T.V.)  
Complainant**

**GRC Complaint No. 2016-243**

**v.**

**Marlboro Township<sup>2</sup>  
Public School District (Monmouth)  
Custodial Agency**

**Records Relevant to Complaint:** Hard copies via pickup of:

1. Billing statements submitted by Robin Ballard, Esq. from Scheck, Price since she began serving as special education counsel for the Marlboro Board of Education (“MBOE”) for the matter of D.C. and C.C. (O.B.O. D.C.) v. Marlboro Bd. of Educ., Docket No. EDS-14086-15. Include a job description for the MBOE attorney/special education counsel and any entries or requests made by personnel to speak with Ms. Ballard.
2. Contracts for Director of Special Education Robert Klein and the Custodian.
3. Contracts, MBOE approvals, and payments (including “backup information”) for the following individuals from 2014 to present:
  - a. Dr. Rochelle Borsky
  - b. Dr. Alison Smoller
  - c. Amanda Yonks (for home instruction)
  - d. Leah Serao (for home instruction)
  - e. Robin Chatsky (for home instruction)
4. MBOE policy, description, or guidelines regarding the following positions:
  - a. Case Manager
  - b. Director of Special Education
  - c. Home Instructor
  - d. Business Administrator
  - e. Child Study Team
  - f. Individualized Education Program (“IEP”) Team
5. Board policy, description, guidelines, or definitions regarding:
  - a. The provision of home instructors
  - b. Completion of records regarding Nurse visits
  - c. Completion of “Visit Records” when a student visits the Nurse
  - d. The “provision of Section 504 Individualized Accommodation Plan(s)”

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<sup>1</sup> As noted above, the Complainant represents T.V.

<sup>2</sup> Represented by James Eric Andrews, Esq., of Schenk, Price, Smith, & King, LLP (Florham Park, NJ).  
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6. Any and all e-mails that mention the word “Carney” from September 2014 to present (authorization from D.C. to obtain information included).
7. Any and all corrective action plans for special education services from 2014 to present.
8. Any and all communications or documents regarding the MBOE’s placement of children in schools not accredited by the New Jersey Department of Education from 2014 to present.
9. Any and all corrective action plans for directives or personal improvement plans regarding the performance and job responsibilities of Mr. Klein from 2014 to present.
10. Any and all communications with Freehold Regional School District regarding the placement or settlement of special education matters wherein children are placed or reimbursed for out-of-district placements.
11. Any and all communications between the Custodian and D.C. from September 2014 to present.
12. Any and all communications and documentation regarding the Custodian’s attendance at an IEP meeting for D.C. on March 7, 2014.

**Custodian of Record:** Cindy Barr-Rague

**Request Received by Custodian:** July 25, 2016

**Response Made by Custodian:** August 3, 2016

**GRC Complaint Received:** August 31, 2016

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

#### **Request and Response:**

On July 21, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 3, 2016, the seventh (7<sup>th</sup>) business day after receipt of the OPRA request, the Custodian responded in writing as follows:

1. The Custodian disclosed the responsive billing statements without redactions due to D.C.’s executed authorization. The Custodian noted that the Complainant was prohibited from sharing these records with any third party under the Family Educational Rights and Privacy Act of 1974 (“FERPA”). The Custodian also noted that the MBOE does not maintain any job descriptions because the MBOE attorney and special counsel are contracted. Finally, the Custodian sought clarification as to the “entries or requests” portion of this item, noting that Ms. Ballard only communicated with MBOE staff through Mr. Klein.
2. The Custodian provided contracts for both herself and Mr. Klein.
3. The Custodian sought clarification as to whether the records sought were limited to D.C., C.C., and J.C. The Custodian stated that assuming this is the case, the following response applies:
  - a. Dr. Borsky – No records relating to D.C., *et al.*, exist.
  - b. Dr. Smoller – Records attached.
  - c. Ms. Yonks – See attached timesheets.

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<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Council Staff the submissions necessary and relevant for the adjudication of this complaint.

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- d. Ms. Serao – See attached timesheets.
  - e. Ms. Shatsky – No records relating to D.C., *et al.*, exist.
4. The Custodian provided job descriptions for the Special Education Director and Business Administrator. The Custodian also stated that no job descriptions for the other four (4) positions existed.
  5. The Custodian provided fifteen (15) MBOE policies relevant to the topics identified.
  6. The Custodian stated that this request item was overly broad because it did not include a sender and/or recipient. The Custodian thus sought clarification.
  7. The Custodian stated that no corrective action plans existed.
  8. The Custodian stated that this request item was overly broad because it did not include a sender and/or recipient. Further, the Custodian noted that the portion seeking “documents” failed to identify a specific record. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30 (App. Div. 2005). The Custodian thus sought clarification.
  9. The Custodian denied records responsive to this OPRA request under the personnel exemption. N.J.S.A. 47:1A-10.
  10. The Custodian stated that this request item was overly broad because it failed to identify specific records. The Custodian thus sought clarification.
  11. The Custodian stated that no such records exist, except for e-mails. The Custodian sought clarification.
  12. The Custodian stated that the only communications responsive to this item were verbal and not documented.

#### Denial of Access Complaint:

On August 31, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant alleged that he did not receive a response to the subject OPRA request. The Complainant also argued that the Custodian failed to provide any responsive records.

#### Statement of Information:

On October 5, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on July 25, 2016.<sup>4</sup> The Custodian noted that the delay was due to the fact that the Complainant sent the OPRA request to the Special Services Department. The Custodian certified that her search included disseminating the OPRA request to MBOE staff to search for and produce responsive financial records. The Custodian affirmed that her office was able to locate MBOE policies. The Custodian certified that she responded in writing on August 3, 2016 disclosing a number of records, denying access to an item, seeking clarification of certain items, and advising that no records existed for others.

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<sup>4</sup> The Custodian noted in her response that she received the OPRA request on July 28, 2016, but certifies in the SOI to both the 25<sup>th</sup> and 28<sup>th</sup>. The evidence of record as provided in the Denial of Access Complaint only indicates that “Arlene” at the Special Services Department received the OPRA request on July 22, 2016. Thus, the GRC has chosen July 25, 2016 as the date of receipt.

The Custodian argues that, contrary to the Complainant's Denial of Access Complaint assertions, she responded to the subject OPRA request fully by disclosing a number of records in response to item Nos. 1 through 5. The Custodian also certified that she determined that no records responsive to a portion of item No. 1, item No. 7, and item No. 12 existed. The Custodian averred that she denied access to item No. 9, which sought personnel records from Mr. Klein's file, under N.J.S.A. 47:1A-10.

The Custodian affirmed that she sought clarification to item No. 3 because it was unclear whether the Complainant sought access to records related to specific students. Further, the Custodian certified that she sought clarification to item Nos. 6 and 8 through 11 because the Complainant failed to include (in some combination) senders, recipients, dates, or subject/content. The Custodian averred that the Complainant failed to provide clarification for any of these items prior to filing this complaint.

## **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).<sup>5</sup> 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).

The only issue presented in this complaint is whether the Custodian timely responded to the Complainant's OPRA request. In the Denial of Access Complaint, the Complainant argued that the Custodian did not respond to the subject OPRA request. However, the Custodian certified in the SOI that she, in fact, responded in writing on August 3, 2016, the seventh (7<sup>th</sup>) business day after receipt of the OPRA request. Further, the Custodian included as part of her SOI a copy of the letter she sent to the Complainant. Thus, the evidence of record supports that no "deemed" denial occurred.

Accordingly, the Custodian has borne her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, there was no "deemed" denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).

### **Prevailing Party Attorney's Fees**

OPRA provides that:

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<sup>5</sup> 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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A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

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

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a “prevailing party” if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. Id. at 432. Additionally, the Court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . .” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. 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].

The Complainant, an attorney representing a client, filed the instant complaint contending that the Custodian failed to respond to the subject OPRA request. The Custodian subsequently certified in the SOI that she responded in writing on August 3, 2016. The Custodian also attached to the SOI the response letter she sent to the Complainant. Thus, no violation of OPRA has occurred and the complaint has not brought about a change in the Custodian's conduct. Based on this, the Complainant is not a prevailing party and is not entitled to an award of attorney's fees.

Accordingly, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters, 387 N.J. Super. at 432. Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 51. Specifically, no violation of OPRA occurred and no further action is recommended. 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. at 432, and Mason, 196 N.J. at 51.

### **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that:

1. The Custodian has borne her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, there was no "deemed" denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).
2. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, no violation of OPRA occurred and no further action



is recommended. 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. at 432, and Mason, 196 N.J. at 51.

Prepared By: Frank F. Caruso  
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May 15, 2018