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JACQUELYN A. SUÁREZ
Commissioner

FINAL DECISION

June 25, 2024 Government Records Council Meeting

Tucker M. Kelley
Complainant
v.
Rockaway Township (Morris)
Custodian of Record

Complaint No. 2022-36

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 did not bear her burden of proof that she timely responded to the portions of the Complainant's February 1, 2022 OPRA request based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6; Ciccarone v. N.J. Dep't of Treasury, GRC Complaint No. 2013-280 (Interim Order, dated July 29, 2014). Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting or denying access within the statutorily mandated seven (7) business days or a reasonably necessary extension thereof, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, the GRC declines to order any further action because the Custodian disclosed the responsive records to the Complainant via e-mail on March 4, 2022.

2. Although the Custodian violated N.J.S.A. 47:1A-5(i), she ultimately responded within the extended deadline, providing the Complaint with the responsive e-mail log without redactions. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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 (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 (2008). Specifically, the evidence of record supports the Custodian's intent to respond to the request notwithstanding the unreasonable extensions of time to

respond. Therefore, the Complainant is not a prevailing party and is not 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 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

Tucker M. Kelley[1] **GRC Complaint No. 2022-36**
Complainant

v.

Rockaway Township (Morris)[2]
Custodial Agency

Records Relevant to Complaint: Electronic copies via e-mail of: "Christina Clipperton's e-mail log i.e. inbox, sent box, trash box and subject line for the time frame of January 24, 2022 to February 1, 2022."

Custodian of Record: Christina Clipperton[3]
Request Received by Custodian: February 1, 2022
Response Made by Custodian: February 10, 2022; February 18, 2022
GRC Complaint Received: February 23, 2022

Background[4]

Request:

On February 1, 2022, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On February 10, 2022, the seventh (7th) business day after receipt of the OPRA request, the Custodian responded in writing stating that an extension until February 18, 2022 was necessary to respond to the Complainant's OPRA request. On February 18, 2022, the Custodian responded again in writing stating an additional extension until March 4, 2022 was needed to respond to the request. In both responses, the Custodian stated the extensions were needed for attorney review.

On February 22, 2022, the Complainant responded to the Custodian stating he did not consent to the Custodian's extension. The Complainant stated that in a similar OPRA request seeking e-mail logs of another employee, the Custodian was able to provide responsive records within the allotted seven (7) business days, despite its date range of thirty-nine (39) days being significantly larger than in the instant request's range of nine (9) days. The Complainant further

[1] Represented by Walter M. Luers, Esq., of Cohn, Lifland, Pearlman, Herrmann & Knopf, LLP (Saddle Brook, NJ).
[2] No representation listed on record. Previously represented by Jonathan N. Frodella, Esq., of Laddey, Clark & Ryan, LLP (Sparta, NJ).
[3] The current Custodian of Record is Lisa Caruso.
[4] 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.

stated that the Custodian was knowingly delaying access to public records pertaining to her office.

Denial of Access Complaint:

On February 23, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant referred to the e-mail correspondence dated February 10, 18, and 22, 2022 between himself and the Custodian regarding his claims of an unlawful denial of access. The Complainant also included a copy of the e-mail log of a Rockaway Township ("Township") employee he received from the Custodian in response to a similar request, which contained 668 entries.

Response:

On March 4, 2022, the last day of the extended deadline, the Custodian responded in writing providing responsive records via a 437-entry Excel spreadsheet.

Statement of Information:

On March 15, 2022, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on February 1, 2022. The Custodian certified that she requested the Township Administrator work with the IT department to obtain and provide her with the e-mail logs. The Custodian certified that she responded in writing on March 4, 2022, providing responsive records without redactions.

The Custodian asserted that the e-mail log needed to be reviewed by counsel for sensitive confidential and security information. The Custodian also asserted that the log at issue was not pulled immediately due to confusion regarding the Complainant's other requests for e-mail logs. The Custodian asserted that after the log was reviewed for potential redactions, it was provided to the Complainant accordingly.

Analysis

Timeliness

OPRA provides that a custodian may request an extension of time to respond to the complainant's OPRA request, but the custodian must provide a specific date by which he/she will respond. Should the custodian fail to respond by that specific date, "access shall be deemed denied." N.J.S.A. 47:1A-5(i).

In Rivera v. City of Plainfield Police Dep't (Union), GRC Complaint No. 2009-317 (May 2011), the custodian responded in writing to the complainant's request on the fourth (4th) business day by seeking an extension of time to respond and providing an anticipated date by which the requested records would be made available. The complainant did not consent to the custodian's request for an extension of time. The Council stated that:

> The Council has further described the requirements for a proper request for an extension of time. Specifically, in Starkey v. N.J. Dep't of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009), the Custodian provided the Complainant with a written response to his OPRA request on the second (2nd) business day following receipt of said request in which the Custodian requested an extension of time to respond to said request and provided the Complainant with an anticipated deadline date upon which the Custodian would respond to the request. The Council held that "because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5(g) [and] N.J.S.A. 47:1A-5(i).

Further, in Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010), the Council held that the custodian did not unlawfully deny access to the requested records, stating in pertinent part that:

> [B]ecause the Custodian provided a written response requesting an extension on the sixth (6th) business day following receipt of the Complainant's OPRA request and providing a date certain on which to expect production of the records requested, and, notwithstanding the fact that the Complainant did not agree to the extension of time requested by the Custodian, the Custodian's request for an extension of time [to a specific date] to respond to the Complainant's OPRA request was made in writing within the statutorily mandated seven (7) business day response time.

Moreover, in Werner v. N.J. Civil Serv. Comm'n, GRC Complaint No. 2011-151 (December 2012), the Council again addressed whether the custodian lawfully sought an extension of time to respond to the complainant's OPRA request. The Council concluded that because the custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated date by which the requested records would be made available, the custodian properly requested the extension pursuant to OPRA. See also Rivera, GRC 2009-317; Criscione, GRC 2010-68; and Starkey, GRC 2007-315, *et seq.*

Although extensions are rooted in well-settled case law, the Council need not find valid every request for an extension containing a clear deadline. In Ciccarone v. N.J. Dep't of Treasury, GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014), the Council found that the custodian could not lawfully exploit the process by repeatedly rolling over an extension once obtained. In reaching the conclusion that the continuous extensions resulted in a "deemed" denial of access, the Council looked to what is "reasonably necessary."

In the instant matter, the Custodian sought an extension of time until March 4, 2022, to respond to the Complainant's OPRA request. The Custodian extended the response time on two (2) occasions for a total of twenty-two (22) business days. As noted above, a requestor's approval is not required for a valid extension. However, it should be noted that the Complainant objected to the second extension prior to the filing of this complaint.

To determine if the extended time for a response is reasonable, the GRC must first consider the complexity of the request as measured by the number of items requested, the ease in identifying and retrieving requested records, and the nature and extent of any necessary redactions. Ciccarone, GRC 2013-280. The GRC must next consider the amount of time the custodian already had to respond to the request. Id. Finally, the GRC must consider any extenuating circumstances that could hinder the custodian's ability to respond effectively to the request.[5] Id.

Regarding the subject OPRA request, the Complainant sought "Christina Clipperton's e-mail log i.e. inbox, sent box, trash box and subject line for the time frame of January 24, 2022 to February 1, 2022." The Custodian ultimately responded on March 4, 2022, the second extension's deadline, providing an Excel spreadsheet without redactions.

From the Custodian's receipt of the Complainant's OPRA request, she sought an additional sixteen (16) business days to respond. Thus, the Custodian sought sixteen (16) business days in addition to the original seven (7) business days, and responded on the deadline, March 4, 2022. Thus, the time expended to respond to the subject OPRA request totaled twenty-five (25) business days.

In determining whether the extensions were ultimately unreasonable, the GRC draws a comparison between the instant complaint and the OPRA request referenced by the Complainant. In the previous request, the Complainant sought the same e-mail logs of another Township employee. However, the date range was more than four (4) times larger than the request at issue. Further, the log provided contained more entries than the log provided here, and the Custodian provided the log within the allotted seven (7) business day deadline. Additionally, the Custodian did not provide any substantive explanation for the extension beyond confusion with the Complainant's other requests seeking e-mail logs. Without any additional explanation, the length of the extension is unsubstantiated based on the available evidence.

Accordingly, the Custodian did not bear her burden of proof that she timely responded to the Complainant's February 1, 2022 OPRA request based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6; Ciccarone, GRC 2013-280. Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting or denying access within the statutorily mandated seven (7) business days or a reasonably necessary extension thereof, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, the GRC declines to order any further action because the Custodian disclosed the responsive records to the Complainant via e-mail on March 4, 2022.

Knowing & Willful

OPRA states that "[a] public official, officer, employee or custodian who knowingly and willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . ." N.J.S.A. 47:1A-11(a). OPRA allows the

[5] "Extenuating circumstances" could include, but not necessarily be limited to, retrieval of records that are in storage or archived (especially if located at a remote storage facility), conversion of records to another medium to accommodate the requestor, emergency closure of the custodial agency, or the custodial agency's need to reallocate resources to a higher priority due to *force majeure*.

Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically, OPRA states ". . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . ." N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1983)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian violated N.J.S.A. 47:1A-5(i), she ultimately responded within the extended deadline, providing the Complaint with the responsive e-mail log without redactions. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

> A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.
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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.

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

Additionally, the Mason Court addressed the issue of whether a plaintiff is a prevailing party when the Custodian does not respond within the statutory limit, but subsequently responds after a complaint is filed. In Mason, the plaintiff submitted an OPRA request on February 9, 2004. The defendant responded on February 20, eight (8) business days later, or one day beyond the statutory limit. Id. at 79. As a result, the Court shifted the burden to the defendant to prove that the plaintiff's lawsuit, filed on March 4, was not the catalyst behind defendant's voluntary disclosure. Id. Because defendant's February 20 response included a copy of a memo dated February 19 -- the seventh (7^{th}) business day -- which advised that one of the requested records should be available on February 27 and the other one week later, the Court determined that the plaintiff's lawsuit was not the catalyst for the release of the records and found that she was not entitled to an award of prevailing party attorney fees. Id. at 80.

In determining whether the Complainant is a prevailing party, the GRC acknowledges that the Custodian's unreasonable extensions resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). Thus, the burden of proving that this complaint was not the catalyst for providing the responsive records to the Complainant shifts to the Custodian pursuant to Mason, 196 N.J. at 76-77.

Here, the Complainant sought e-mail logs of Ms. Clipperton for a specific period. In response, the Custodian extended the time to respond to the request several times, with the last notice occurring on February 18, 2022. On February 22, 2022, the Complainant rejected this extension, and subsequently filed the instant complaint on February 23, 2022. The Custodian thereafter responded to the Complainant on March 4, 2022, the date of the extended deadline.

Upon review, the GRC is satisfied that the Custodian intended to provide responsive records to the Complainant, regardless of the filing of the complaint. In Mason, the Court specifically identified instances in which a custodian fails to respond at all within the statutory deadline to shift the burden of proof. Id. at 76. However, the Custodian here responded within the statutory period extending the time to respond to the Complainant. The Custodian's additional extensions were within the extended periods as well. Further, the Custodian responded to the Complainant within the final extended period. Although the GRC finds extensions unreasonable, the evidence demonstrates the Custodian's good faith intent to respond, and the complaint filing was not the catalyst resulting in the Custodian's disclosure of records.

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 Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 76. Specifically, the evidence of record supports the Custodian's intent to respond to the request notwithstanding the unreasonable extensions of time to respond. 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 76.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the portions of the Complainant's February 1, 2022 OPRA request based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6; Ciccarone v. N.J. Dep't of Treasury, GRC Complaint No. 2013-280 (Interim Order, dated July 29, 2014). Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting or denying access within the statutorily mandated seven (7) business days or a reasonably necessary extension thereof, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). However, the GRC declines to order any further action because the Custodian disclosed the responsive records to the Complainant via e-mail on March 4, 2022.

2. Although the Custodian violated N.J.S.A. 47:1A-5(i), she ultimately responded within the extended deadline, providing the Complaint with the responsive e-mail log without redactions. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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 (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 (2008). Specifically, the evidence of record supports the Custodian's intent to respond to the request notwithstanding the unreasonable extensions of time to respond. Therefore, the Complainant is not a prevailing party and is not 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 51.

Prepared By: Samuel A. Rosado
Staff Attorney

June 18, 2024