



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

September 24, 2019 Government Records Council Meeting

NJ Foundation for Open Government, Inc.

Complaint No. 2018-240

Complainant

v.

Borough of Woodbine (Cape May)

Custodian of Record

At the September 24, 2019 public meeting, the Government Records Council (“Council”) considered the September 17, 2019 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 dismiss the complaint because the Complainant’s Counsel withdrew the matter via letter to the GRC on September 4, 2019. 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 24th Day of September 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: September 27, 2019



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 24, 2019 Council Meeting**

**New Jersey Foundation for Open Government, Inc.¹
Complainant**

GRC Complaint No. 2018-240

v.

**Borough of Woodbine (Cape May)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. “For the most recent special meeting held by the Governing Body for which minutes are available, please provide the following records:
 - a. The notice of the meeting sent to all newspapers, which the Governing Body noticed.
 - b. Proof of publication of the meeting notice, if available.
 - c. The publication schedule of the newspapers that were noticed, if available.
 - d. The minutes of the special meeting.
2. The minutes of the most recently held Governing Body meeting for which minutes are available. By way of explanation, if the Governing Body held a meeting on March 20, 2018 and April 20, 2018, but the April 20th meeting minutes have not yet been approved, please provide the minutes of the March 20, 2018 meeting.
3. The minutes of the two most recently held nonpublic (i.e. closed or executive session) governing body meetings for which minutes are available in either full or redacted form. For example, if the most recent closed meeting for which minutes are available, in whole or in part, took place on December 14, 2017 and January 14, 2018, please provide me with those minutes.
4. For the nonpublic meetings for which minutes were disclosed in response to Item 3 above, please provide the motion or resolution that authorized the nonpublic meeting in accordance with N.J.S.A. 10:4-13. For such motion or resolution that is spread out in full in the public meeting minutes, please provide only the pages that contain the motion or resolution.
5. To the extent that they do not duplicate the records responsive to Item 4 above, please provide the N.J.S.A. 10:4-13 motions or resolutions that authorized the two most recent Governing Body nonpublic meetings.

¹ Represented by Anthony H. Ogozalek, Jr., Esq. (Cinnaminson, NJ).

² Represented by Richard P. Tonetta, Esq. (Vineland, NJ).

New Jersey Foundation for Open Government, Inc. v. Borough of Woodbine (Cape May), 2018-240 – Supplemental Findings and Recommendations of the Executive Director

6. All invoices and billing records submitted by the Municipal Solicitor that reflect time spent on municipal matters for the period 3/1/18 through 6/30/18. Also being requested are the relevant purchase orders for the municipal invoices and billing records.
7. The official OPRA form of the municipality that is used by the Custodian of Records.

Custodian of Record: Lisa Garrison

Request Received by Custodian: July 30, 2018

Response Made by Custodian: July 30, 2018

GRC Complaint Received: October 17, 2018

Background

August 27, 2019 Council Meeting:

At the August 27, 2019 public meeting, the Government Records Council (“Council”) considered the August 20, 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, found that:

1. The Custodian’s response was insufficient because she failed to respond in writing to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the 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).
3. The Custodian’s response to request item number 1, informing the Complainant that “[w]e have not had any special meetings,” constitutes an insufficient search and an unlawful denial of access to the responsive records subsequently located. N.J.S.A. 47:1A-6. Schneble v. N.J. Dep’t of Env’t Protection, GRC Complaint No. 2007-220 (April 2008).
4. The Custodian failed to respond to request items number 2 through 7, which constituted a “deemed” denial of those request items. However, the GRC declines to order disclosure of these records because the Custodian certified in the Statement of Information that she disclosed said records in unredacted form as of October 29, 2018. N.J.S.A. 47:1A-6.
5. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), conducted an insufficient search for the requested records and provided an insufficient

response to the request pursuant to N.J.S.A. 47:1A-(g), the Custodian admitted that she inadvertently failed to address request items 2 through 7 which resulted in the “deemed” denial. And following receipt of the complaint, the Custodian disclosed to the Complainant all records responsive to the request. 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 an unreasonable denial of access under the totality of the circumstances.

6. 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. 432. Additionally, a 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 complaint alleging a denial of access was filed on October 17, 2018, and as of October 29, 2018, eight (8) days following receipt of the complaint, the Custodian disclosed all records responsive to the request. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party, who is 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. **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 August 28, 2019, the Council distributed its August 27, 2019 Interim Order to all parties. On August 29, 2019, the Custodian’s Counsel e-mailed a letter to the Government Records Council (“GRC”), wherein Counsel stated that he received the Council’s Interim Order, the content of which surprised him because he resolved all issues with the Complainant’s Counsel, including the payment of attorney fees, in December of 2018. Counsel further stated that it was his understanding that the complaint was withdrawn by the Complainant. On August 29, 2019, the GRC e-mailed the Custodian’s Counsel, informing him that the GRC did not receive a notice of withdrawal from the Complainant.

On August 29, 2019, the GRC received an e-mail from the Complainant’s Counsel. Counsel stated that he did withdraw the complaint and that he would resend the GRC a copy of the notice of withdrawal on September 3, 2019. On September 4, 2019, upon not receiving the Complainant’s notice of withdrawal on September 3, 2019, the GRC e-mailed the Complainant’s Counsel requesting the copy of the notice of withdrawal. On September 4, 2019, the Complainant’s Counsel sent a letter via e-mail to the GRC. Therein, Counsel stated that due to a clerical mistake, the Complainant’s Counsel did not send a notice of withdrawal to the GRC. Counsel further stated that all issues between the parties have been resolved and that he wanted the complaint withdrawn.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council dismiss the complaint because the Complainant's Counsel withdrew the matter via letter to the GRC on September 4, 2019. Therefore, no further adjudication is required.

Prepared By: John E. Stewart

September 17, 2019



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

August 27, 2019 Government Records Council Meeting

New Jersey Foundation for Open Government, Inc.
Complainant

Complaint No. 2018-240

v.

Borough of Woodbine (Cape May)
Custodian of Record

At the August 27, 2019 public meeting, the Government Records Council (“Council”) considered the August 20, 2019 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’s response was insufficient because she failed to respond in writing to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the 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).
3. The Custodian’s response to request item number 1, informing the Complainant that “[w]e have not had any special meetings,” constitutes an insufficient search and an unlawful denial of access to the responsive records subsequently located. N.J.S.A. 47:1A-6. Schneble v. N.J. Dep’t of Env’t Protection, GRC Complaint No. 2007-220 (April 2008).
4. The Custodian failed to respond to request items number 2 through 7, which constituted a “deemed” denial of those request items. However, the GRC declines to order disclosure of these records because the Custodian certified in the Statement of Information that she disclosed said records in unredacted form as of October 29, 2018. N.J.S.A. 47:1A-6.
5. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), conducted an insufficient search for the requested records and provided an insufficient response to the request pursuant to N.J.S.A. 47:1A-5(g), the Custodian admitted that she



inadvertently failed to address request items 2 through 7 which resulted in the “deemed” denial. And following receipt of the complaint, the Custodian disclosed to the Complainant all records responsive to the request. 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 an unreasonable denial of access under the totality of the circumstances.

6. 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. 432. Additionally, a 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 complaint alleging a denial of access was filed on October 17, 2018, and as of October 29, 2018, eight (8) days following receipt of the complaint, the Custodian disclosed all records responsive to the request. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party, who is 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. **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 27th Day of August 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: August 28, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 27, 2019 Council Meeting**

**New Jersey Foundation for Open Government, Inc.¹
Complainant**

GRC Complaint No. 2018-240

v.

**Borough of Woodbine (Cape May)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. “For the most recent special meeting held by the Governing Body for which minutes are available, please provide the following records:
 - a. The notice of the meeting sent to all newspapers, which the Governing Body noticed.
 - b. Proof of publication of the meeting notice, if available.
 - c. The publication schedule of the newspapers that were noticed, if available.
 - d. The minutes of the special meeting.
2. The minutes of the most recently held Governing Body meeting for which minutes are available. By way of explanation, if the Governing Body held a meeting on March 20, 2018 and April 20, 2018, but the April 20th meeting minutes have not yet been approved, please provide the minutes of the March 20, 2018 meeting.
3. The minutes of the two most recently held nonpublic (i.e. closed or executive session) governing body meetings for which minutes are available in either full or redacted form. For example, if the most recent closed meeting for which minutes are available, in whole or in part, took place on December 14, 2017 and January 14, 2018, please provide me with those minutes.
4. For the nonpublic meetings for which minutes were disclosed in response to Item 3 above, please provide the motion or resolution that authorized the nonpublic meeting in accordance with N.J.S.A. 10:4-13. For such motion or resolution that is spread out in full in the public meeting minutes, please provide only the pages that contain the motion or resolution.
5. To the extent that they do not duplicate the records responsive to Item 4 above, please provide the N.J.S.A. 10:4-13 motions or resolutions that authorized the two most recent Governing Body nonpublic meetings.

¹ Represented by Anthony H. Ogozalek, Jr., Esq. (Cinnaminson, NJ).

² Represented by Richard P. Tonetta, Esq. (Vineland, NJ).

New Jersey Foundation for Open Government, Inc. v. Borough of Woodbine (Cape May), 2018-240 – Findings and Recommendations of the Executive Director

6. All invoices and billing records submitted by the Municipal Solicitor that reflect time spent on municipal matters for the period 3/1/18 through 6/30/18. Also being requested are the relevant purchase orders for the municipal invoices and billing records.
7. The official OPRA form of the municipality that is used by the Custodian of Records.

Custodian of Record: Lisa Garrison

Request Received by Custodian: July 30, 2018

Response Made by Custodian: July 30, 2018

GRC Complaint Received: October 17, 2018

Background³

Request and Response:

On July 29, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.⁴ On July 30, 2018, the same date the request was received, the Custodian responded in writing informing the Complainant that “[w]e have not had any special meetings.”

Denial of Access Complaint:

On October 17, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian only responded to item 1 of the request by stating, “[w]e have not had any special meetings.” The Complainant further asserted that the Custodian’s response to request item number 1 was “false and non-responsive” because there were public notices of special meetings held on July 30, 2008 and August 28, 2014, copies of which the Complainant attached to the complaint. The Complainant stated that the Custodian should have provided these records if they were records responsive to the most recent special meeting for which minutes were available. The Complainant further asserted that the Custodian ignored request items 2 through 7 in her response, therefore there was a “deemed” denial of those request items.

The Complainant stated that he is asking the GRC to compel the Custodian to identify and disclose records responsive to all seven (7) of his request items and award him prevailing party attorney’s fees.

Statement of Information:

On October 30, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she responded to the Complainant’s July 29, 2018 OPRA request in writing

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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

⁴ July 29, 2018 was a Sunday.

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on July 30, 2018 and October 29, 2018. The Custodian certifies that the following records are responsive to the Complainant's request:

- August 4, 2008 special meeting minutes with attachments, proof of publication AC, fax cover sheet, public notice, transmission verification report, proof of publication Cape May Herald, e-mail CMHerald.
- August 28, 2014 special meeting minutes with attachments (titled "Regular Meeting), proof of publication AC Press, public notice.
- December 21, 2017 closed session meeting minutes with attachments.
- April 5, 2018 closed session meeting minutes with attachments.
- May 3, 2018 (incorrectly dated May 4, 2018) regular meeting minutes with attachments.
- May 3, 2018 workshop meeting minutes.
- June 21, 2018 regular meeting minutes with attachments.
- February 2018 solicitor bills.⁵
- March 2018 solicitor bills.
- April 2018 solicitor bills.
- May 2018 solicitor bills.
- June 2018 solicitor bills.

The Custodian certified that she began searching for the requested records but inadvertently failed to complete the search. The Custodian further certified that, "[s]ince learning of the error, all of the requested documents have been submitted in accordance with OPRA."

The Custodian's Counsel stated that the Custodian also serves as the tax collector and Borough Registrar. Counsel stated that the OPRA request was inadvertently not completed by the Custodian. Counsel further stated that failure to fulfill the request was not an intentional act on the part of the Custodian. Counsel also stated that the Custodian was not aware that the request was not completed until the complaint was filed; however, as of October 29, 2018, all requested documents were disclosed to the Complainant without redactions.

Additional Submissions:

The Custodian did not list request item number 7 on the SOI's document index. However, the Custodian certified that as of October 29, 2018, all of the requested records were disclosed to the Complainant without redactions. For this reason, the GRC e-mailed the Complainant's Counsel on October 30, 2018, seeking confirmation that all records responsive to the request were indeed received by the Complainant in unredacted form. On November 1, 2018, the Complainant's Counsel e-mailed the GRC stating that there are a few white outs on the disclosed bills but that same are inconsequential and he would address them with the Custodian's Counsel.

⁵ Although the Custodian certified that she disclosed this record to the Complainant, it was not a record responsive to the request.

Analysis

Sufficiency of Response

OPRA provides that a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g). Further, in Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that “. . . [t]he Custodian's response was legally insufficient because he failed to respond to each request item individually.” Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g).

Here, the Complainant's July 29, 2018 OPRA request contained seven (7) request items. The Custodian responded to the Complainant's request on July 30, 2018, by informing the Complainant that “[w]e have not had any special meetings.” Although the Custodian did not indicate to which response item number she was responding, she referred to special meetings; therefore, she was clearly referencing request item number 1.

As such, the Custodian's response was insufficient because she failed to respond in writing to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff, GRC 2007-272.

Timeliness

Unless a shorter time period is otherwise provided, a custodian must 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 accordingly 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).⁶ 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 Custodian timely responded to request item number 1 because she responded on the same date the request was received. The Custodian, however, failed to respond to request items numbered 2 through 7 until October 29, 2018, which was the sixty-third (63rd) business day following receipt of the request, and the eighth (8th) business day following receipt of the complaint.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business

⁶ 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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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.

Insufficient Search

The Council has maintained that it is among a custodian’s duties to perform a complete search for the requested records before responding to an OPRA request, as doing so will help ensure that the Custodian’s response is accurate and has an appropriate basis in law. In Schneble v. N.J. Dep’t of Env’t Protection, GRC Complaint No. 2007-220 (April 2008), the custodian initially responded to the complainant’s OPRA request by stating that no records responsive existed. The complainant, however, submitted e-mails that were responsive to her request with the Denial of Access Complaint. The custodian certified that, upon receipt of the e-mails attached to the Denial of Access Complaint, the custodian again searched through DEP files and located records responsive to the request. The GRC held that because the custodian performed an inadequate initial search, the custodian unlawfully denied the Complainant access to the requested records. See also Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (January 2011).

Here, although the Custodian certified that she inadvertently failed to address request item numbers 2 through 7, she did address request item number 1 by responding that “[w]e have not had any special meetings.” However, similar to the fact pattern of Schneble, the Complainant here attached to the Denial of Access Complaint public notices of special meetings held on July 30, 2008 and August 28, 2014. Thereafter, subsequent to the filing of this complaint, the Custodian performed another search and located special meeting minutes with attachments for the meetings held on August 4, 2008 and August 28, 2014, which she disclosed to the Complainant. Thus, as in Schneble, the Custodian failed to conduct an adequate search to locate all responsive records prior to her response. The Custodian’s failure to conduct a sufficient search for all requested records constitutes an unlawful denial of access.

Therefore, the Custodian’s response to request item number 1, informing the Complainant that “[w]e have not had any special meetings,” constitutes an insufficient search and an unlawful denial of access to the responsive records subsequently located. N.J.S.A. 47:1A-6. Schneble, GRC 2007-220.

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 complaint, the Custodian failed to respond to request items number 2 through 7, which constituted a “deemed” denial of those request items. However, the GRC declines to order disclosure of these records because the Custodian certified in the SOI that she disclosed said records in unredacted form as of October 29, 2018. N.J.S.A. 47:1A-6.

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)).

Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), conducted an insufficient search for the requested records and provided an insufficient response to the request pursuant to N.J.S.A. 47:1A-(g), the Custodian admitted that she inadvertently failed to address request items 2 through 7 which resulted in the “deemed” denial. And following receipt of the complaint, the Custodian disclosed to the Complainant all records responsive to the request. 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 an 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. The Supreme Court also 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 filed the instant complaint on October 17, 2018, asserting an unlawful denial of access and asking the GRC to compel the Custodian to identify and disclose records responsive to all seven (7) of his request items and award him prevailing party attorney’s fees. On October 29, 2018, the Custodian disclosed to the Complainant all records responsive to the request. Thus, the evidence of record supports that the Complainant is a prevailing party who is entitled to an award of attorney’s fees.

Therefore, 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. 432. Additionally, a 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 complaint alleging a denial of access was filed on October 17, 2018, and as of October 29, 2018, eight (8) days following receipt of the complaint, the Custodian disclosed all records responsive to the request. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party, who is 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. **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 Executive Director respectfully recommends the Council find that:

1. The Custodian’s response was insufficient because she failed to respond in writing to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the 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).

3. The Custodian's response to request item number 1, informing the Complainant that "[w]e have not had any special meetings," constitutes an insufficient search and an unlawful denial of access to the responsive records subsequently located. N.J.S.A. 47:1A-6. Schneble v. N.J. Dep't of Env't Protection, GRC Complaint No. 2007-220 (April 2008).
4. The Custodian failed to respond to request items number 2 through 7, which constituted a "deemed" denial of those request items. However, the GRC declines to order disclosure of these records because the Custodian certified in the Statement of Information that she disclosed said records in unredacted form as of October 29, 2018. N.J.S.A. 47:1A-6.
5. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), conducted an insufficient search for the requested records and provided an insufficient response to the request pursuant to N.J.S.A. 47:1A-(g), the Custodian admitted that she inadvertently failed to address request items 2 through 7 which resulted in the "deemed" denial. And following receipt of the complaint, the Custodian disclosed to the Complainant all records responsive to the request. 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 an unreasonable denial of access under the totality of the circumstances.
6. 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. 432. Additionally, a 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 complaint alleging a denial of access was filed on October 17, 2018, and as of October 29, 2018, eight (8) days following receipt of the complaint, the Custodian disclosed all records responsive to the request. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party, who is 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. **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.**

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August 20, 2019