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Commissioner

FINAL DECISION

June 25, 2024 Government Records Council Meeting

Matthew Streger, Esq.
(o/b/o Lincoln Park EMS)
Complainant
v.
NJ Department of Health
Custodian of Record

Complaint No. 2022-299

At the June 25, 2024 public meeting, the Government Records Council ("Council") considered the June 18, 2024 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 Custodian attempted to reasonably accommodate the Complainant's voluminous OPRA request and subsequently certified that responding to the requests would have substantially disrupted agency operations. Additionally, it is evident that the parties could not reach a reasonable accommodation. Therefore, the Custodian did not unlawfully deny access to the Complainant's OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-6; Vessio v. N.J. Dep't of Cmty. Affairs, Div. of Fire Safety, GRC Complaint No. 2007-63 (May 2007); Caggiano v. N.J. Dep't of Law & Pub. Safety, Div. of Consumer Affairs, GRC Complaint No. 2007-69 (September 2007); Karakashian v. N.J. Dep't of Law & Pub. Safety, Div. of Consumer Affairs, Office Bd. of Medical Examiners, GRC Complaint No. 2013-121, *et seq.* (November 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, the subject OPRA request would result in a substantial disruption of agency operations. N.J.S.A. 47:1A-5(g). 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 June 2024

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: June 27, 2024

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
June 25, 2024 Council Meeting

Matthew Streger, Esq.[1] **GRC Complaint No. 2022-299**
(On Behalf of Lincoln Park EMS)
Complainant

v.

N.J. Department of Health[2]
Custodial Agency

Records Relevant to Complaint: Electronic copies of "[a]ny communications, electronic or otherwise" including letters, memorandum, e-mails, text messages, or other systems "for" three (3) individuals between January 1, 2014 and April 6, 2022 ("or as far back as these records are kept") containing the subject matters "data sharing, data access, agreements or contracts for access or sharing, inquiries about data access or sharing, or other access requested or granted to the ImageTrend system for purposes of fatal accident investigations, opioid or drug monitoring, [Health Insurance Portability and Accountability Act ("HIPAA")] compliance, or other general access."

Custodian of Record: Daniel M. Kazar
Request Received by Custodian: April 6, 2022
Response Made by Custodian: April 28, 2022
GRC Complaint Received: June 30, 2022

Background[3]

Request and Response:

On April 6, 2022, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On April 28, 2022,[4] the Custodian purportedly responded in writing stating that a search for responsive e-mails resulted in 25,000 pages of records. The Custodian averred that reviewing and disclosing such a volume of records would result in a substantial disruption of agency operations. The Custodian requested that the

[1] The Complainant represents Lincoln Park EMS.
[2] Represented by Deputy Attorney General Francis X. Baker.
[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 GRC notes that it appears that a "deemed" denial of access occurred here. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the GRC will not address the issue because the Complainant did not raise it.

Complainant narrow the scope of his OPRA request. On April 29, 2022, the Complainant purportedly narrowed his request by removing the search terms "opioid and drug monitoring."

On May 6, 2022, the Custodian responded in writing advising that new search was conducted that resulted in over 20,000 pages of responsive records. The Custodian reasserted that the resulting records would create a substantial disruption of agency operations and again asked the Complainant to narrow his OPRA request. On the same day, the Complainant responded narrowing the search terms to "fatal accident reporting" and "the ImageTrend System." The Complainant noted that he would not narrow the request any further.

On May 20, 2022, the Custodian responded in writing stating that the newly narrowed request resulted in over 6,000 pages of records and reasserted that the resulting records would create a substantial disruption of agency operations. The Custodian again asked the Complainant to narrow the scope of the subject OPRA request. On the same day, the Complainant responded stating that he would not narrow the OPRA request again. On June 16, 2022, the Custodian responded in writing denying the subject OPRA request on the basis that it would substantially disrupt the New Jersey Department of Health ("DOH"), Division of Public Health Infrastructure's ("DPHI") operations. N.J.S.A. 47:1A-5(g).

Denial of Access Complaint:

On June 30, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant disputed the Custodian's denial of access, arguing that he narrowed the subject OPRA request considerably on multiple occasions.

Statement of Information:[5]

On February 22, 2023, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on April 6, 2022. The Custodian certified that his search included contacting DOH's Information Technology Management and Administration to conduct a search based on the perimeters included in the subject OPRA request. The Custodian certified that he purportedly responded in writing on April 28, 2022 advising that a search returned over 25,000 pages of responsive records. The Custodian affirmed that he stated that the request would cause a substantial disruption of agency operations and asked the Complainant to narrow the subject OPRA request. The Custodian confirmed that the Complainant narrowed the request, but that a search again yielded over 20,000 pages of records. The Custodian thus certified that he responded in writing on May 6, 2022 again denied the OPRA request as a substantial disruption of agency operations. The Custodian affirmed that a second narrowing of the OPRA request resulted in over 6,000 pages of records; he responded in writing on June 16, 2022 denying the request as a substantial disruption after the Complainant refusal to narrow the OPRA request any further.

The Custodian contended that he lawfully denied access to the subject OPRA request under the substantial disruption exemption. N.J.S.A. 47:1A-5(g). The Custodian contended that the

[5] On July 12, 2022, this complaint was referred to mediation. On January 30, 2023, this complaint was referred back to the GRC for adjudication.

courts have held that custodians may rely on this exemption "after attempting to reach a reasonable solution with the requestor." Mason v. City of Hoboken, 196 N.J. 51, 64 (2008) (quoting N.J.S.A. 47:1A-5(g)). The Custodian further argued that "[t]his would occur, by example, where a request is problematic because of the number of documents sought, or because of duplication difficulties . . .." Lagerkvist v. Office of the Governor of State, 443 N.J. Super. 230, 236 (App. Div. 2015). See also Spectraserv, Inc. v. Middlesex Cnty. Util. Auth., 416 N.J. Super. 565, 579-580 (App. Div. 2010). The Custodian further noted that the New Jersey Supreme Court has held that while a search for e-mails could be simple, reviewing the resulting records for potentially exempt material takes ". . . considerably longer. . .." Paff v. Galloway Twp., 229 N.J. 340, 357 (2017). The Custodian argued that here, the subject OPRA request produced over 25,000 pages of records; the time to review and redact the potentially responsive records would substantially disruption agency operations.

The Custodian further argued that the Complainant's clarifications did not cure the issue: over 20,000 and 6,000 pages of records resulted therefrom respectively. The Custodian acknowledged that the latter marked a sizable reduction in potentially responsive records; however, 6,000 pages still represented a "inordinate amount of pages for the . . . review." The Custodian contended that the forgoing represented his attempts to accommodate the request and that the Complainant eventually declined to continue seeking a reasonable solution. The Custodian noted that while the Complainant has a prerogative to decline further clarifying his OPRA request, DPHI was under no obligation to engage in review and disclosures that would have substantially disrupted its operations. The Custodian thus argued that he lawfully denied access to the subject OPRA request.[6]

Additional Submissions:

On February 28, 2023, the Complainant filed a sur-reply to the SOI. Therein, the Complainant contended that DOH purposely broadened their search net in order to produce a voluminous number of resulting records. The Complainant argued that his narrowing of the subject OPRA request did not stop DOH from engaging in this practice. The Complainant argued that the sole focus of the OPRA request remains obtaining communications and contracts related to ImageTrend and data sharing with the New Jersey State Police ("NJSP"). The Complainant contended that the more difficult DOH has become during the process, "the more it is becoming obvious that there is something to hide here." The Complainant requested that the GRC compel disclosure of responsive records in their entirety going back to 2014, as originally requested.

[6] The GRC notes that pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 *et seq.*, communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications that occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative, or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4. The GRC notes that while its regulations allow for a consent waiver, "all participants" must consent. N.J.A.C. 5:105-2.5(f). Here, while the Custodian's Counsel obtained consent from the Complainant, he did not also obtain consent from the mediator. Thus, the GRC will not consider any discussions derived from communications occurring during the mediation.

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 ". . . [i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." N.J.S.A. 47:1A-5(g).

Regarding a voluminous records request, in Vessio v. N.J. Dep't of Cmty. Affairs, Div. of Fire Safety, GRC Complaint No. 2007-63 (May 2007) the GRC ruled that based on the custodian's certification that granting access to all fire safety inspection files from 1986 to 2006 would result in a substantial disruption to the agency's operations, and the custodian's efforts to reach a "reasonable solution" with the complainant that accommodates the interests of the requestor and the agency, and the voluminous nature of the complainant's request, the custodian's denial of access was authorized by N.J.S.A. 47:1A-5(i). See also Caggiano v. N.J. Dep't of Law & Pub. Safety, Div. of Consumer Affairs, GRC Complaint No. 2007-69 (September 2007) (holding that the custodian lawfully denied access to an OPRA request under the substantial disruption exemption that required an extended inspection of 745 pages of records).

Regarding requests for e-mails, the GRC has established specific criteria deemed necessary under OPRA to request an e-mail communication. See Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). The Council determined that to be valid, such requests must contain: (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. See also Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (Interim Order March 28, 2007); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). Further, the Council has provided guidance on how requests containing the Elcavage criteria do not require research, thus effectively resulting in a search:

> [A] valid OPRA request requires a search, not research. An OPRA request is thus only valid if the subject of the request can be readily identifiable based on the request. Whether a subject can be readily identifiable will need to be made on a case-by-case basis. When it comes to e-mails or documents stored on a computer, a simple keyword search may be sufficient to identify any records that may be responsive to a request. As to correspondence, a custodian may be required to search an appropriate file relevant to the subject. In both cases, e-mails and correspondence, a completed "subject" or "regarding" line may be sufficient to determine whether the record relates to the described subject. Again, what will be sufficient to determine a proper search will depend on how detailed the OPRA

> request is, and will differ on a case-by-case basis. What a custodian is not required to do, however, is to actually read through numerous e-mails and correspondence to determine if same is responsive: in other words, conduct research.
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> [Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2013-43 and 2013-53 (Interim Order dated September 24, 2013).]

Here, the Complainant's OPRA request sought multiple forms of communications from three (3) individuals regarding at least eight (8) identifiable subjects from 2014 through the date of the OPRA request. The Custodian responded noting that the resulting 25,000 pages of records would create a substantial disruption of agency operations. As a result, the Custodian asked the Complainant to narrow his request. The Complainant responded eliminating one of the search terms. Subsequent correspondence imitated the initial response until the Complainant declined to narrow his OPRA request any further on May 20, 2022. The Custodian subsequently denied the OPRA request based on the substantial disruption exemption. N.J.S.A. 47:1A-5(g).

This complaint followed: therein the Complainant asserted that he disagreed with the denial due to his attempts to narrow the request. However, the Complainant did not provide any additional arguments regarding his position. In the SOI, the Custodian certified that searches identified over 25,000, over 20,000, and over 6,000 pages of responsive records. The Custodian argued that after attempts to accommodate the OPRA request failed, he denied access. In his sur-reply, the Complainant argued that DOH conducted a purposefully broad search to ensure a voluminous response that would imply the substantial disruption exemption. The Complainant also noted that the focus of the OPRA request remained a contract with ImageTrend and data sharing with NJSP. The Complainant requested that the GRC require disclosure of all responsive records dating back to 2014.

Initially, the GRC notes that in Karakashian v. N.J. Dep't of Law & Pub. Safety, Div. of Consumer Affairs, Office Bd. of Medical Examiners, GRC Complaint No. 2013-121, *et seq*. (November 2013), the Council held that the complainant's OPRA requests were lawfully denied under the "substantial disruption" exemption. In reaching this conclusion, the Council considered whether the custodian's actions represented a reasonable attempt to accommodate the subject OPRA requests:

> In the early response stages, the Custodian attempted to schedule a meeting to narrow the requests and subsequently attempted to offer the Complainant a spreadsheet of complaints and current employee information. The Custodian noted that these records would need to be compiled and that additional time would be necessary to respond. The Complainant effectively rejected this offer and narrowed his employee information request to a time period of 1998 to 2005. The Custodian responded denying the requests for failure to reach a reasonable accommodation.
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> [Id. at 7.]

Here, the evidence of record supports the Custodian's attempts to accommodate the Complainant by seeking a narrowing of the subject OPRA request after initially locating 25,000

of records. After clarifications resulting in 20,000 and 6,000 pages of records respectively were located, the Complainant ultimately rejected any further attempts to narrow the OPRA request a third (3rd) time. As in Karakashian, multiple attempts to narrow the OPRA request in manner that would not disrupt DPHI's operations represents a reasonable accommodation the Custodian could rely on to ultimately deny same as a "substantial disruption."

As for the request itself, the GRC is persuaded that the nature of same resulted in numerous potentially responsive records would have substantially disrupted DPHI's operations. Specifically, the request seeks communications over an eight (8) year period and contains terms such as "HIPPA compliance" and "general access" that necessarily returned copious results. The GRC's position is further supported by the Complainant's unwillingness to narrow the OPRA request any further, only to assert in his sur-reply that the focus was for contracts related to ImageTrend and data sharing with the NJSP. This topic clearly provides a narrower scope than included in the actual OPRA request submitted.[7] Further, the GRC does not agree with the Complainant's position that it purposely attempted to conduct a broad search simply to reply on the substantial disruption denial. Instead, the Custodian obviously conducted a search consistent with Verry, GRC 2013-43, *et seq.*, and the terms included in the OPRA request returned voluminous results.

Accordingly, the Custodian attempted to reasonably accommodate the Complainant's voluminous OPRA request and subsequently certified that responding to the requests would have substantially disrupted agency operations. Additionally, it is evident that the parties could not reach a reasonable accommodation. Therefore, the Custodian did not unlawfully deny access to the Complainant's OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-6; Vessio, GRC 2007- 63; Caggiano, GRC 2007-69; Karakashian, GRC 2013-121, *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.
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> [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.

[7] The GRC notes that the submitted OPRA request does not reference NJSP.

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.
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> [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).
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> [Id. at 76.]

In this complaint, the Complainant disputed the Custodian's denial on the basis that he narrowed his OPRA request sufficiently. In the SOI, the Custodian maintained the position that he lawfully denied access to the OPRA request as a substantial disruption of agency operations. In the sur-reply, the Complainant argued that the Custodian purposely conducted a broad search and that the GRC should require disclosure of all records responsive to the OPRA request. However, the GRC has found that the OPRA request would result in a substantial disruption of DPHI's operations, and that the Custodian made reasonable attempts to accommodate the Complainant's OPRA request without success. Based on this, the Complainant is not a prevailing party because the GRC has found that no unlawful denial of access occurred.

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 subject OPRA request would result in a substantial disruption of agency operations. N.J.S.A. 47:1A-5(g). 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 Custodian attempted to reasonably accommodate the Complainant's voluminous OPRA request and subsequently certified that responding to the requests would have substantially disrupted agency operations. Additionally, it is evident that the parties could not reach a reasonable accommodation. Therefore, the Custodian did not unlawfully deny access to the Complainant's OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-6; Vessio v. N.J. Dep't of Cmty. Affairs, Div. of Fire Safety, GRC Complaint No. 2007-63 (May 2007); Caggiano v. N.J. Dep't of Law & Pub. Safety, Div. of Consumer Affairs, GRC Complaint No. 2007-69 (September 2007); Karakashian v. N.J. Dep't of Law & Pub. Safety, Div. of Consumer Affairs, Office Bd. of Medical Examiners, GRC Complaint No. 2013-121, *et seq*. (November 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, the subject OPRA request would result in a substantial disruption of agency operations. N.J.S.A. 47:1A-5(g). 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
June 18, 2024