



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

April 30, 2019 Government Records Council Meeting

Libertarians for Transparent Government
Complainant

Complaint No. 2017-34

v.

Elizabeth Board of Education (Union)
Custodian of Record

At the April 30, 2019 public meeting, the Government Records Council (“Council”) considered the April 23, 2019 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 his burden of proof that he timely responded to the Complainant’s November 15, 2016 OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to said 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 portion of the Complainant’s October 25, 2016 request item No. 2 seeking correspondence and e-mails is invalid because it failed to include the date or ranges of dates within which the Custodian could conduct a search. MAG Entm’t, LLC v. Div. Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 8, 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011).
3. The Custodian did not unlawfully deny access to the requested settlement agreement at the time of the Complainant’s two (2) OPRA requests because the evidence supports that the agreement had not yet executed and finalized a settlement at that time. N.J.S.A. 47:1A-6; Libertarians for Transparent Gov’t v. Gov’t Records Council, 453 N.J. Super. 83 (App. Div.) (certif. denied, 233 N.J. 484 (2018)); Libertarians for Transparent Gov’t v. William Paterson Univ., 2018 N.J. Super. Unpub. LEXIS 843 (App. Div. 2018); Paff v. City of Union City (Hudson), GRC Complaint No. 2012-262 (August 2013).

4. With respect to informal or draft agreements sought in the Custodian's October 25, 2016, OPRA request item No. 2, the Custodian did not unlawfully deny access. N.J.S.A. 47:1A-6. Draft or informal agreements between the parties satisfy the requirements to qualify for protection under the deliberative process privilege via N.J.S.A. 47:1A-1.1. Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div.) (certif. denied, 233 N.J. 484 (2018)); Libertarians for Transparent Gov't v. William Paterson Univ., 2018 N.J. Super. Unpub. LEXIS 843 (App. Div. 2018); O'Shea v. West Milford BOE, GRC Complaint No. 2004-93 (April 2006).
5. The Custodian's failure to respond to the Complainant's November 15, 2016 OPRA request resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian lawfully denied access to the Complainant's two (2) OPRA requests on multiple bases. 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.
6. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the responsive settlement agreement was not final at the time that the Complainant submitted both OPRA requests. Thus, the Custodian was under no obligation to provide the agreement as part of the SOI. 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.

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 30th Day of April 2019

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 3, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
April 30, 2019 Council Meeting**

**Libertarians for Transparent Government¹
Complainant**

GRC Complaint No. 2017-34

v.

**Elizabeth Board of Education (Union)²
Custodial Agency**

Records Relevant to Complaint:

October 25, 2016 OPRA request: Regarding Elizabeth Bd. Of Educ. v. McCarter, English, et al, Docket No. UNN-L-3014-12, electronic copies via e-mail of:

1. The settlement agreement(s) related to the above; or
2. All informal agreements, draft agreements, correspondence, e-mails, *etc.*, related to the case that discloses settlement amounts and/or other settlement terms.

November 15, 2016 OPRA request: Regarding Elizabeth Bd. Of Educ., Docket No. UNN-L-3014-12, a copy of the settlement agreement that settled the malpractice lawsuit filed against McCarter & English (“McCarter”) and/or Francis A. Kirk, Esq.

Custodian of Record: Harold Kennedy, Jr.

Request Received by Custodian: October 25, 2016; November 15, 2016

Response Made by Custodian: November 3, 2016

GRC Complaint Received: February 16, 2017

Background³

Request and Response:

On October 25, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 3, 2017, the Custodian responded in writing disclosing a settlement agreement.

¹ Represented by Ted M. Rosenberg, Esq. (Moorestown, NJ).

² Represented by Robert F. Varady, Esq., of La Corte, Bundy, Varady & Kinsella (Union, NJ).

³ 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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On November 4, 2017, the Complainant e-mailed the Custodian advising that the disclosed agreement resolved a third-party complaint. The Complainant stated that he sought the settlement agreement resolving the Board's lawsuit against McCarter. The Complainant noted that the disclosed agreement referenced the settlement agreement sought at the bottom of the first page. The Complainant requested that the Custodian disclose the correct settlement agreement.

On November 15, 2016, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On January 16, 2017, the Complainant resubmitted his November 15, 2016 OPRA request to the Custodian via facsimile seeking a status update.

Denial of Access Complaint:

On February 16, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the Custodian disclosed a settlement agreement not responsive to his October 25, 2016 OPRA request and failed to respond to the November 15, 2016 OPRA request for the actual agreement sought. The Complainant contended that the Custodian's failure to either grant or deny access to the responsive agreement resulted in a "deemed" denial of access. The Complainant noted that he reasonably attempted to advise the Custodian that a non-responsive settlement agreement was disclosed.

The Complainant requested that the Council: 1) order the Custodian to identify responsive records not yet provided; 2) order disclosure of said records or an explanation as to why same are exempt from disclosure; and 3) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.

Statement of Information:

On March 1, 2017, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's first (1st) OPRA request on October 25, 2016. The Custodian certified that his search included contacting Counsel regarding the request. The Custodian certified that he responded in writing on November 3, 2016 disclosing a settlement agreement deemed to be responsive to said OPRA request.⁴

The Custodian stated that the settlement agreement provided was in relation to a third-party complaint filed against former Board Counsel as part of Docket No. UNN-L-3014-12. The Custodian certified that at the time of receipt of the subject OPRA request, the settlement agreement involving all other parties had not yet been executed fully. The Custodian affirmed that he was attaching a copy of the executed settlement agreement to the SOI.

Additional Submissions:

On March 2, 2017, Complainant's Counsel submitted a letter brief responding to the SOI. Therein, Counsel objected to the SOI because it failed to address the November 15, 2016 OPRA request in any way. Counsel asserted that the GRC could not properly adjudicate this complaint

⁴ The Custodian did not address the Complainant's November 15, 2016 OPRA request in his SOI.
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without obtaining an amended SOI, which was a normal GRC procedure. See Paff v. Cnty. of Salem, GRC Complaint No. 2015-342 (June 2017) (where the Council returned an incomplete SOI to the custodian requiring completion and resubmission).

Counsel next argued that the Complainant was a prevailing party here because the Board disclosed the responsive settlement agreement as part of the SOI. Counsel also noted that it was no longer necessary for the Council to order disclosure, but that the catalyst theory supports an award of attorney's fees.

On February 8, 2019, the GRC sought additional information from the Custodian. Therein, the GRC stated that this complaint centered on two (2) OPRA requests; however, the Custodian only addressed one in his SOI. The GRC also stated that it was unclear whether the settlement agreement attached to the SOI was finalized before receipt of either the November 15, 2016 OPRA request or January 16, 2017 resubmission. The GRC thus requested that the Custodian respond to the following questions in a legal certification:

1. On what date did you receive the November 15, 2016 OPRA request, if any? Please also certify to whether you received the January 16, 2017 resubmission.
2. On what date did you respond in writing to the November 15, 2016 OPRA request or January 16, 2017 resubmission?
3. On what date was the newly disclosed settlement agreement finalized?

The GRC requested that the Custodian provide his legal certification to the GRC by February 13, 2019.

On February 13, 2019, the Custodian responded to the GRC's request for additional information. The Custodian certified that he received the Complainant's November 15, 2016 OPRA request via e-mail on that day. The Custodian affirmed however that he had no record of receiving the January 16, 2017 resubmission notwithstanding that the fax confirmation sheet indicated the correct fax number. The Custodian certified that because he did not receive the January 16, 2017 resubmission, he did not respond to it.

Additionally, the Custodian affirmed that the settlement agreement attached to the SOI was not finalized at the time that he received the November 15, 2016 OPRA request. The Custodian certified that the agreement was finalized on December 22, 2016.

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).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).

Regarding the November 15, 2016 OPRA request, the Complainant contended in the Denial of Access Complaint that the Custodian failed respond to it. The Complainant noted that he attempted to obtain a status update on the request via facsimile on January 16, 2017. The Custodian did not address the request in SOI; thus, the GRC sought additional information from him. On February 13, 2019, the Custodian certified that he in fact received the November 15, 2016 OPRA request via e-mail. However, the Custodian did not respond to it. The Custodian further noted that he did not receive the January 16, 2017 follow-up fax, although it appeared to be sent to the correct number. Notwithstanding, the facts of this complaint ultimately support a "deemed" denial finding with respect to the November 15, 2016 OPRA request.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's November 15, 2016 OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to said 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.

Validity of Request

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records "readily accessible for inspection, copying, or examination."* N.J.S.A. 47:1A-1.

[MAG Entm't, LLC v. Div. Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).]

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files,

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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analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

[Id. at 549 (emphasis added).]

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency’s files.” Id. at 549 (emphasis added). See also Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);⁶ N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Additionally, the GRC established criteria deemed necessary to specifically identify an e-mail communication in Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 8, 2010). In Elcavage, the Council determined that “[i]n accordance with MAG, *supra*, and its progeny, in order to specifically identify an e-mail the OPRA request must contain (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail was transmitted or the e-mails were transmitted, and (3) identification of the sender and/or the recipient thereof.” Id. The Council also applied the criteria set forth in Elcavage to other forms of correspondence, such as letters. See Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011).

With respect to the portion of the Complainant’s October 25, 2016 OPRA request item No. 2 seeking e-mails and correspondence, it identifies the subject matter as the Complainant stated that the e-mails should contain the settlement amount or settlement terms pertaining to the subject litigation. However, the request fails to identify the specific date or range of dates during which the correspondence and/or e-mails were transmitted. Thus, the request item failed to include all necessary criteria in order to be considered valid under Elcavage and Armenti.

Accordingly, the portion of the Complainant’s October 25, 2016 request item No. 2 seeking correspondence and e-mails is invalid because it failed to include the date or ranges of dates within which the Custodian could conduct a search. MAG, 375 N.J. Super. 534 at 546; Bent, 381 N.J. Super. 30 at 37; N.J. Builders Ass’n, 390 N.J. Super. 166 at 180; Elcavage, GRC 2009-07; Armenti, GRC 2009-154.

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.

⁶ Affirming Bent v. Stafford Police Dep’t, GRC Complaint No. 2004-78 (October 2004).
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OPRA excludes from the definition of a government record “inter-agency or intra-agency advisory, consultative or deliberative material.” N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the “deliberative process privilege.”

In O’Shea v. West Milford BOE, GRC Complaint No. 2004-93 (April 2006), the Council stated that:

[N]either the statute nor the courts have defined the terms ... “advisory, consultative, or deliberative” [(“ACD”)] in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA’s ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004).

In Libertarians for Transparent Gov’t v. Gov’t Records Council, 453 N.J. Super. 83 (App. Div.) (certif. denied, 233 N.J. 484 (2018)), the Appellate Division discussed the deliberative process privilege at length regarding a request for draft meeting minutes, stating:

The applicability of the deliberative process privilege is government by a two-prong test. The judge must determine both that a document is (1) “pre-decisional,” meaning it was “generated before the adoption of an agency’s police or decision;” and (2) deliberative, in that it “contain[s] opinions, recommendations, or advice about agency policies.” [Educ. Law Ctr. v. Dep’t of Educ., 198 N.J. at 276 (quoting Integrity, 165 N.J. at 83)]. If a document stratifies both prongs, it is exempt from disclosure under OPRA pursuant to the deliberative process privilege.

Regarding the first prong, the court stated that “a draft is not a final document. It has been prepared for another person or persons’ editing and eventual approval.” Id. at 90. Therefore, the court held that by their very nature, draft meeting minutes are pre-decisional since they are subject to revision and not yet approved for public release. Id. at 90-91.

Regarding the second prong, the court held that “the document must be shown to be closely related to the ‘the formulation or exercise of . . . policy-oriented judgment or [to] the process by which policy is formulated.’” Ciesla v. N.J. Dep’t of Health & Sr. Servs., 429 N.J. Super. 127, 138 (App. Div. 2012) (quoting McGee v. Twp. of E. Amwell, 416 N.J. Super. 602, 619-20 (App. Div. 2010)). Id. at 91. The court found that the requested draft minutes, as compiled by the writer in attendance at the meeting, were subject to additions, suggestions, and other edits from the members of the public body. Id. Thus, the draft minutes satisfied the second prong of the test. Id. at 92.

Turning to unexecuted settlement agreements, in Paff v. City of Union City (Hudson), GRC Complaint No. 2012-262 (August 2013), the Council addressed the disclosability of same. There,

although the custodian's response was insufficient, the Council declined to require disclosure of the requested settlement agreement because same was not finalized and completed until November 26, 2012. More specifically, plaintiffs signed the subject agreement on October 10, 2012, but the settlement agreement was not final and subject to disclosure until November 26, 2012, when a representative from the City's insurance carrier executed the form. Thus, at the point that both parties' signatures appeared on the form, the GRC was satisfied that the agreement was finalized. The Council's reinforced its position on unexecuted agreements in Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (Interim Order dated January 28, 2014). There, the complainant filed after being denied access to a resubmitted request for the same agreement at issue in Paff, GRC 2012-262. The Council ultimately determined that the custodian unlawfully denied access to the settlement agreement because it was "finalized and executed" on November 26, 2012.

Thus, the Council's position on settlement agreements is that same are not finalized until all parties have executed the agreement. This position was more recently mirrored in Libertarians for Transparent Gov't v. William Paterson Univ., 2018 N.J. Super. Unpub. LEXIS 843 (App. Div. 2018). There, the court reversed the trial judge's decision that defendant unlawfully denied access to an unexecuted settlement agreement. The court reasoned that "[u]ntil a settlement is signed, it remains a draft document subject to continued revision and negotiation." Id. at 5 (citation omitted); see also Libertarians for Transparent Gov't v. Borough of Westwood (Bergen), GRC Complaint No. 2016-214 (October 2018). The court further held that "[h]aving determined that the judge mistakenly concluded [defendant] violated OPRA, [plaintiff] was not a prevailing party." Id.

Here, the Complainant's October 25, 2016 OPRA request sought, among other items, a settlement agreement regarding Elizabeth Bd. of Educ., Docket No. UNN-L-3014-12. The Custodian originally disclosed a settlement agreement, which the Complainant argued was not the correct agreement. Thus, the Complainant submitted a second (2nd) OPRA request on November 15, 2016 and did not receive a response prior to initiating this complaint.

Thereafter, as part of the SOI submitted on March 1, 2017, the Custodian attached a copy of the responsive settlement agreement. The agreement was executed by the settling parties, with defendant's signature dated December 22, 2016. Having had the opportunity to review the agreement, the GRC determined that it needed additional information from the Custodian. Thus, on February 8, 2019, the GRC asked the Custodian to certify to the exact date that the disclosed agreement was finalized. On February 13, 2019, the Custodian legally certified that the agreement was, in fact, finalized on December 22, 2016.

Based on all the forgoing, the evidence of record supports that the Custodian lawfully denied access to the requested settlement agreement. Specifically, the agreement was not finalized and thus still in draft form at the time of both requests. Libertarians, 453 N.J. Super. 83; Paff, GRC 2012-262. Further, although unpublished and decided during the pendency of this complaint, the court's decision in Libertarians, 2018 N.J. Super. Unpub. LEXIS 843 is on point. The GRC is thus satisfied that the Custodian was under no obligation to provide the unexecuted agreement to the Complainant upon receipt of either request.

Accordingly, the Custodian did not unlawfully deny access to the requested settlement agreement at the time of the Complainant's two (2) OPRA requests because the evidence supports

that the agreement had not yet executed and finalized a settlement at that time. N.J.S.A. 47:1A-6; Libertarians, 453 N.J. Super. 83; Libertarians, 2018 N.J. Super. Unpub. LEXIS 843; Paff, GRC 2012-262.

Informal/Draft Agreements

A portion of the Complainant's October 25, 2016 OPRA request item No. 2 explicitly sought "informal" and/or "draft" agreements between the parties to the litigation. As discussed above, all available case law supports the non-disclosure of "informal" and/or "draft" agreements because they satisfy the two-prong ACD test. Therefore, the informal and/or draft settlement agreements satisfy the second prong of the test. Id. at 91.

Accordingly, with respect to informal or draft agreements sought in the Custodian's October 25, 2016, OPRA request item No. 2, the Custodian did not unlawfully deny access. N.J.S.A. 47:1A-6. Draft or informal agreements between the parties satisfy the requirements to qualify for protection under the deliberative process privilege via N.J.S.A. 47:1A-1.1. Libertarians, 453 N.J. Super. at 90-91; Libertarians, 2018 N.J. Super. Unpub. LEXIS 843; O'Shea, GRC 2004-93.

Knowing & Willful

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . ." N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically, OPRA states ". . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . ." N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the matter before the Council, the Custodian's failure to respond to the Complainant's November 15, 2016 OPRA request resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian lawfully denied access to the Complainant's two (2)

OPRA requests on multiple bases. 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, [certif. denied] (1984).

[Id. at 76.]

In Mason, the plaintiff submitted an OPRA request on February 9, 2004. The defendant responded on February 20, eight (8) business days later, or one day beyond the statutory limit. Id. at 79. As a result, the Court shifted the burden to the defendant to prove that the plaintiff's lawsuit, filed on March 4, was not the catalyst behind defendant's voluntary disclosure. Id. Because defendant's February 20 response included a copy of a memo dated February 19 -- the seventh (7th) business day -- which advised that one of the requested records should be available on February 27 and the other one week later, the Court determined that the plaintiff's lawsuit was not the catalyst for the release of the records and found that she was not entitled to an award of prevailing party attorney fees. Id. at 80.

Here, the Complainant initially sought access to a settlement agreement in Elizabeth Bd. of Educ., Docket No. UNN-L-3014-12. The Custodian responded to the October 25, 2016 OPRA request disclosing to an agreement that Complainant asserted was not responsive. The Complainant thus submitted a second OPRA request on November 16, 2016 via e-mail. After not receiving a response, the Complainant sought a status update on January 16, 2017 via facsimile. This complaint followed, wherein the Custodian disclosed the responsive settlement agreement as part of the SOI.

In determining whether the Complainant is a prevailing party, the evidence of record must establish a casual nexus existed between the filing of this complaint and disclosure of the responsive agreement. Having reviewed the evidence, the GRC does not find that such a casual

nexus exists. Specifically, the agreement in question was not finalized until December 22, 2016; after the Complainant submitted his second OPRA request. Thus, at the time of the subject OPRA requests, no unlawful denial of access occurred, and the Custodian was under no obligation to provide the agreement to the Complainant after that date.

Further, the GRC acknowledges that the Custodian's failure to respond in writing in a timely manner to the Complainant's November 16, 2016 OPRA request resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). Thus, the burden of proving that this complaint was not the catalyst for providing the responsive agreement to the Complainant shifts to the Custodian pursuant to Mason, *supra*. To this end, the Custodian has provided sufficient evidence to support that the agreement was not disclosable at the time of said request. Additionally, on February 13, 2019, the Custodian certified that although he received the November 16, 2016 OPRA request vis e-mail, he never received the Complainant's status update request in January 2017. Notwithstanding, the agreement was still not disclosable unless and until the Complainant submitted a new OPRA request. See Paff v. Neptune Twp. Hous. Auth. (Monmouth), GRC Complaint No. 2010-307 (Interim Order dated April 25, 2012) (holding that the custodian lawfully denied access to draft meeting minutes and that the complainant was "required to submit a new OPRA request" if he wished to obtain them after approval. *Id.* at 20 (citing Blau v. Union Cnty., GRC Complaint No. 2003-75 (January 2005))).

Finally, the GRC finds Libertarians, 2018 N.J. Super. Unpub. LEXIS 843 to be instructive on this issue. As previously noted that Appellate Division determined that plaintiff was not a prevailing party because the trial court erroneously held that a draft settlement agreement was disclosable. The facts there mirror those here; thus, a similar conclusion follows. Based on all of the forgoing, the Complainant is not a prevailing party entitled to an award of attorney's fees.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters, 387 N.J. Super. 432. Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the responsive settlement agreement was not final at the time that the Complainant submitted both OPRA requests. Thus, the Custodian was under no obligation to provide the agreement as part of the SOI. 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.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's November 15, 2016 OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to said 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 portion of the Complainant's October 25, 2016 request item No. 2 seeking correspondence and e-mails is invalid because it failed to include the date or ranges of dates within which the Custodian could conduct a search. MAG Entm't, LLC v. Div. Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007). Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 8, 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011).
3. The Custodian did not unlawfully deny access to the requested settlement agreement at the time of the Complainant's two (2) OPRA requests because the evidence supports that the agreement had not yet executed and finalized a settlement at that time. N.J.S.A. 47:1A-6; Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div.) (certif. denied, 233 N.J. 484 (2018)); Libertarians for Transparent Gov't v. William Paterson Univ., 2018 N.J. Super. Unpub. LEXIS 843 (App. Div. 2018); Paff v. City of Union City (Hudson), GRC Complaint No. 2012-262 (August 2013).
4. With respect to informal or draft agreements sought in the Custodian's October 25, 2016, OPRA request item No. 2, the Custodian did not unlawfully deny access. N.J.S.A. 47:1A-6. Draft or informal agreements between the parties satisfy the requirements to qualify for protection under the deliberative process privilege via N.J.S.A. 47:1A-1.1. Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div.) (certif. denied, 233 N.J. 484 (2018)); Libertarians for Transparent Gov't v. William Paterson Univ., 2018 N.J. Super. Unpub. LEXIS 843 (App. Div. 2018); O'Shea v. West Milford BOE, GRC Complaint No. 2004-93 (April 2006).
5. The Custodian's failure to respond to the Complainant's November 15, 2016 OPRA request resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian lawfully denied access to the Complainant's two (2) OPRA requests on multiple bases. 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.
6. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the responsive settlement agreement was not final at

the time that the Complainant submitted both OPRA requests. Thus, the Custodian was under no obligation to provide the agreement as part of the SOI. 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.

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