



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 25, 2022 Government Records Council Meeting

Michael I. Inzelbuch, Esq. (o/b/o C.J.)
Complainant
v.
Teaneck Board of Education (Bergen)
Custodian of Record

Complaint No. 2020-247
and 2020-248

At the January 25, 2022 public meeting, the Government Records Council (“Council”) considered the January 18, 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. The evidence of record supports that the Custodian never received the Complainant’s October 30, and November 10, 2020 OPRA requests, and the Complainant’s evidence is insufficient to overcome the Custodian’s certification and evidence. Thus, the Custodian did not unlawfully deny access to the Complainant’s OPRA requests. N.J.S.A. 47:1A-6. See Martinez v. Morris Cnty. Prosecutor’s Office, GRC Complaint No. 2014-2 (September 2014), and Valdes v. N.J. Dep’t of Educ., GRC Complaint No. 2012-19 (April 2013).
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, 71 (2008). Specifically, no unlawful denial of access occurred because the Custodian did not receive the subject OPRA requests prior to the filing of each complaint. 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 25th Day of January 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: January 27, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 25, 2022 Council Meeting**

**Michael I. Inzelbuch (On behalf of C.J.)¹
Complainant**

**GRC Complaint Nos. 2020-247
and 2020-248²**

v.

**Teaneck Board of Education (Bergen)³
Custodial Agency**

Records Relevant to Complaint:

October 30, 2020 OPRA request:⁴ Electronic copies via e-mail of:

1. “Any and all documentation, recordings, *etc.*” regarding the Town Hall meeting with special education students from June through October 2020.
2. “Any and all” contracts, purchase orders, Teaneck Board of Education (“BOE”) approvals, or correspondence between BOE staff/consultants and the South Bergen Jointure Commission (“SBJC”).

November 10, 2020 OPRA request:⁵ Electronic copies via e-mail of:

1. “Any and all” BOE minutes, notes, resolutions, correspondence, communications, *etc.* regarding the BOE “allegedly advising the Administration and/or attorney for the [BOE] that they will not pay for nor reimburse any students who attend Shefa School, or the Sinai School as recently stated by Ms. Simon.”
2. “Any and all” BOE resolutions and/or minutes “as to any payments to the Shefa School and/or the Sinai School” from 2018 to present.

Custodian of Record: Melissa Simmons
Request Received by Custodian: December 24, 2020
Response Made by Custodian: January 22, 2021
GRC Complaint Received: December 29, 2020

¹ The Complainant represents C.J., a minor.

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ Represented by Justin A. Marchetta, Esq. and Graham K. Staton, Esq., of Inglesino, Webster, Wyciskala & Taylor, LLC (Parsippany, NJ).

⁴ This OPRA request is the subject of GRC Complaint No. 2020-247.

⁵ This OPRA request is the subject of GRC Complaint No. 2020-248.

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Background⁶

Request and Response:

On October 30, 2020, the Complainant submitted the first (1st) Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 10, 2020, the Complainant submitted the second (2nd) OPRA request to the Custodian seeking the above-mentioned records.

On December 22, 2020, the Complainant e-mailed Nathanya Simon, Esq. of Scarinci, Hollenbeck, LLC stating that he did not receive a response to either OPRA request. The Complainant noted that if he did not receive a response by December 23, 2020, he would “need to consider any and all action(s).”⁷ On December 23, 2020, Ms. Simon responded stating that she “[did] not recall” receiving the subject OPRA requests but that the BOE offices would be closed through January 4, 2021. Ms. Simon stated that if any records existed in response to the October 30, 2020 OPRA request, she would provide them during the week of January 4, 2021. Ms. Simon further noted that it appeared any records responsive to November 10, 2020 OPRA request item No. 1 were exempt under several exemptions present in N.J.S.A. 47:1A-1.1 and that an extension may be necessary for a response to item No. 2. On the same day, Ms. Simon e-mailed the Custodian and other individuals from the BOE asking whether they received the OPRA requests. Director of Special Education and Nursing Services Erica Cerilli-Levine responded stating that she did not recall receiving the requests and asked whether Ms. Simone had “the original correspondence.”

On December 24, 2020, the Complainant submitted a consolidated version of the subject OPRA requests to the Custodian.

Denial of Access Complaint:

On December 29, 2020,⁸ the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to respond to the subject OPRA requests.

Supplemental Responses:

On December 30, 2020, the Custodian acknowledged receipt of the consolidated OPRA request and noted that the BOE was closed until January 4, 2021. The Custodian stated that she would address the newly submitted OPRA request upon her return to work. On January 22, 2021, the Custodian responded in writing to the subject OPRA requests. The Custodian stated that no records responsive to the October 30, 2020 OPRA request item No. 1 exist. The Custodian identified minutes responsive to the October 30, 2020 OPRA request item No. 2 and directed the Complainant to the BOE’s website for access. The Custodian also disclosed a contract and

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 Complainant did not attach with OPRA request to his December 22, 2020 e-mails.

⁸ The Complainant executed both complaints and sent them to the GRC via e-mail on December 24, 2020.

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purchase orders with the SBJC. The Custodian further stated that no records responsive to the November 10, 2020 OPRA request item No. 1 existed, but that the Complainant may review the BOE's meeting minutes for payment approvals. The Custodian also disclosed payment records for Shefa and Sinai Schools from 2018 to present in response to the November 10, 2020 OPRA request item No. 2. The Custodian noted that no payments were made to Shefa School in 2018.

Statement of Information:

On February 12, 2021, the Custodian filed a Statement of Information ("SOI") for both complaints. The Custodian certified that the subject OPRA requests were "not known" to the BOE until December 22, 2020 because the Complainant submitted them to the "wrong entity." The Custodian certified that the Complainant subsequently submitted a consolidated version of the subject OPRA requests on December 24, 2020. The Custodian certified that although she acknowledged receipt of the consolidated request on that December 30, 2020, the BOE was closed through January 4, 2021 for the holiday and remained closed until January 11, 2021 due to COVID-19. The Custodian certified that upon returning to work, BOE counsel left the Complainant a voicemail on January 13, 2021 seeking clarification of the October 30, 2020 OPRA request Item No. 1. The Custodian affirmed that the Complainant did not respond, and she ultimately responded to the requests on January 22, 2021.⁹

The Custodian argued that she acted properly under OPRA because the Complainant failed to submit the subject OPRA requests to the BOE until December 24, 2020. The Custodian stated the BOE was closed from that day through January 4, 2021 due to the holidays. The Custodian further averred that the BOE closed for another week due to COVID-19 and no employee could perform a search until returning to work. The Custodian argued that the COVID-19 closure is exactly why the Legislature amended OPRA to waive the statutory response time in March 2020. See P.L. 2020 c.10. The Custodian asserted that the request was addressed promptly upon her return to work and that she complied with OPRA; thus, this complaint should be dismissed.

Further, the Custodian argued that her actions were not knowing and willful in nature because she made a good faith effort to comply with the OPRA requests. The Custodian noted that this is notwithstanding the circumstantial office closures and the Complainant's failure to provide clarification upon request. The Custodian also argued that the Complainant is not entitled to an award of attorney's fees because he failed to prevail here. The Custodian argued that these complaints did not bring about a change in the BOE's actions because she intended to respond once she returned to work. The Custodian argued that contrary to the Complainant's assertion, she did respond on January 22, 2021 disclosing records responsive to two (2) of the request items and advising that no responsive records existed to the others.

Additional Submissions:

On February 17, 2021, the Complainant e-mailed Custodian's Co-Counsel seeking to resolve these matters without prejudice. The Complainant noted that the SOI response indicated that the Custodian disclosed records; he asked that said correspondence be resent as he could not

⁹ The Custodian did not include a copy of her response as part of the SOI.
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locate it. The Complainant also clarified his October 30, 2020 OPRA request item No. 1 to seek records from “any such meetings held/coordinated/conducted by or with the Special Education Department.” On the same day, Co-Counsel responded thanking the Complainant for his clarification and noting that he would ask the Custodian to “forward the responsive records.”

On February 22, 2021, the Complainant e-mailed the GRC noting that he provided clarification on February 17, 2021. The Complainant also noted that it appeared the Custodian did not ultimately disclose the responsive records until that time due to an incorrect e-mail address.

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 further provides that, “a request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian.” N.J.S.A. 47:1A-5(g). OPRA further provides that, “the council shall make a determination as to whether the complaint is within its jurisdiction or frivolous or *without any reasonable factual basis*.” N.J.S.A. 47:1A-7(e) (emphasis added).

In Martinez v. Morris Cnty. Prosecutor’s Office, GRC Complaint No. 2014-2 (September 2014), the complainant contended that the custodian should have received his OPRA request and provided a photocopy of the certified mail receipt as evidence. The certified mail receipt identified the date of delivery and confirmed that the address was correct. The Council held that the certified mail receipt was insufficient to show that the custodian received the request.

Furthermore, in Valdes v. N.J. Dep’t of Educ., GRC Complaint No. 2012-19 (April 2013), the complainant filed a complaint after not receiving a response to his OPRA request. As part of his Denial of Access Complaint, the complainant included a certified mail receipt stamped “State of NJ – Capital Post Office.” The Council determined that the custodian did not unlawfully deny access to the complainant’s OPRA request because same was never received. The Council reasoned that “the Custodian did not sign the receipt and there is no indication that [the Department of Education] received the request, only that the State received it . . . it is entirely possible that the Custodian never received the OPRA request.” Id. See also Bey v. State of New Jersey, Office of Homeland Security & Preparedness, GRC Complainant No. 2013-237 (February 2014) (complainant’s certified mail return receipt sufficient only to show that the State received the request, not the custodian).

In the instant matter, the Complainant contended that he submitted his OPRA requests to the Custodian on October 30, and November 10, 2020 and provided a copy of facsimile confirmation sheets showing a successful transmission. However, the Custodian certified in the

SOI that she did not receive either OPRA request until receipt of the December 24, 2020 consolidated OPRA request. The Custodian also included e-mails between the Complainant, Ms. Simon, and the BOE on December 22, and 23, 2020 confirming that neither OPRA request was received.

The facts in this matter are analogous to those in Martinez, GRC 2014-2 and Valdes, GRC 2012-19. Like the certified mail receipts, the Complainant's fax confirmation receipts are evidence that transmission was successful but does not confirm that the Custodian received the OPRA requests. Instead, the Custodian was able to provide as part of the SOI e-mails confirming the BOE's lack of knowledge to the existence of both OPRA requests. Thus, the Complainant's evidence is insufficient to overcome the Custodian's certification that the BOE never received the either OPRA request.

Therefore, the evidence of record supports that the Custodian never received the Complainant's October 30, and November 10, 2020 OPRA requests, and the Complainant's evidence is insufficient to overcome the Custodian's certification and evidence. Thus, the Custodian did not unlawfully deny access to the Complainant's OPRA requests. N.J.S.A. 47:1A-6. See Martinez, GRC 2014-2, and Valdes, GRC 2012-19.

In closing, the GRC declines to review Complainant's consolidated OPRA request filed on December 24, 2020 and the Custodian's responses to it because the complaint filing would be unripe. Specifically, the Complainant concurrently submitted the consolidated OPRA request with the BOE and these complaints to the GRC on December 24, 2020; thus, no unlawful denial of access to the consolidated request had occurred at that time. See Smith v. Moorestown Twp., 2020 N.J. Super. Unpub. LEXIS 1108 (App. Div. June 10, 2020); Barlow, III v. N.J. Dep't of Treasury, Div. of Risk Mgmt., GRC Complaint No. 2017-135 (November 2017).

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 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 stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . .” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney’s fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, citing Teeters, 387 N.J. Super. at 429; see, e.g., Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), certif. denied, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney’s fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney’s fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney’s fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature’s revisions therefore: (1) mandate, rather than permit, an award of attorney’s fees to a **prevailing party**; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

[Mason at 73-76.]

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.]

Here, the Complainant, who identified in the Denial of Access Complaint that he represented C.J., filed the instant complaints arguing that the Custodian failed to respond to the subject OPRA requests. In the SOI, the Custodian certified that she did not receive either OPRA request until December 24, 2020, when the Complainant submitted a consolidated version of both OPRA requests. Based on the evidence of record, the GRC has determined that no unlawful denial of access occurred because the Custodian never received the subject OPRA requests for which these complaints were filed. Thus, the Complainant is not a prevailing party entitled to an award of reasonable attorney's fees.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters, 387 N.J. Super. 432. Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, no unlawful denial of access occurred because the Custodian did not receive the subject OPRA requests prior to the filing of each complaint. 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 evidence of record supports that the Custodian never received the Complainant's October 30, and November 10, 2020 OPRA requests, and the Complainant's evidence is insufficient to overcome the Custodian's certification and evidence. Thus, the Custodian did not unlawfully deny access to the Complainant's OPRA requests. N.J.S.A. 47:1A-6. See Martinez v. Morris Cnty. Prosecutor's Office, GRC Complaint No. 2014-2 (September 2014), and Valdes v. N.J. Dep't of Educ., GRC Complaint No. 2012-19 (April 2013).
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, 71 (2008). Specifically, no unlawful denial of access occurred because the Custodian did not receive the subject OPRA requests prior to the filing of each complaint. 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

January 18, 2022