



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

April 28, 2020 Government Records Council Meeting

Monica Manning
Complainant

Complaint No. 2018-216 and 2018-2017

v.

Middletown Township (Monmouth)
Custodian of Record

At the April 28, 2020 public meeting, the Government Records Council (“Council”) considered the April 3, 2020 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The requested Review was exempt from disclosure under the “inter-agency or intra-agency advisory, consultative, or deliberative material” exemption. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274, 286 (2009); Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009). Thus, the Custodian lawfully denied access to both Complainant’s OPRA requests. N.J.S.A. 47:1A-6.
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, the Custodian lawfully denied access to the requested report as “inter-agency or intra-agency advisory, consultative, or deliberative material.” N.J.S.A. 47:1A-1.1. 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 28th Day of April 2020

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: April 30, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 28, 2020 Council Meeting**

**Monica Manning¹
Complainant**

**GRC Complaint Nos. 2018-216
and 2018-2017**

v.

**Middletown Township (Monmouth)²
Custodial Agency**

Records Relevant to Complaint:

June 13, 2018 OPRA request:³ Copies of the following in relation to the “Village 35” traffic study:

1. Traffic simulation supplied by vendor for the traffic study.
2. Study of current roadway usage and recommendations by vendor of roadway improvements needed.
3. “Village 35” traffic study.⁴

September 10, 2018 OPRA request:⁵ Copies of the following in relation to the “Village 35” traffic study:

1. All collected data and databases from the traffic study used by the vendor to formulate their study.
2. Names of all roadways and intersections included in, or that have been studied by, the vendor.
3. Traffic simulation supplied by vendor for the traffic study.
4. Study of current roadway usage and recommendations by vendor of roadway improvements needed.
5. “Village 35” traffic study.

Custodian of Record: Heidi Brunt

Request Received by Custodian: June 18, 2018; September 10, 2018

Response Made by Custodian: June 22, 2018; September 18, 2018

GRC Complaint Received: October 4, 2018

¹ Represented by Andrew Provence, Esq., of Litwin & Provence, LLC (Newark, NJ).

² Represented by Brian M. Nelson, Esq., of Archer & Greiner, P.C. (Red Bank, NJ).

³ This OPRA request is the subject of GRC Complaint No. 2018-216.

⁴ The Complainant sought additional records that are not at issue in this complaint.

⁵ This OPRA request is the subject of GRC Complaint No. 2018-217.

Background⁶

Request and Response:

On June 13, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 22, 2018, Planning Director Sanyogita Chavan responded in writing on behalf of the Custodian denying the subject OPRA request on the basis that Middletown Township (“Township”) had not yet received a copy of the final traffic study.

On September 10, 2018, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On September 18, 2018, the Custodian responded in writing denying the subject OPRA request under the “inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material” exemption. N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On October 4, 2018, the Complainant filed two (2) Denial of Access Complaints with the Government Records Council (“GRC”). The Complainant disputed the Custodian’s response to each OPRA request. The Complainant did not include any legal arguments regarding her position that the Custodian unlawfully denied access to the requested records.

Statement of Information:

On October 19 and 31, 2018, the Custodian filed two (2) Statements of Information (“SOI”).⁷ Therein, the Custodian certified that she received the Complainant’s June 13, 2018 OPRA request on June 18, 2018. The Custodian certified that her search included asking the appropriate Township officials, including Director Chavan, to search for responsive records. The Custodian certified that the Township responded in writing on June 22, 2018 advising that it had not yet received a final report. The Custodian did not address the facts surrounding the Complainant’s September 10, 2018 OPRA request.⁸

The Custodian certified that the only record responsive to the Complainant’s June 13, 2018 OPRA request was a draft report entitled “DRAFT Stantec Village 35 Independent Traffic Review, December 21, 2017” (“Review”). The Custodian argued that she lawfully denied access to this record under the ACD exemption. Ciesla v. N.J. Dep’t of Health and Senior Serv., 429 N.J. Super. 127, 137-138 (citing Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274, 286 (2009)). The Custodian averred that it was the ACD exemption which framed the basis for the Township’s denial of the June 13, 2018 OPRA request.

⁶ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

⁷ The Custodian submitted identical SOIs for each complaint. Neither addressed the Complainant’s September 10, 2018 OPRA request. It should be noted that the September 10, 2018 OPRA request was comprised of multiple items from the June 13, 2018 OPRA request. However, the Complainant provided documents evidencing the Custodian’s response to the September 10, 2018 OPRA request.

⁸ Ibid.

The Custodian contended that on its face, the Review was properly denied for multiple reasons. The Custodian asserted that the Review was pre-decisional and contained recommendations and advice about potential Township policies. The Custodian noted that the Review was still in draft form, as it contained a “Draft” watermark on every page. The Custodian next noted that the Review contained raw data marked highlighted to demarcate further consideration. The Custodian argued that the Review was like the record at issue in Educ. Law Ctr., 198 N.J. 274 in that it set forth policy options for the Township. The Custodian finally averred that as of the filing of the SOI, the Review remained in draft form and was not yet finalized.

Analysis

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.

OPRA provides that the definition of a government record “shall not include . . . [ACD] material.” When the exception is invoked, a governmental entity may “withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” Educ. Law Ctr., 198 N.J. at 285 (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)). The New Jersey Supreme Court has also ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr., 198 N.J. 274.

A custodian claiming an exception to the disclosure requirements under OPRA on that basis must initially satisfy two conditions: 1) the document must be pre-decisional, meaning that the document was generated prior to the adoption of the governmental entity's policy or decision; and 2) the document must reflect the deliberative process, which means that it must contain opinions, recommendations, or advice about agency policies. Id. at 286 (internal citations and quotations omitted). The key factor in this determination is whether the contents of the document reflect “formulation or exercise of . . . policy-oriented judgment or the process by which policy is formulated.” Id. at 295 (adopting the federal standard for determining whether material is “deliberative” and quoting Mapother v. Dep't of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)). Once the governmental entity satisfies these two threshold requirements, a presumption of confidentiality is established, which the requester may rebut by showing that the need for the materials overrides the government's interest in confidentiality. Id. at 286-87.

The Council has also repeatedly held that draft records of a public agency fall within the deliberative process privilege. In Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009), the Council, in upholding the custodian’s denial as lawful, determined that the requested study of the local police department was a draft document and that draft

documents in their entirety are ACD material pursuant to N.J.S.A. 47:1A-1.1. Subsequently, in Shea v. Village of Ridgewood (Bergen), GRC Complaint No. 2010-79 (February 2011), the custodian certified that a requested letter was in draft form and had not yet been reviewed by the municipal engineer. The Council, looking to relevant case law, concluded that the requested letter was exempt from disclosure under OPRA as ACD material. See also Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div. 2018); Ciesla v. N.J. Dep't of Health and Senior Serv., GRC Complaint No. 2010-38 (May 2011) (aff'd Ciesla, 429 N.J. Super. 127 (holding that a draft staff report was exempt from disclosure as ACD material)).

In the consolidated matters before the Council, the Complainant's two (2) OPRA requests at issue here sought access to information and a traffic study involving Village 35. In response to each OPRA request, the Township denied access because either the report in question was not finalized or the report was exempt under the ACD exemption. Following the Denial of Access Complaint, the Custodian certified in the SOI that the Review was the record responsive to the Complainant's June 13, 2018 OPRA request. The Custodian further provided detailed reasons as to why she properly denied the Review under the ACD exemption. Those reasons included that the Review was not finalized, contained "Draft" watermarks on every page, and contained characteristics of a working copy. The Custodian also argued that the Review contained recommendations and opinions that the Township were reviewing as part of a pending policy decision. The Custodian argued that the foregoing proved that the Review was exempt and compared the instant issue to the facts of Educ. Law Ctr., 198 N.J. 274.

Initially, the GRC notes that the evidence of record supports that the Review was responsive to both OPRA requests. The GRC reaches this conclusion because the September 10, 2018 OPRA request contained items previously submitted as part of the June 13, 2018 OPRA request. Also, of import, the GRC was able to locate what is reasonably construed as the final Review dated May 28, 2019.⁹ An examination of the Review provides additional insight into the Custodian's assertion that the Review was the record responsive to the Complainant's OPRA requests. Specifically, the review contains the information sought in each of the Complainant's request items. That information includes Stantec's simulations, identification of streets studied, Stantec's recommendations based on the review, and the datasets Stantec utilized to arrive at those conclusions. Thus, it is logical to conclude that the Review was the record ultimately responsive to each OPRA request.

Applying all relevant case law to the facts of these complaints, the GRC is satisfied that the Custodian lawfully denied access to the Review under OPRA as ACD material. In reaching this conclusion, the GRC finds compelling the Custodian's argument regarding the composition of the review, as well as the fact that it was not a final report. Such a finding is consistent with Dalesky, GRC 2008-61, where the facts mirror those contained here. Thus, and consistent with Dalesky, the requested Review was exempt from disclosure under the ACD exemption.

In addition, an examination of the finalized Review further supports the Custodian's position that it was exempt as ACD material at the time of the Complainant's OPRA requests.

⁹ The finalized Review was posted to an advocacy website protesting the Village 35 project. https://www.stopvillage35.com/uploads/9/1/3/5/91351486/village_35_independent_traffic_review_and_corridor_study.pdf (accessed March 10, 2020).

Specifically, the Review was officially released months after the subject OPRA requests were filed and were considered as part of the Township Planning Board’s decision-making process regarding the Village 35 project proposal.¹⁰ Further, the Review clearly contained Stantec’s opinions of the current and potential future traffic impacts. The Review also contained Stantec’s recommendations to the Planning Board for addressing traffic and alleviating any issues stemming from the Village 35 project based on the traffic study. Thus, it is clear that the Review met both prongs of the ACD test as contemplated in Educ. Law Ctr., 198 N.J. 274 and prevailing case law.

Accordingly, the requested Review was exempt from disclosure under the ACD exemption. N.J.S.A. 47:1A-1.1; Educ. Law Ctr., 198 N.J. 274; Dalesky, GRC 2008-61. Thus, the Custodian lawfully denied access to both Complainant’s OPRA requests. N.J.S.A. 47:1A-6.

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

¹⁰ The Township Planning Board addressed the issue at multiple public meetings culminating with a vote to approve at its July 10, 2019 meeting. The GRC notes that representatives of Stantec presented some of its Review findings at that meeting. https://www.middlestownnj.org/AgendaCenter/ViewFile/Minutes/_07102019-584 (accessed March 11, 2020).

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.]

Here, the Complainant submitted two (2) OPRA requests seeking access to information and the Review for the Village 35 project. The Custodian denied access and subsequently argued in the SOI that the Review (the only record responsive to the subject OPRA requests) was exempt as ACD material. Upon review of the facts and arguments submitted herein, the GRC has determined that the Review was exempt from disclosure and that the Custodian lawfully denied access to both OPRA requests. Thus, neither complaint before the Council resulted in the relief sought. For this reason, Complainant is not a prevailing party entitled to a fee award.

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 Custodian lawfully denied access to the requested report as ACD material. N.J.S.A. 47:1A-1.1. 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 Executive Director respectfully recommends the Council find that:

1. The requested Review was exempt from disclosure under the "inter-agency or intra-agency advisory, consultative, or deliberative material" exemption. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 286 (2009); Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009). Thus, the Custodian lawfully denied access to both Complainant's OPRA requests. N.J.S.A. 47:1A-6.
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, the Custodian lawfully denied access to the requested report as "inter-agency or intra-agency advisory, consultative, or deliberative material." N.J.S.A. 47:1A-1.1. 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.

Prepared By: Frank F. Caruso
Executive Director

April 3, 2020