



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

July 26, 2022 Government Records Council Meeting

E.K. and P.W. (o/b/o W.W.)
Complainant

Complaint No. 2020-105

v.

Mantua Township Board of Education (Gloucester)
Custodian of Record

At the July 26, 2022 public meeting, the Government Records Council (“Council”) considered the July 19, 2022 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. Although the Custodian did not timely respond to the Complainants’ OPRA request within the extended period, she provided an explanation that would reasonably justify a delay in access to said records. As such, due to extenuating circumstances, the Custodian’s failure to timely respond in writing to the Complainants’ request for records does not rise to the level of a “deemed” denial pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See also Dunwell (O.B.O. Borough of Alpha) v. Twp. of Phillipsburg (Warren), GRC Complaint No. 2020-64 (February 2022).
2. The Custodian has borne her burden of proof that she lawfully denied access to the Complainants’ OPRA request seeking the contents of WW’s evaluators’ files. N.J.S.A. 47:1A-6. Specifically, the evaluators were selected by and worked on behalf of the Complainants and the Mantua Township School District had no control over the records generated by the evaluators. See Hittinger v. N.J. Transit, GRC Complaint No. 2013-324 (July 2014).
3. The Custodian did not unlawfully deny access to the Complainants’ OPRA request item No. 1a seeking financial records pertaining to WW. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that she disclosed all records that existed in the Mantua Township School District’s possession. Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010); Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015).
4. 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, 432 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainants' 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, 71 (2008). Specifically, the Custodian provided all responsive records that existed in the Mantua Township School District's possession. 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. at 432, and Mason, 196 N.J. at 71.

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 26th Day of July 2022

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: July 28, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 26, 2022 Council Meeting**

**E.K. and P.W. (on Behalf of W.W.)¹
Complainant**

GRC Complaint No. 2020-105

v.

**Mantua Township Board of Education (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:

1. The file(s) containing WW's student records dated 12/1/19 to 4/14/20 of his two evaluations by Rowan University Assessment and Learning Center and his evaluation by Technology for Education & Communication Consulting.
 - a. Financial records are requested immediately pursuant to N.J.S.A. 47:1A-5(e), 196 N.J. 65. Financial records consist of contracts, bills, invoices, receipts, ledger accounts, purchase orders, payments, both sides of canceled checks.
 - b. The contents of communication files (i.e., e-mails, memos text messages, voicemails and correspondence, etc.).
 - i. Where the sender or recipient is identified as being any of the following: Carmen Henderson, Kelly Yanek, Laura E. Beider, Susan M. Kerr, Rowan University Assessment & Learning Center, Technology for Education & Communication Consulting, Dr. Robert J. Fisicaro, Michelle Daminger, Bonnie Nuss, Mary Port, Fran Adler, James Hochberg, Michael Magilton, Emily Pedersen, Stephanie DiAntonio, Rich Wessel, Ashley Zimmerman and Stephanie Logan; and
 - ii. The body/subject is any of the following: Elaine Kilmartin, [W.W.], Evaluation, IEE.
 - c. Education/special education records.

Custodian of Record: Michelle Daminger

Request Received by Custodian: April 14, 2020

Response Made by Custodian: April 15, 2020; April 22, 2020; April 23, 2020; April 29, 2020; May 13, 2020

GRC Complaint Received: May 26, 2020

¹ Represented by Jamie Epstein, Esq. (Hamilton, NJ).

² Represented by George M. Morris, Esq., of Parker McCay, P.A. (Mount Laurel, NJ).

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Background³

Request and Response:

On April 14, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 15, 2020, the Custodian responded in writing stating that the school was closed pursuant to the Governor’s Executive Order pertaining to the COVID-19 crisis, and it was unknown when business would return to normal. The Custodian noted that the Mantua Township School District (“District”) was operating under a minimal staffing plan with priority given to education of the student body. The Custodian further stated the following in response to the Complainants’ request items:

1. The District expects to be able to provide these documents by April 30, 2020 due to the limited staffing available within the building and access to the specific records.
 - a. The District assumes your request seeks items related to the above noted evaluations. Based upon that assumption, the District expects to be able to provide these documents by April 30, 2020 due to the limited staffing available within the building and access to the specific records.
 - b. The District’s IT personnel will need to run 17 search strings to identify potentially responsive documents. Each document will need to be reviewed for relevancy and to ensure redactions when appropriate. The District will endeavor to run these searches over the next several weeks but the IT personnel’s priority is ensuring the operation of virtual classrooms and the technological issues associated with online teach and learning. As soon as the District knows how many documents are returned from the search efforts, it will be in a better position to know how long it will take to produce responsive documents and whether a special services charge is required for the time to review and redact the materials. The District will provide an update to this request on or before April 30, 2020.
 - c. This portion of the request is denied as it does not identify any specific records to produce. Please provide additional clarity.

On April 15, 2020, Complainants’ Counsel responded to the Custodian providing clarification to item No. 1c of the OPRA request. Counsel stated that the request item sought attachments to communications records responsive to 1b. Counsel also stated that the request item sought the “contents of the evaluators’ WW file.” Counsel further stated that WW did not waive his right to claim that the Custodian denied immediate access to responsive records, as well as a general denial since the extension did not provide a specific compliance date.

On April 22, 2020, the Custodian responded in writing, providing evaluations of WW and a single page record responsive to item No. 1a. The Custodian also stated that communications will be provided as soon as she receives them from the District’s IT department. On April 23, 2020, Custodian’s Counsel provided additional responsive records to Complainants’ Counsel.

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.
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On April 23, 2020, Complainants' Counsel replied to Custodian's Counsel, asserting that several of the provided records were not requested, and he was denied access to additional records responsive to item Nos. 1a and 1c without being provided a basis for denial.

On April 29, 2020, the Custodian's Counsel e-mailed Complainants' Counsel, stating that the District's IT department identified over 900 potentially responsive e-mails, and provided those e-mails to him for review and potential redaction. Custodian's Counsel stated that due to the volume of e-mails, the District needed an additional extension until May 8, 2020 to submit a response. That same day, Complainants' Counsel responded via e-mail noting that no update was provided regarding records responsive to item Nos. 1a and 1c.

On May 8, 2020, Complainants' Counsel e-mailed the Custodian, stating that multiple extensions have been taken by the District, and that failure to provide responsive records that day constituted an unlawful denial.

On May 11, 2020, Custodian's Counsel e-mailed Complainants' Counsel, stating that problems occurred converting the e-mails for review. Custodian's Counsel also stated that the District was working to confirm if any additional records exist, but "are extremely limited due to the availability of staff during the covid shutdown." Custodian's Counsel stated that he hoped to have an answer by the end of the week, as well as provide the responsive e-mails by the end of business the next day. That same day, the Custodian e-mailed Complainants' Counsel providing additional records with minor redactions for attorney-client privilege. The Custodian also noted there were responsive e-mail chains between the District's attorneys and the District that were wholly protected under the privilege.

On May 13, 2020, the Custodian e-mailed the Complainants' Counsel, providing five (5) invoices responsive to the Complainants' OPRA request. The Custodian further stated that a review of District files confirmed that no other responsive records exist.

On May 18, 2020, Custodian's Counsel e-mailed Complainants' Counsel confirming that same received all responsive records, except for two (2) attachments that were included with the e-mail. Custodian's Counsel confirmed that the attachments were the final responsive records.

On May 19, 2020, Complainants' Counsel responded to Custodian's Counsel, asserting that the District has provided only a fraction of what should have been provided, including the communications records responsive to item No. 1b. Complainants' Counsel asserted that if no additional records are received by May 22, 2020, he will assume they will not be provided and that an unlawful denial of access occurred. That same day, Custodian's Counsel responded to Complainants' Counsel, stating that the District is confirming that no further responsive records exist regarding the request for financial records. Custodian's Counsel also stated that regarding communications records, no responsive e-mails exist pertaining to WW except for communications between the Custodian and Custodian's Counsel on the instant OPRA request. Custodian's Counsel stated that no additional records were provided regarding communications because none exist.

Denial of Access Complaint:

On May 26, 2020, Complainants' Counsel filed a Denial of Access Complaint with the Government Records Council ("GRC"). Counsel initially asserted that the Custodian failed to timely respond to the OPRA requests when she failed to provide immediate access to the financial student records. N.J.S.A. 47:1A-5(e); Mason v. City of Hoboken, 196 N.J. 51, 65 (2008); North Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 2015 N.J. Super. Unpub. LEXIS 76, *43 (App. Div. 2015). Counsel argued further that while the Custodian provided an extension deadline of April 30, 2020 and May 8, 2020 for certain request items, the Custodian failed to meet those asserted deadlines. N.J.S.A. 47:1A5(g); N.J.S.A. 47:1A-5(i); Kohn v. Twp. of Livingston Library, GRC Complaint No. 2007-124 (March 2008). Counsel thus argued that a "deemed" denial of access occurred and the Custodian was "willfully and deliberately flaunting" her OPRA obligations. Counsel further argued that the forgoing is notwithstanding that the Custodian had already violated N.J.S.A. 47:1A-5(e) by failing to immediately respond to OPRA request item No. 1a seeking financial student records. Counsel thus contended that the Council should order disclosure of all financial records without redactions.

Counsel further asserted that the Custodian failed to provide the requested contents of WW's own evaluations. Counsel asserted that the District hired the evaluators to conduct the evaluations. Counsel asserted that under Burnett v. Cnty of Gloucester, 415 N.J. Super. 506, 517 (App. Div. 2010), an agency is required to produce records of contractors held off-site under OPRA. Counsel therefore argued that the District could not renege its responsibility to provide responsive records simply because the evaluators were off-site.

Counsel also asserted that the Custodian provided only partial responses to the OPRA request, including failing to provide any responsive "contracts, bills, [] receipts, ledger accounts, purchase orders, payments, both sides of canceled checks." Counsel asserted that the GRC should order disclosure of the outstanding evaluations and financial records. Counsel argued that the Council should find that the Custodian knowingly and willfully violated OPRA and that the Complainant is a prevailing party entitled to an award of attorney's fees.

Supplemental Response:

On May 26, 2020, the Custodian e-mailed Complainants' Counsel stating that in continuing to respond during the pandemic and with limited staff, the District identified additional records believed to be responsive to the Complainants' request and attached them to the e-mail.

Statement of Information:

On June 23, 2020, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainants' OPRA request on April 14, 2020. Regarding request item No. 1b, the Custodian certified that her search included the District's IT department conducting a search for responsive e-mails. The Custodian also certified that she communicated with District employees to ensure that she was in possession of any physical documents. The Custodian certified that she and/or Custodian's Counsel responded in writing on April 15, 2020, April 22, 2020, April 23, 2020, April 29, 2020, May 11, 2020, May 13, 2020, and May 26, 2020.

The Custodian certified that records identified as Bates0001 through Bates0201 were e-mails responsive to item No. 1b. The Custodian also certified that records identified as Bates0201 through Bates0438 were responsive to item Nos. 1a and 1c. The Custodian also certified that certain e-mails were redacted to protect attorney-client privilege.⁴

Regarding the evaluations, Custodian's Counsel asserted that Complainants' Counsel's reliance on Burnett was misplaced. Counsel asserted that in Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30 (App. Div. 2005), the court found that there was no denial of access when the requested records were in the possession of other organizations. Counsel asserted that the facts in this matter were more akin to Bent rather than Burnett. Counsel asserted that in a separate litigation between the current parties at the Office of Administrative Law ("OAL"), the Complainants asserted that the evaluators at issue were their own experts. Counsel contended that the evaluators were "hand selected" by the Complainants and were paid to provide independent educational evaluations ("IEEs") at the District's expense in accordance with 34 C.F.R. 300.502 of the Individuals with Disabilities Education Act ("IDEA"). Counsel also asserted that in the OAL matter, the District requested copies of any IEEs received by the Complainants but were refused by Complainants' Counsel, citing the work-product privilege.⁵ Counsel thus argued that the District was unable to provide the "contents of the files" of the third-party evaluators in response to the OPRA request. Ultimately, Counsel maintained that all responsive records in the District's possession were provided to Complainants' Counsel and that no additional responsive records exist.

Counsel further argued that the District worked diligently to process the request but were hampered by the COVID-19 pandemic. Counsel argued that Complainants' Counsel ignored the fact that the District had been closed since March 13, 2020 and operating under the Governor's stay-at-home orders. Counsel asserted that technology personnel were primarily focused on providing virtual education, and teachers and other District personnel were working from home, thus making communications to obtain responsive records challenging. Counsel argued that he and the Custodian continually apprised Complainants' Counsel of the challenges and revised the deadlines and extensions as permitted by OPRA and by the March 20, 2020 amendment. Counsel thus argued that the District made a "reasonable effort" to respond to the Complainants' OPRA request and requested the GRC dismiss the complaint.

Additional Submissions:

On June 20, 2022, the GRC submitted a request for additional information from Complainants' Counsel. Specifically, the GRC asked:

1. Was Complainants' Counsel in possession of the "contents of the evaluators' WW file" at the time of the request?
2. Was Complainants' Counsel in possession of the relevant IEEs conducted by the evaluators/contractors at the time of the request?

⁴ Complainants' Counsel has not disputed the redactions contained within the provided e-mail correspondence.

⁵ Counsel included in the SOI correspondence between the parties corroborating this claim.

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3. Of the documents disclosed by the Custodian in response to the Complainants' OPRA request, were any responsive to item No. 1c in whole or in part? Please specify which records were responsive in whole, in part, or not responsive.
4. Were the evaluators/contractors at issue specifically selected by the Complainants and/or Complainants' Counsel?

The request provided Complainants' Counsel until the end of business on June 23, 2022 to submit a certification.

On June 24, 2022, Complainants' Counsel e-mailed the GRC, stating that while he understood some of the clarifications requested, he did not understand others. Complainants' Counsel stated that he wished to be sure he understood what the GRC was asking him to certify to before responding. That same day, GRC e-mailed Complainants' Counsel requesting that he specify which of the questions in the request for additional information he needed clarification.

On June 29, 2022, the GRC e-mailed Complainants' Counsel, stating that as of that date the GRC has not received a certification nor a response to the June 24, 2020 e-mail. The GRC also stated that the deadline to provide a certification had since passed. The GRC then requested that Complainants' Counsel either submit a certification in response to the request for additional information or specify which questions he needs clarification before certifying by the end of business on July 1, 2022. Complainants' Counsel did not respond to the GRC.

Analysis

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 dated October 31, 2007).

Likewise, barring extenuating circumstances, a custodian's failure to respond immediately in writing to a complainant's OPRA request for immediate access records, either granting access, denying access, seeking clarification, or requesting an extension of time, also results in a "deemed" denial of the request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i).⁷ See Cody v. Middletown Twp. Public Schools, GRC Complaint No. 2005-98 (December

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.

⁷ OPRA lists immediate access records as "budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." N.J.S.A. E.K. and P.W. (on Behalf of W.W.) v. Mantua Township Board of Education (Gloucester), 2020-105 – Findings and Recommendations of the Executive Director

2005) and Harris v. NJ Dep't of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007), holding that the custodian was obligated to immediately notify the complainant as to the status of immediate access records.

Moreover, in Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant's March 19, 2007 OPRA request seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records would be provided later in the week. Id. The evidence of record showed that no records were provided until May 31, 2007. Id. The GRC held that:

The Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5(i) resulting in a “deemed” denial of access to the records.

[Id.]

Additionally, the Legislature amended OPRA on March 20, 2020, in response to the global pandemic. P.L. 2020, c.10. Based on that amendment, N.J.S.A. 47:1A-5 now provides that:

During a period declared pursuant to the laws of this State as a state of emergency, public health emergency, or state of local disaster emergency, the deadlines by which to respond to a request for, or grant or deny access to, a government record under paragraph (1) of this subsection or subsection e. of this section shall not apply, provided, however, that the custodian of a government record shall make a reasonable effort, as the circumstances permit, to respond to a request for access to a government record within seven business days or as soon as possible thereafter.”

[Id.]

“Paragraph (1) of this subsection” refers to N.J.S.A. 47:1A-5(i) and “subsection e. of this section” refers to N.J.S.A. 47:1A-5(e).

To this end, although adjudicated during the pendency of this matter, the GRC finds Dunwell (O.B.O. Borough of Alpha) v. Twp. of Phillipsburg (Warren), GRC Complaint No. 2020-64 (February 2022) pertinent. There, the complainant asserted that the custodian failed to timely provide immediate access records under OPRA. The custodian certified that at the time she received the OPRA request, the municipality was operating with reduced staff and subsequently shutdown temporarily due to the pandemic and could not provide a response until the fifth (5th)

47:1A-5(e). The Council has also determined that purchase orders and invoices are immediate access records. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-03 (April 2013).
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business day after receipt. The Council held that although the request was submitted prior to the enactment of N.J.S.A. 47:1A-5(i)(2), the custodian provided sufficient facts and circumstances to reasonably justify the delay in providing access to the immediate access records.

Here, the Complainants' OPRA request item No. 1a sought, among other records, contracts, bills, invoices, and purchase orders. Complainants' Counsel submitted the request on April 14, 2020, and the Custodian responded on April 15, 2020, stating that an extension until April 30, 2020 was needed to fulfill the request. The Custodian also asserted that an extension until April 30, 2020 was needed to process the request item Nos. 1b and 1c. The Custodian noted that the school was closed due to the Governor's Executive Order and that the District was operating at a minimum staffing capacity. The Custodian also noted the March 20, 2020 amendment to OPRA suspended the statutory deadline during a state of emergency. Thereafter, the Custodian and Custodian's Counsel provided records to Complainants' Counsel at or beyond the extended deadline of April 30, 2020 and the additional deadline of May 8, 2020. The Custodian certified that the last portion of responsive records were provided on May 26, 2020.

The evidence of record reveals that while the Custodian responded "immediately" to the Complainants' Counsel seeking an extension of time, she failed to respond within the extended deadlines imposed. See Kohn, GRC 2007-124. However, there extenuating circumstances which contributed to the delay of the Custodian's response. The evidence of record demonstrates that the Custodian and Custodian's Counsel maintained regular communication with Complainants' Counsel throughout the process, providing responsive records when able and providing revised updates on when additional records would be available. Further, and like Dunwell, the Custodian certified to the significant hardships facing the District because of the COVID-19 crisis, including reduced on-site staff, significant staff disruptions due to remote work, and hindered communications amongst personnel which contributed to the delays and piecemeal production.

Therefore, although the Custodian did not timely respond to the Complainants' OPRA request within the extended period, she provided an explanation that would reasonably justify a delay in access to said records. As such, due to extenuating circumstances, the Custodian's failure to timely respond in writing to the Complainants' request for records does not rise to the level of a "deemed" denial pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See also Dunwell, GRC 2020-64.

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.

Evaluations of WW

In Burnett, 415 N.J. Super. 506, the custodian claimed that records in possession of a third-party contractor executed on behalf of an agency are not subject to access. The Appellate Division

reviewed the Law Division's ruling relying on Bent, 381 N.J. Super. at 38-39 and holding that the defendant did not have to disclose the records responsive to the plaintiff's OPRA request because the records were not in the defendant's possession. The Appellate Division found that the motion judge interpreted Bent, *supra*, too broadly. The Appellate Division held:

We find the circumstances in Bent, *supra*, to be far removed from those existing in the present matter because . . . the settlement agreements at issue were made by or on behalf of the [defendants] in the course of its official business. Were we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply . . . relinquish possession to [third] parties, thereby thwarting the policy of transparency that underlies OPRA . . . We reject any narrowing legal position in this matter that would provide grounds for impeding access to such documents.

[Id. at 517.]

However, in Hittinger v. N.J. Transit, GRC Complaint No. 2013-324 (July 2014), the complainant sought, among other records, contracts and agreements between an advertising agency under contract with NJ Transit and vendors who contracted with said agency. The Council distinguished the relationship between the advertising agency and NJ Transit, finding that unlike the custodian in Burnett, 415 N.J. Super. 506, NJ Transit was not bound by, nor has any discretion over, contracts made between the advertising agency and client vendors. Hittinger, GRC 2013-324. The terms of the agreement between NJ Transit and the advertising agency provided that the agency accepted full responsibility for the procurement of advertising. Id. at 3. The Council therefore held that NJ Transit was not obligated to obtain responsive records pertaining to agreements and communications between the advertising agency and client vendors. Id. at 7.

In the instant matter, the Custodian certified that no records exist in response to the portion of the Complainants' OPRA request seeking IEEs of WW. In response, Complainants' Counsel argued that such records were required to be retrieved from the evaluators pursuant to Burnett, 415 N.J. Super. at 517.

In comparing this matter to Burnett, 415 N.J. Super. 506 and Hittinger, GRC 2013-234, the GRC is persuaded that the facts here trend towards Hittinger. The GRC notes that before the instant filing, the parties were in litigation at OAL pertaining to the underlying special education matter. During the litigation, the District paid for the evaluators at issue as required by law. See 34 C.F.R. 300.502. However, the evaluators were not only selected by the Complainants, but they also conducted the IEEs for the Complainants' benefit against the District during litigation. Moreover, the evidence of record demonstrates that Custodian's Counsel attempted to obtain the IEEs at issue from Complainants' Counsel, but he refused asserting the work-product privilege. Thus, like the vendors in Hittinger, the evaluators were under the control and oversight of the Complainants, notwithstanding the District's legal obligation to pay for their services. The District did not have the ability to retrieve WW's IEEs or file contents, as the evaluators answered to the Complainants or Complainants' Counsel. Therefore, the District was not obligated to retrieve responsive records from the evaluators in accordance with Hittinger, GRC 2013-324.

The GRC also notes that it attempted to obtain additional information from Complainants' Counsel on whether the evaluators were "hand-selected" by the Complainants, whether Complainants' Counsel possessed the responsive records at the time of the request, and whether the Custodian's records production were responsive at all to item No. 1c. Complainants' Counsel requested clarification of the GRC's request, but did not specify what portion of the request for additional information needed clarification. Complainants' Counsel was given eight (8) business days to provide a response but failed to do so.

Accordingly, the Custodian has borne her burden of proof that she lawfully denied access to the Complainants' OPRA request seeking the contents of WW's evaluators' files. N.J.S.A. 47:1A-6. Specifically, the evaluators were selected by and worked on behalf of the Complainants and the District had no control over the records generated by the evaluators. See Hittinger, GRC 2013-234.

Financial Records

In Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010), the Council found that the custodian did not unlawfully deny access to the requested records based on the custodian's certification that all such records were provided to the complainant. The Council held that the custodian's certification, in addition to the lack of refuting evidence from the complainant, was sufficient to meet the custodian's burden of proof. See also Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015).

In the instant matter, Complainants' Counsel asserted that the Custodian only provided a handful of responsive records and failed to provide additional financial records and e-mail correspondence. In the SOI, the Custodian certified she disclosed all responsive records that existed in the District's possession were provided various dates leading up to the May 26, 2020 complaint filing. The Custodian further affirmed that no other responsive records exist or were not maintained by the District.

Given the evidence of record contained herein as well as the findings outlined above, the GRC determines that this complaint more closely mirrors the facts in Danis, GRC 2009-156. That is, the Custodian disclosed all financial and e-mail correspondence and certified in the SOI that no additional records exist or were not in the District's possession at the time of the OPRA request. As noted above, the evaluators were under the control of the Complainant's and Complainants' Counsel, and the District is not obligated to obtain any responsive financial records that may be in the evaluators' possession.

Therefore, the Custodian did not unlawfully deny access to the Complainants' OPRA request item No. 1a seeking financial records pertaining to WW. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that she disclosed all records that existed in the District's possession. Danis, GRC 2009-156, *et seq.*; Burns, GRC 2005-68; Holland, GRC 2014-63, *et seq.*

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, 432 (App. Div. 2006), the Appellate Division 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, 71 (2008), the 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”(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 held that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” Id. at 603 (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.

[196 N.J. at 73-76.]

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, New Jersey v. Singer, 469 U.S. 832 (1984).

[Id. at 76.]

In the instant matter, Complainants’ Counsel filed the instant complaint asserting that the Custodian unlawfully denied access to the requested records. However, the evidence of record indicates that the Custodian provided all responsive records in the District’s possession and was not obligated to obtain records from a third-party outside the District’s control. Thus, the Complainant has not achieved the desired result and is not a prevailing party in this complaint.

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. at 432. Additionally, no factual causal nexus exists between the Complainants’ filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 71. Specifically, the Custodian provided all responsive records that existed in the District’s possession. 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. at 432, and Mason, 196 N.J. at 71.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian did not timely respond to the Complainants’ OPRA request within the extended period, she provided an explanation that would reasonably justify a delay in access to said records. As such, due to extenuating circumstances, the Custodian’s failure to timely respond in writing to the Complainants’ request for records does not rise to the level of a “deemed” denial pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i). See also Dunwell (O.B.O. Borough of

Alpha) v. Twp. of Phillipsburg (Warren), GRC Complaint No. 2020-64 (February 2022).

2. The Custodian has borne her burden of proof that she lawfully denied access to the Complainants' OPRA request seeking the contents of WW's evaluators' files. N.J.S.A. 47:1A-6. Specifically, the evaluators were selected by and worked on behalf of the Complainants and the Mantua Township School District had no control over the records generated by the evaluators. See Hittinger v. N.J. Transit, GRC Complaint No. 2013-324 (July 2014).
3. The Custodian did not unlawfully deny access to the Complainants' OPRA request item No. 1a seeking financial records pertaining to WW. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that she disclosed all records that existed in the Mantua Township School District's possession. Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010); Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015).
4. 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, 432 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainants' 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, 71 (2008). Specifically, the Custodian provided all responsive records that existed in the Mantua Township School District's possession. 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. at 432, and Mason, 196 N.J. at 71.

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