



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 22, 2022 Government Records Council Meeting

Craig S. Dunwell (o/b/o Borough of Alpha)
Complainant

Complaint No. 2020-64

v.

Town of Phillipsburg (Warren)
Custodian of Record

At the February 22, 2022 public meeting, the Government Records Council (“Council”) considered the February 15, 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 immediately respond to three (3) immediate access request items, she did provide an explanation that would reasonably justify a delay in access to said records. As such, due to extenuating circumstances, the Custodian’s failure to respond immediately in writing to the Complainant’s request for immediate access 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).
2. This complaint is materially defective and shall be dismissed because the Complainant verified his complaint before the statutory time period for the Custodian to respond, *as extended*, had expired and immediate access records are not at issue. See Sallie v. N.J. Dep’t of Banking and Ins., GRC Complaint No. 2007-226 (April 2009) and Hardwick v. N.J. Dep’t of Transp., GRC Complaint No. 2011-52 (August 2012). See also Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2012-323 (February 2013).
3. 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 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, the Complainant verified his complaint before the statutory time period provided for the Custodian to respond had expired, and therefore prior to any denial of access to the requested records. As such, the complaint is materially defective. 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. 423, 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 22nd Day of February 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: February 24, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 22, 2022 Council Meeting**

**Craig S. Dunwell (o/b/o Borough of Alpha)¹
Complainant**

GRC Complaint No. 2020-64

v.

**Town of Phillipsburg (Warren)²
Custodial Agency**

Records Relevant to Complaint:

OPRA Request Number 1 dated February 28, 2020: Copies to be picked up by the Complainant of “[a]ll documents related to Docket No. WRN-L-136-14, including but not limited to:”

1. Complaints, Amended Complaints, Answers, Orders, and Pleadings;
2. Mediation expert reports and position papers;
3. Interrogatories and Answers to interrogatories;
4. Demands for admissions and responses thereto;
5. Deposition transcripts;
6. Expert witness reports;
7. Expert witness invoices presented for payment;
8. All Correspondence;
9. “All emails between and among elected officials, town employees, and/or outside contractors not protected by the attorney-client privilege related to and/or concerning said litigation; and Phillipsburg Town Council resolutions related to said litigation including the resolution approving the settlements in each case and authorizing the settlement agreements to be executed.”

OPRA Request Number 2 dated February 28, 2020: Copies to be picked up by the Complainant of

1. “[a]ll correspondence, email, and memorandum pertaining to revenue generated at the Phillipsburg sanitary sewer plant from septic waste haulers from 01/01/2014-present;
2. All Phillipsburg invoices for payment to be made by septic waste haulers from 01/01/2014-present;
3. All payments made by septic waste haulers to the Town of Phillipsburg and/or the Phillipsburg sanitary sewer plant and/or sewer utility from 01/01/2014-present.”

¹ Represented by Joseph C. Tauriello, Esq. (Princeton, NJ).

² Represented by James F. Moscagiuri, Esq., of Lavery, Salvaggi, Abromitis & Cohen, P.C. (Hackettstown, NJ).
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OPRA Request Number 3 dated February 28, 2020: Copies to be picked up by the Complainant of “[a]ll invoices from Sandy Galacio, Jr. Esq. and Windels Marx law firm presented for payment from 01/01/2014-present.”

Custodian of Record: Victoria L. Kleiner
Requests Received by Custodian: March 3, 2020
Response Made by Custodian: March 10, 2020
GRC Complaint Received: March 13, 2020

Background³

Requests and Response:

On February 28, 2020, the Complainant submitted three (3) Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records.⁴ On March 10, 2020, the fifth (5th) business day following receipt of said requests, the Custodian responded in writing informing the Complainant that because several requests were filed, some of the requested records would need the attention of the municipality’s IT provider, and responsive records would require attorney review, therefore she would need an extension of time until March 30, 2020, to fulfill the request. The Custodian informed the Complainant that if the extension of time posed a problem, he should contact her.

Denial of Access Complaint:

On March 13, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that on February 28, 2020, he personally delivered three (3) OPRA requests to the Town of Phillipsburg clerk’s office seeking the records relevant to the complaint. The Complainant stated that he did not receive a response to the requests. The Complainant further stated that, “[t]he Parties to the litigation signed the settlement agreement in 2019. As such, the requested documents are not exempt from release under any of the OPRA exemptions.” The Complainant attached to the complaint a settlement agreement form regarding all claims and causes of action asserted with respect to Docket Number WRN-136-14 consolidated with Docket Number WRN-L-41-14 filed in the Superior Court.

Statement of Information:

On June 12, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that the Complainant submitted the OPRA requests to the Town on February 28, 2020, and she received the requests on March 3, 2020. The Custodian certified that she responded in writing on March 10, 2020, informing the Complainant that she required an extension of time until March 30, 2020, and that a special service charge may be required. The Custodian certified that the extension of time was necessary because the Complainant sought voluminous records for

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 The Custodian certified that she did not personally receive the requests until March 3, 2020.

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numerous categories of documents. Moreover, the Custodian certified that “[a]t the same time that the subject records request (sic) came in, the Town was not only going through a relatively new transition in administration, but the significant issues related to COVID-19 began to emerge.” The Custodian further certified that the requested records are not centrally located, but rather spread out over several offices within the Town. The Custodian certified that most of the requested records are in the possession of Windels, Marx Law Firm (the “Firm”).

The Custodian certified that on March 12, 2020, she received the Denial of Access Complaint. The Custodian certified that she contacted the Complainant’s Counsel to discuss the matter, but Counsel was dismissive.

The Custodian certified that during the week of March 9, 2020, some of the Town’s employees were not in the municipal building due to COVID-19, and that the following week the municipal building was shut down to all but essential personnel because of the emerging pandemic. The Custodian further certified that because of reduced staff, hours, and access, the Complainant’s requests for a voluminous quantity of records was disruptive to municipal operations. N.J.S.A. 47:1A-5(g). The Custodian certified that the New Jersey Legislature passed A3849 on March 19, 2020, which amended OPRA to permit records custodians to extend the OPRA deadlines.

The Custodian certified that contemporaneously she learned that the Firm, which possesses the vast majority of the requested records, was closed, and remains closed, due to the COVID-19 pandemic. The Custodian attached to the SOI a certification dated June 4, 2020, from Sandy Galacio, Esq. Mr. Galacio averred that he is an attorney in the Firm. Mr. Galacio certified that the Firm’s New Brunswick office was closed because of the pandemic and his last day in the office was March 18, 2020. Mr. Galacio further certified that some of the physical files have been uploaded to the Firm’s electronic storage system; however, the dislocations caused by the pandemic have made it difficult to forward the requested records to the Custodian. Mr. Galacio certified that he cannot search for many of the requested records; therefore, those records cannot be produced until he returns to the office.

Finally, the Custodian certified that the Complainant’s requests were not denied. The Custodian certified that the requests were, and are, in the process of being addressed; however, the pandemic is hindering the requests from being processed.

Additional Submissions:

On September 3, 2021, in reply to an inquiry from the GRC, the Complainant’s Counsel e-mailed the GRC stating that the Custodian failed to disclose any records in response to multiple request items.

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).⁵ Thus, a custodian's failure to respond in writing to a complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

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).⁶ See Cody v. Middletown Twp. Public Schools, GRC Complaint No. 2005-98 (December 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.

Here, the Complainant sought the following immediate access records:

- OPRA Request Number 1: Expert witness invoices presented for payment.
- OPRA Request Number 2: Phillipsburg invoices for payment to be made by septic waste haulers from January 1, 2014 to February 28, 2020.
- OPRA Request Number 3: All invoices from Sandy Galacio, Jr. Esq. and Windels Marx law firm presented for payment from January 1, 2014 to February 28, 2020.

The evidence of record reveals that the Custodian failed to respond immediately to the Complainant's request for said records; however, there were extenuating circumstances which contributed to the delay of the Custodian's response. The Custodian certified that although the requests were submitted to the Town on February 28, 2020, she did not receive the requests until March 3, 2020. Further, the Custodian certified that at the same time the Complainant's requests were submitted, "significant issues related to COVID-19 began to emerge." The Custodian certified that the consequent reduced hours and staffing significantly hindered her ability to respond to OPRA requests.

The Custodian's certified response is consistent with the amendments to OPRA on March 20, 2020 due to the global pandemic. P.L. 2020, c.10. Based on that amendment, N.J.S.A. 47:1A-5 now provides that:

⁵ A custodian's written response, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

⁶ 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. 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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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). The Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. The GRC notes that amid the turmoil described by the Custodian she was able respond to the Complainant’s requests on the fifth (5th) business day following her receipt of the requests, which is not an unreasonable delay in responding to immediate access records given all of the facts and circumstances of record here.

Therefore, although the Custodian did not immediately respond to three (3) immediate access request items, she did provide an explanation that would reasonably justify a delay in access to said records. As such, due to extenuating circumstances, the Custodian’s failure to respond immediately in writing to the Complainant’s request for immediate access 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).

Unripe Cause of Action

The Council is permitted to raise additional defenses regarding the disclosure of records pursuant to Paff v. Twp. of Plainsboro, Docket No. A-2122-05T2 (App. Div. 2007), *certif. denied* by Paff v. Twp. of Plainsboro, 193 N.J. 292 (2007).⁷ In Paff, the complainant challenged the GRC’s authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the custodian’s denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian’s cited basis for denial was lawful. The court held that:

[t]he GRC has an independent obligation to ‘render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to’ OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian’s initial determination; it is charged with determining if the initial decision was correct.

⁷ On appeal from Paff v. Twp. of Plainsboro, GRC Complaint No. 2005-29 (March 2006).
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[Id.]

The court further stated that:

[a]side from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998) (citing Isko v. Planning Bd. Of Livingston, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action), aff'd, 24 N.J. 139 (1957).

[Id.]

In Sallie v. N.J. Dep't of Banking and Ins., GRC Complaint No. 2007-226 (April 2009), the complainant forwarded a complaint to the GRC asserting that he had not received a response from the custodian and by the time the GRC received his complaint seven business days would have passed. The Council held that “. . . the Complainant's cause of action was not ripe at the time he verified his Denial of Access Complaint.” The Council reasoned that because the complainant filed the complaint before the statutorily mandated seven business day period had expired, the custodian had not yet denied the complainant access to a government record. As such, the Council dismissed the complaint.

The Council has applied the same analysis to a valid extension of time. In Hardwick v. N.J. Dep't of Transp., GRC Complaint No. 2011-52 (August 2012), the custodian within the statutorily mandated seven business day period requested a valid extension of time. Thereafter, the complainant filed a Denial of Access Complaint within the extended time period. The Council held that because the complainant filed his complaint with the GRC prior to expiration of the custodian's extension of time, and as of the date the complaint was filed the custodian had not denied access to any responsive records, the complaint was unripe for adjudication and must be dismissed.

Here, the Custodian did not claim that any of the records sought were exempt from disclosure. Rather, the Custodian certified that although the requests were in the process of being addressed, the pandemic was hindering the requests from being processed. However, the GRC notes *sua sponte* that the complaint was filed prematurely and is therefore unripe for adjudication.

The Custodian responded to the request on March 10, 2020, informing the Complainant that she required an extension of time until March 30, 2020. OPRA provides that a custodian “. . . shall grant access to a government record or deny access to a government record as soon as possible, but not later than seven business days after receiving the request . . .” N.J.S.A. 47:1A-5(i). However, the Council has long held that extensions of time are proper when a custodian requests an extension in writing within the statutorily mandated seven business days and provides

an anticipated deadline date as to when the requested records would be made available. See Starkey v. N.J. Dep't of Transp., GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009); Rivera v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2008-112 (April 2010) and O'Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010). See also Rivera v. City of Plainfield Police Dep't (Union), GRC Complaint No. 2009-317 (May 2011) and Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010).

In view of the voluminous quantity of records sought by the Complainant's three (3) requests, along with other circumstances impacting hours of operation and staffing resulting from the emerging pandemic, it was reasonable for the Custodian to seek an extension of time until March 30, 2020. Moreover, there is nothing in the evidence of record to indicate that the Complainant objected to the extension of time.

N.J.S.A. 47:1A-6 provides that “[a] person who is denied access to a government record by the custodian of the record . . . may institute a proceeding to challenge the custodian's decision by filing . . . a complaint with the Government Records Council . . .” For such a complaint to be ripe, however, the complainant must have been denied access to a government record. In the instant complaint, however, the Complainant verified his complaint on March 12, 2020, which was within the extended time period, and therefore before he was denied access to any of the records responsive to his request. Thus, the Complainant here acted in a similar manner as the complainants in Sallie, GRC 2007-226 and Hardwick, GRC 2011-52, by filing a Denial of Access Complaint with the GRC prior to expiration of the valid time period for the Custodian to respond, and therefore prior to any denial of access to the requested records. As such, the complaint is not ripe for adjudication.

Accordingly, this complaint is materially defective and shall be dismissed because the Complainant verified his complaint before the statutory time period for the Custodian to respond, *as extended*, had expired and immediate access records are not at issue. See Sallie, GRC 2007-226 and Hardwick, GRC 2011-52. See also Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2012-323 (February 2013).

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 Custodian responded in writing to the Complainant’s OPRA requests on March 10, 2020, which was within the seven (7) business day statutory time period for the Custodian to respond, informing the Complainant that she required an extension of time until March 30, 2020. The Custodian informed the Complainant that if the extension of time posed a problem, he should contact her. The Complainant did not object to the extension of time; however, on March 12, 2020, and within the extended time period, the Complainant verified his complaint. As such, because the Complainant verified the complaint before he was denied access to any of the records responsive to his request, the complaint is materially defective. 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, the Complainant verified his complaint before the statutory time period provided for the Custodian to respond had expired, and therefore prior to any denial of access to the requested records. As such, the complaint is materially defective. 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. Although the Custodian did not immediately respond to three (3) immediate access request items, she did provide an explanation that would reasonably justify a delay in access to said records. As such, due to extenuating circumstances, the Custodian’s failure to respond immediately in writing to the Complainant’s request for immediate access 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).
2. This complaint is materially defective and shall be dismissed because the Complainant verified his complaint before the statutory time period for the Custodian to respond, *as extended*, had expired and immediate access records are not at issue. See Sallie v. N.J. Dep’t of Banking and Ins., GRC Complaint No. 2007-226 (April 2009) and Hardwick v. N.J. Dep’t of Transp., GRC Complaint No. 2011-52 (August 2012). See also Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2012-323 (February 2013).

3. 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 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, the Complainant verified his complaint before the statutory time period provided for the Custodian to respond had expired, and therefore prior to any denial of access to the requested records. As such, the complaint is materially defective. 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. 423, and Mason, 196 N.J. at 71.

Prepared By: John E. Stewart

February 15, 2022