STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

***In Camera* Findings and Recommendations of the Executive Director**
November 10, 2020 Council Meeting

Gregory Mascera, Esq.[1]
Complainant

GRC Complaint No. 2018-61

v.

Verona Board of Education (Essex)[2]
Custodial Agency

Records Relevant to Complaint:

December 18, 2017 OPRA request: Copies of:

1. All e-mails from Dr. Rui Dionisio to any member of the Verona Board of Education ("BOE") or staff and any member of the Verona High School ("VHS") administration or staff "in any way relating to" the decision to place football coach Louis Racioppe on administrative leave.
2. All e-mails from Dr. Dionisio to any individual not covered under No. 1 above "in any way relating to" the decision to place Coach Racioppe on administrative leave.
3. All e-mail correspondence to Dr. Dionisio to any member of the BOE or staff and any member of the VHS administration or staff "in any way relating to" the decision to place football Coach Racioppe on administrative leave.
4. All e-mails to Dr. Dionisio to any individual not covered under No. 3 above "in any way relating to" the decision to place Coach Racioppe on administrative leave.
5. All e-mails from Josh Cogdill to any member of the BOE or staff and any member of the VHS administration or staff "in any way relating to" the decision to place football Coach Racioppe on administrative leave.
6. All e-mails from Mr. Cogdill to any individual not covered under No. 5 above "in any way relating to" the decision to place Coach Racioppe on administrative leave.
7. All e-mails to Josh Cogdill to any member of the BOE or staff and any member of the VHS administration or staff "in any way relating to" the decision to place football Coach Racioppe on administrative leave.
8. All e-mails to Mr. Cogdill to any individual not covered under No. 7 above "in any way relating to" the decision to place Coach Racioppe on administrative leave.

January 16, 2018 OPRA request: Copies of:

1. All student survey responses provided to the BOE on or about October 10, 2017 regarding

[1] The Complainant, an attorney with Bannon, Rawding, McDonald & Mascera (Verona, NJ) represents Louis Racioppe.
[2] Represented by Michael Gross, Esq. of Kenney, Gross, Kovats, & Parton (Red Bank, NJ)

the VHS football team or coaching staff.

2. All correspondence, written or electronic, to or from any BOE member regarding the VHS football team or coaching staff from January 1, 2014 through present not to include e-mails previously disclosed in response to a prior OPRA request.
3. All correspondence, written or otherwise, from Dr. Dionisio to or from any person regarding the VHS football team or coaching staff from January 1, 2014 through present not to include e-mails previously disclosed in response to a prior OPRA request.

Custodian of Record: Cheryl Nardino
Request Received by Custodian: December 18, 2017; January 16, 2018
Response Made by Custodian: December 18, 2017; January 16, 2018
GRC Complaint Received: April 9, 2018

Records Submitted for *In Camera* Examination: October 16 and November 1, 2017 e-mails and a spreadsheet attachment.

Background

April 28, 2020 Council Meeting:

At its April 28, 2020 public meeting, the Council considered the April 21, 2020 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, found that:

1. The Custodian's failure to respond to the Complainant's clarified January 16, 2018 OPRA request item Nos. 2 and 3 within the renewed seven (7) business days resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-100 (Interim Order dated June 26, 2012). However, the GRC declines to order any additional actions because the Custodian ultimately disclosed those responsive e-mails on February 26 and [May] 3, 2018 respectively.

2. Because the Custodian failed to provide a specific lawful basis for redactions made to two (2) e-mails, as well as the denial of the spreadsheet attachment, her responses to the Complainant's December 18, 2017 OPRA request were insufficient. N.J.S.A. 47:1A-5(g); Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008). Additionally, the Custodian's response to the Complainant's January 16, 2018 OPRA request was legally insufficient because she failed to respond to each item contained therein. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013).

3. The GRC must conduct an *in camera* review of the October 16 and November 1, 2017 e-mails, as well as the spreadsheet attachment responsive to the Complainant's

December 18, 2017 OPRA request to determine the validity of the Custodian's assertion that the record was exempt under OPRA. N.J.S.A. 47:1A-1.1. Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

4. **The Custodian shall deliver[3] to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 3 above), nine (9) copies of the redacted records (in the case of the e-mails), a document or redaction index[4], as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,[5] that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

5. The Custodian may have unlawfully denied access to the student surveys sought in the Complainant's January 16, 2018 OPRA request item No. 1. N.J.S.A. 47:1A-6 Thus, the Custodian must locate said surveys and either disclose them or provide a specific lawful basis for denying access along with a detailed explanation of the contents. However, should the Custodian determine that no responsive records exist, she must certify to this fact.

6. **The Custodian shall comply with conclusion No. 5 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver[6] certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,[7] to the Executive Director.[8]**

7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

8. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

---

[3] The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

[4] The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

[5] "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

[6] The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

[7] "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

[8] Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Procedural History:

On April 29, 2020, the Council distributed its Interim Order to all parties. On the same day, Custodian's Counsel sent a letter to the Government Records Council ("GRC") advising that the Custodian was on long-term leave and unavailable. Counsel further stated that the BOE was working remotely due to COVID-19 and it was unlikely that the business office would be able to locate the relevant records within the prescribed time frame. Counsel thus requested a thirty (30) day extension of time to respond to the Council's Order. On May 5, 2020, the GRC responded granting an extension of time through June 4, 2020 given the circumstances presented by Counsel.

On June 4, 2020, Acting BOE Secretary Ernest Turner responded to conclusion Nos. 5, and 6 of the Council's Interim Order via e-mail. Therein, Mr. Turner stated that he was currently responsible for addressing OPRA requests. Mr. Turner certified that on this day, he responded denying access to the student surveys responsive to the Complainant's January 16, 2018 OPRA request item No. 1. Mr. Turner stated that the surveys constitute "student records" and the Complainant did not fall within any of the categories permitting access to them. N.J.A.C. 6A:32-2.1; N.J.A.C. 6A:32-7.5; L.R. v. Camden City Pub. Sch. Dist., 238 N.J. 547 (2019).[9]

On June 8, 2020, the GRC received Mr. Turner's response to conclusion Nos. 3 and 4 of the Council's Interim Order.[10] Mr. Turner certified that he was providing nine (9) redacted and unredacted copies of the October 16, and November 1, 2017 e-mails, as well as a numbered redaction index. Mr. Turner further certified that he was also providing nine (9) copies of the spreadsheet attachment. Mr. Turner reiterated that the redactions and spreadsheet constitute "student records" and the Complainant did not fall within any of the categories permitting access to them. N.J.A.C. 6A:32-2.1; N.J.A.C. 6A:32-7.5; L.R., 238 N.J. 547. Mr. Turner further argued that in light of L.R., the redactions included both e-mails were "overly generous."

Analysis

Compliance

At its April 28, 2020 meeting, the Council ordered the Custodian to provide for *in camera* review nine (9) copies of an October 16, and November 1, 2017 e-mail (redacted and unredacted) and spreadsheet attachment. The Council further ordered the Custodian to disclose responsive student surveys, provide a specific lawful basis for denying access to them, or certify if no such records exist. The Council further ordered the Custodian to simultaneously deliver certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On April 29, 2020, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on May 6, 2020.

On April 29, 2020, the same business day after receipt of the Council's Order, Custodian's Counsel sought and received an extension of time through June 4, 2020. On June 3, 2020,

[9] Affirming L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56 (App. Div. 2017) by equal division.
[10] Custodian's Counsel sent the Custodian's entire compliance package via UPS Ground on June 3, 2020. However, the GRC did not receive the package until June 8, 2020.

Custodian's Counsel caused Mr. Turner's *in camera* package to the GRC via UPS Ground. On June 4, 2020, the GRC received the first of two (2) responses from Mr. Turner. Therein, Mr. Turner certified that he was denying access to the responsive student surveys as "student records" under N.J.A.C. 6A:32-2.1 and pursuant to L.R., 238 N.J. 547. On June 8, 2020, the GRC received the second response from Mr. Turner. Therein, he certified that he was submitting the required nine (9) copies of the redacted and unredacted e-mails and spreadsheet attachment along with a document index. Mr. Turner argued that the redactions and spreadsheet were properly withheld N.J.A.C. 6A:32-2.1 and pursuant to L.R., 238 N.J. 547. Mr. Turner further provided certified confirmation of compliance to the Executive Director.

In determining whether Mr. Turner complied with the Council's Order, the GRC first notes that he addressed all issues required by the Order. Further, Mr. Turner delivered to the GRC all documents required for the *in camera* review. Notwithstanding, the GRC must address the timing of the *in camera* package because footnote No. 7 of the Council's decision clearly stated that the GRC must "physically receive[] by the deadline." It is clear that Counsel caused production of the *in camera* package on June 3, 2020 via UPS Ground. In utilizing delivery information resources available from UPS' website,[11] the package should have reached the GRC on June 4, 2020. However, given the current health crisis and its impact on operations within the GRC, it is plausible that the package timely arrived, but was not received until the following Monday. Based on these specific facts, the GRC believes it appropriate to exercise leniency here and accept the *in camera* package as received within time.

Therefore, Mr. Turner complied with the Council's April 28, 2020 Interim Order because he responded in the extended time frame submitting a complete *in camera* package to the GRC. Further, Mr. Turner submitted a certification detailing his reasons for denying access to the requested student surveys. Finally, Mr. Turner simultaneously provided certified confirmation of compliance to the Executive Director.

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. N.J.S.A. 47:1A-6.

OPRA also provides that:

> The provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

[11] https://www.ups.com/maps/results?loc=en_US (accessed August 11, 2020).

[N.J.S.A. 47:1A-9(a).]

The regulations of the State Board of Education and the Commissioner define a "student record" as ". . . information related to an individual student *gathered within or outside the school district and maintained within the school district*, regardless of the physical form in which it is maintained." N.J.A.C. 6A:32-2.1 (emphasis added). The regulations of the State Board of Education and the Commissioner of Education provide that "[o]nly authorized organizations, agencies or persons as defined herein shall have access to student records . . ." to include "persons from outside the school if they have written consent of the parent . . ." N.J.A.C. 6A:32-7.5(e)(14). Finally, the regulations require that "[i]n complying with this section, individuals shall adhere to requirements pursuant to [OPRA] and [FERPA]." N.J.A.C. 6A:32-7.5(g). To this end, the Council has looked to these exceptions in determining whether a complainant can access "student records" in part or whole under OPRA. See *i.e.* Martinez v. Edison Bd. of Educ. (Middlesex), GRC Complaint No. 2014-126 (May 2015); but see Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2014-92 (September 2014).

More recently, the Appellate Division addressed OPRA and the disclosure of "student records" in L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56 (App. Div. 2017). In one of the four (4) consolidated cases, the trial court ordered the school district to disclose student records requested under OPRA, with redactions made to all personally identifying information ("PII"). The Appellate Division held that redacting PII from a document does not remove its classification as a "student record." Id. at 83. The court found that "N.J.A.C. 6A:32-7.5(g)'s does not expressly incorporate FERPA's provisions for the redaction of PII into the [New Jersey Pupil Records Act ("NJPRA")] or its regulations. Moreover, nothing in the NJPRA or its regulations states that sufficiently anonymized documents, with all PII removed, are no longer "student records" under N.J.A.C. 6A:32-1." Id. at 85.

The court further discussed the interplay between the NJPRA, FERPA and OPRA:

> It is reasonable to conclude that N.J.A.C. 6A:32-7.5(g) centrally concerns functionality—a district's *processing* of student record requests from an authorized person or organization. See K.L., *supra*, 423 N.J. Super. at 350, 32 A.3d 1136 ("In providing access to school records in accordance with N.J.A.C. 6A:32-7.5, school districts must also comply with the requirements of OPRA and FERPA, N.J.A.C. 6A:32-7.5(g)."). For instance, if a school district receives an OPRA request from an authorized person or organization listed under N.J.A.C. 6A:32-7.5(e), then it must process that request in compliance with OPRA and FERPA requirements. Nothing in the plain language of N.J.A.C. 6A:32-7.5(g), however, supersedes or nullifies the limitations of "authorized" parties, as set forth at N.J.A.C. 6A:32-7.5(a) and (e). Hence, we agree with the judge in the Hillsborough case that a requestor cannot gain access to a student record unless the requestor satisfies one of the "[a]uthorized" categories listed in N.J.A.C. 6A:32-7.5(e)(1) through (16).
>
> [Id. at 86-87 (emphasis in original).][12]

[12] The Supreme Court of New Jersey subsequently affirmed by equal division noting that "N.J.A.C. 6A:32-7.5(g) confirms that individuals and entities may request student records in accordance with OPRA's provisions, and that

In Camera Review:

In this matter, the Council ordered the Custodian to provide for an *in camera* review copies of two (2) redacted and unredacted e-mails, as well as a spreadsheet. Having received these records, the GRC is able to access the content of the e-mail redactions and the overall content contained in the spreadsheet sought by the Complainant. Having reviewed the records received from Mr. Turner, the GRC is satisfied that the Custodian lawfully denied access to both the redacted portions of the e-mails, as well as the spreadsheet.

Regarding the e-mail redactions, the GRC agrees with Mr. Turner that the Custodian provided more access than was required per L.R., 452 N.J. Super. 56. This is because the e-mails fall within the broad definition of a "student record." N.J.A.C. 6A:31-1. The e-mails in question were sent by parents of football team players about the BOE's handling of the head coach, who is represented by the Complainant. Those e-mails clearly identify the students involved and thus are "student records" exempt from disclosure under OPRA and the Complainant has not met any of the exceptions contained within N.J.A.C. 6A:31-7.5.

Regarding the spreadsheet, same is comprised of what appears to be a database coalescing the student survey responses into one document. That spreadsheet includes the list of questions asked to each student, the employee that conducted the survey, the students who were interviewed, their grade and student ID number, corresponding answers to the survey questions, and additional notes regarding expounding on those responses.

Accordingly, the redacted portions of the responsive October 16 and November 1, 2017 e-mails, as well as the entirety of the responsive spreadsheet, are exempt from disclosure as "student records" under OPRA. N.J.S.A. 47:1A-9(a); N.J.A.C. 6A:31-7.5; L.R., 452 N.J. Super. 56. Thus, the Custodian lawfully denied access to these records under OPRA. N.J.S.A. 47:1A-6.

Student Surveys:

The Council also ordered the Custodian to either: 1) disclose the responsive student surveys; 2) provide a specific lawful basis for denying access to them; or 3) certify if no such records exist. Mr. Turner responded to the Council's Interim Order stating that the surveys in question constituted "student records" exempt from access under the NJPRA. N.J.A.C. 6A:32-2.1. Mr. Turner further certified that the Complainant did not provide any evidence that he fell within the categories of individuals "permitted" to access same. N.J.A.C. 6A:32-7.5.

Having reviewed the argument of the Custodian, and in determining that the spreadsheet is composed of information from the surveys in question, it is obvious that same are "student records" not subject to access under OPRA. Specifically, these surveys asked student athletes participating in football several questions about coaching staff's treatment of them during practices and games. They also likely include the identifiable student information contained in the spreadsheet and their responses to those questions. Thus, the surveys clearly fall within the definition of a "student record" under N.J.A.C. 6A:32-2.1 as "information related to an individual

---

educational agencies must comply with those provisions when they respond to such requests." L.R. v. Camden City Pub. Sch. Dist., 238 N.J. 547, 569 (2019).

student" and are exempt for the reasons set forth by the L.R. court. Further, Mr. Turner accurately noted in his certification that there is no evidence in the record that the Complainant qualified as an individual eligible to access these surveys under N.J.A.C. 6A:32-7.5.

Accordingly, the Custodian lawfully denied access to the responsive student surveys. N.J.S.A. 47:1A-6. Specifically, said surveys are "student records" as defined in N.J.A.C. 6A:32-2.1 and are thus exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a); L.R., 452 N.J. Super. 56. Additionally, the Complainant failed to prove that he fell within one of categories of individuals allowed to access "student records." N.J.A.C. 6A:32-7.5.

Knowing & Willful

OPRA states that "[a] public official, officer, employee or custodian who knowingly or 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 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. 1993)); 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)).

In the matter before the Council, the Custodian violated OPRA by failing to respond to the Complainant's January 16, 2018 OPRA request item Nos. 2 and 3. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian's responses to the Complainant's December 18, 2017 and January 16, 2018 OPRA requests were insufficient. Notwithstanding, the Custodian lawfully denied access to the redacted portions of the October 16 and November 1, 2017 e-mails, spreadsheet, and student surveys. N.J.S.A. 47:1A-9(a); N.J.A.C. 6A:32-7.5. Further, the Custodian ultimately disclosed those remaining records that existed to the Complainant on February 26 and May 3, 2018 respectively. Additionally, the evidence of record does not indicate that the Custodian's violations 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.
>
> [N.J.S.A. 47:1A-6.]

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court 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 (2008), the Supreme 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." Mason, 196 N.J. at 71, (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* (1984).

[Id. at 76.]

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 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 failure to respond in writing to the Complainant's January 16, 2018 OPRA request item Nos. 2 and 3 in a timely manner 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, *supra.*

In the matter before the Council, the Complainant filed the instant complaint stating that he was representing Coach Racioppe. Therein, the Complainant argued that the Custodian denied him access to unredacted copies of the October 16, and November 1, 2017 e-mails, as well as multiple other e-mails from 2016 and 2017 responsive to his January 16, 2018 OPRA request item Nos. 2 and 3, e-mail attachments, and student surveys. In the SOI, the Custodian certified that she denied access to certain records under FERPA and OPRA. However, a month after the complaint filing and over two (2) months after the Complainant's e-mail alerting her that 2016 and 2017 e-mails remained undisclosed, the Custodian disclosed thirty-one (31) additional pages of e-mails.

The Complainant responded to the SOI noting that he finally received the e-mails sought, but only after the filing of this complaint. The Complainant further contended that the GRC should require disclosure of the responsive surveys and that he should be awards attorney's fees as a prevailing party.

The evidence of record here supports that the Complainant has prevailed in regard to his January 16, 2018 OPRA request item Nos. 2 and 3. Specifically, prior to the filing of this complaint, the Complainant had to engage the Custodian on a few occasions to garner a full response to each OPRA request. However, over a month passed between the Complainant's notification that the Custodian failed to respond to said OPRA request items and the instant complaint. It was only after this filing and another month that the Custodian finally disclosed responsive e-mails as part of the SOI. Thus, even though the Custodian lawfully denied access to the redacted portions of the October 16, and November 1, 2017 e-mails, as well as the spreadsheet and surveys, this complaint nonetheless resulted in a change in the Custodian's conduct as it related to the nondisclosed e-mails. Further, there is no evidence in the record proving that this complaint was not the catalyst for the SOI disclosure. For these reasons, the Complainant prevailed and is entitled to a reasonable award in attorney's fees commensurate with the relief achieved. See *e.g.* Mills v. State, 2020 N.J. Super. Unpub. LEXIS 1545 (App. Div. 2020).

Therefore, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a 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 filing of this complaint led directly to the Custodian disclosing outstanding e-mails responsive to the Complainant's January 16, 2018 OPRA request item Nos. 2 and 3. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is 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. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Mr. Turner complied with the Council's April 28, 2020 Interim Order because he responded in the extended time frame submitting a complete *in camera* package to the GRC. Further, Mr. Turner submitted a certification detailing his reasons for denying access to the requested student surveys. Finally, Mr. Turner, simultaneously provided certified confirmation of compliance to the Executive Director.

2. **The *In Camera* Examination set forth above reveals the Custodian has lawfully denied access to redacted portions of the October 16 and November 1, 2017 e-mails and the responsive spreadsheet pursuant to N.J.S.A. 47:1A-6.**

3. The Custodian lawfully denied access to the responsive student surveys. N.J.S.A. 47:1A-6. Specifically, said surveys are "student records" as defined in N.J.A.C. 6A:32-2.1 and are thus exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a); L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56 (App. Div. 2017). Additionally, the Complainant failed to prove that he fell within one of categories of individuals allowed to access "student records." N.J.A.C. 6A:32-7.5.

4. The Custodian violated OPRA by failing to respond to the Complainant's January 16, 2018 OPRA request item Nos. 2 and 3. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian's responses to the Complainant's December 18, 2017 and January 16, 2018 OPRA requests were insufficient. Notwithstanding, the Custodian lawfully denied access to the redacted portions of the October 16 and November 1, 2017 e-mails, spreadsheet, and student surveys. N.J.S.A. 47:1A-9(a); N.J.A.C. 6A:32-7.5. Further, the Custodian ultimately disclosed those remaining records that existed to the Complainant on February 26 and May 3, 2018 respectively. Additionally, the evidence of record does not indicate that the Custodian's violations 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.

5. The Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a 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 filing of this complaint led directly to the Custodian disclosing outstanding e-mails responsive to the Complainant's January 16, 2018 OPRA request item Nos. 2 and 3. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is 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. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Prepared By: Frank F. Caruso
Executive Director

October 27, 2020