



State of New Jersey
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

December 15, 2020 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o African
American Data and Research Institute)
Complainant

Complaint No. 2018-145

v.

Eatontown Police Department (Monmouth)
Custodian of Record

At the December 15, 2020 public meeting, the Government Records Council (“Council”) considered the December 8, 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, finds that:

1. The Custodian lawfully denied access to the Complainant’s July 17, 2018 OPRA request. N.J.S.A. 46:1A-6. Specifically, the Custodian certified, and the record reflects, that Eatontown Police Department does not possess or maintain the requested complaints and summonses. See Simmons v. Mercado, 464 N.J. Super. 77 (App. Div. 2020), certif. granted, 2020 LEXIS 1218 (Oct. 26, 2020); Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
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, 432 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Complainant failed to achieve the relief sought in his Denial of Access Complaint. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 71.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.



Final Decision Rendered by the
Government Records Council
On The 15th Day of December 2020

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: December 17, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 15, 2020 Council Meeting**

**Rotimi Owoh, Esq., (On Behalf of¹
African American Data and Research Institute)
Complainant**

GRC Complaint No. 2018-145

v.

**Eatontown Police Department (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:³

1. Driving While Intoxicated/Driving Under the Influence (“DWI/DUI”) complaints prepared and filed by the Eatontown Police Department (“EPD”) from January 2016 through present.
2. Drug possession complaints prepared and filed by the EPD from January 2016 through present.
3. Drug paraphernalia complaints and summonses prepared by the EPD from January 2016 through present.

Custodian of Record: James Rolly
Request Received by Custodian: July 17, 2018
Response Made by Custodian: July 19, 2018
GRC Complaint Received: July 23, 2018

Background⁴

Request and Response:

On July 17, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 19, 2018, the Custodian responded in writing denying the Complainant’s request, stating that the requested records were court records and not in the Borough of Eatontown’s (“Borough”) possession. The Custodian stated that the Borough had a shared services agreement with the Borough of Tinton Falls (“Tinton

¹ The Complainant represents the African American Data and Research Institute.

² Represented by Andrew Bayer of Pashman, Stein, Walder, Hayden, P.C. (Holmdel, N.J.). Previously represented by Gene J. Anthony, Esq. of the Law Offices of Gene J. Anthony (Eatontown, N.J.).

³ The Complainant sought additional records that are not at issue in this complaint.

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.

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Falls”) to handle its court matters.

Later in the day on July 19, 2018, the Complainant responded to the Custodian requesting clarification on the Custodian’s response. The Complainant requested confirmation that EPD did not have copies of the complaints and summonses that had not been disposed; whether Tinton Falls’ Police Department (“TFPD”) retained copies of the records on EPD’s behalf; and whether either police department retained copies of the records. The Complainant stated that the reason he sought clarification was that New Jersey’s Records Retention and Disposition Schedule for Municipal Police Departments (“retention schedule”) required EPD to maintain copies of the requested records for thirty (30) days after disposition.

That same day, the Custodian responded stating that EPD officers prepared and filed reports with the EPD Records Bureau and with the Shared Municipal Courts of Tinton Falls, Eatontown, and Monmouth Beach (“Court”), which was administered by Tinton Falls. The Custodian stated that once filed, the dissemination of the requested records were governed by N.J. Court Rules, R. 1:38. The Custodian stated that the Court did not provide EPD with copies of its files, and the retention schedules did not require EPD to maintain or keep those records on file.

Denial of Access Complaint:

On July 19, 2018,⁵ the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that EPD would not provide the requested records despite other police departments disclosing them without issue. The Complainant argued that the New Jersey Superior Court and GRC supported the contention that summonses and complaints were subject to disclosure under OPRA. See O.R. v. Plainsboro Twp., Docket No. MID-L-5752-16; Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004). The Complainant also included an excerpted copy of the retention schedule referenced in his earlier correspondence.

The Complainant requested that the Council compel compliance with the OPRA request and award him counsel fees.

Statement of Information:

On August 8, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on July 17, 2018. The Custodian certified that no search was undertaken because an unauthorized use of an Administrative Office of the Courts’ computer could have violated N.J.S.A. 2C:30-2. The Custodian certified that he responded to the Complainant on July 19, 2018, denying the request.

The Custodian asserted that “filed” was defined as “submit (a legal document, application, or charge) to be placed on record by the appropriate authority.” The Custodian asserted that the authority in question was the Court, which possessed the responsive records and their dissemination was governed by R. 1:38. The Custodian noted that the retention schedule provided

⁵ The GRC received the Denial of Access Complaint at 1:00p.m.
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by the Complainant stated that the “Record Copy is maintained by the municipal court.” The Custodian argued that the retention schedule did not require EPD to make the requested records or for the Court to provide EPD with copies of same. The Custodian asserted that to his knowledge no other office in the Borough possessed the requested records.

The Custodian also asserted that the GRC has previously dismissed complaints where the complainant sought records of the judicial branch under OPRA for lack of jurisdiction. See Schlosser v. City of Union City (Hudson), GRC Complaint No. 2009-45 (May 2009); Mertrud v. Twp. of Byram Mun. Ct., GRC Complaint No. 2004-80 (October 2004).

Additional Submissions:

On August 8, 2018, the Complainant filed a letter brief in opposition to the Custodian’s SOI. Therein, the Complainant argued that police departments in the State were required to retain summonses and complaints until thirty (30) days after disposition of same.⁶ The Complainant further asserted that municipalities were required to retain these records for at least fifteen (15) years if they are part of a “Municipal Prosecutor’s Case File.” The Complainant argued that because EPD’s police officers and the municipal prosecutor were Borough employees, their records were subject to access under OPRA and should have been disclosed accordingly. The Complainant asserted that to the contrary, the Custodian failed to disclose any records as of the date of his letter brief. The Complainant noted that if the responsive records were in storage or otherwise unavailable, the Custodian had an obligation to extend the time frame but failed to do so. N.J.S.A. 47:1A-5(i).

The Complainant next reiterated his Denial of Access Complaint argument that the Council already decided that summonses and complaints were subject to disclosure. The Complainant asserted that in Merino, GRC 2003-110, the Council held that the custodian was required to disclose responsive summonses that existed regardless of whether they exceeded their retention period. The Complainant contended that the Council’s decision supported his position that EPD should have disclosed all responsive summonses and complaints it retained. The Complainant further contended that Merino, GRC 2003-110 was consistent with court decisions where defendants argued that a requestor was required to obtain records from the courts. O.R., Docket No. MID-L-5752-16; AADARI v. Woodbridge Twp., Docket No. MID-L-2052-18. The Complainant further noted that many other municipalities throughout the State have complied recently with similar requests.⁷

The Complainant further argued that EPD’s obligation to disclose responsive records was not diminished simply because the Judiciary also made them available to the public. See Keddie v. Rutgers, 148 N.J. 36, 52 (1997). The Complainant also noted that it was far cheaper to obtain the responsive records via OPRA than through R. 1:38. The Complainant argued that OPRA

⁶ The Complainant referred to his experience that DUI/DWI or drug possession charges normally included sample testing by the New Jersey State Police. The Complainant alleged that this testing averaged between three (3) and six (6) months.

⁷ The Complainant identified twenty-two (22) municipalities that complied with similar requests submitted by the Complainant on behalf of AADARI.

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should not be used as “a money generating scheme (another form of taxation) for government.” The Complainant thus argued that EPD should be required to disclose the responsive records.

On July 6, 2020, the GRC requested additional information from the Custodian. Specifically, the GRC asked:

1. Does [the Borough’s] municipal prosecutor keep or maintain copies of the requested summonses and complaints as part of a “Municipal Prosecutor’s Case File”?
2. Does [the Borough] keep or maintain copies of the requested summonses and complaints in archives or storage?

On July 15, 2020, the Custodian’s Counsel responded to the GRC’s request, providing a certification from the Custodian. The Custodian certified that the Borough’s municipal prosecutor did not keep or maintain copies of the requested summonses and complaints as part the Municipal Prosecutor’s Case File. The Custodian also certified that the Borough did not maintain copies of the requested summonses and complaints in archives or storage. Additionally, Counsel included a copy of Simmons v. Mercado, 464 N.J. Super. 77 (App. Div. 2020), certif. granted, 2020 LEXIS 1218 (Oct. 26, 2020), asserting that the case was on point and supported the Borough’s position.

On July 16, 2020, the Complainant filed a response to the Custodian’s certification. The Complainant asserted that the Borough provided CDR-1 complaints to the Complainant on March 6, 2020, in response to an OPRA request submitted on September 25, 2019. The Complainant contended that it was improbable that the Borough did not have access to the records at the time of the instant request or that they do not possess them as of July 2020. The Complainant also asserted that the Borough provided copies of summonses on May 29, 2020.

The Complainant also asserted that Simmons case was not applicable if the requested records were available to the custodian. The Complainant argued that the records provided to the Complainant on March 6, 2020 and May 29, 2020 demonstrated that the Borough had access to the records before the Simmons decision.

On September 16, 2020, the GRC requested additional information from the Custodian. Specifically, the GRC asked:

1. Please provide a detailed description on how EPD officers create the requested summonses and complaints through eCDR.
2. Does EPD have access to the requested complaints and summonses through eCDR once created?
3. How does EPD notify the municipal prosecutor or county prosecutor that a complaint or summons has been created?

On September 23, 2020, Counsel responded to the GRC’s request, providing a certification from the Custodian. The Custodian certified that the creation of summonses and complaints in eCDR began by signing into the Administrative Office of the Court’s (“AOC”) online portal. The Custodian certified that once submitted to and approved by the court administrator, the summons

or complaint was filed through the online portal and a copy was printed and provided to the defendant.

The Custodian certified that access to the complaints and summonses through eCDR was controlled by the AOC because eCDR belonged to the Judiciary. The Custodian certified that EPD had to contract with the Judiciary to grant EPD officers access to eCDR. The Custodian certified that as part of the agreement, EPD officers had access to the requested complaints and summonses through eCDR for creation, review, and/or service to defendants, but were thereafter maintained by the Judiciary.

The Custodian also certified that in a lawsuit filed by the Complainant, the Borough accessed the requested complaints and summonses contrary to the terms of EPD's contract with the Judiciary. The Custodian certified that despite receiving the requested records, the Complainant continued to pursue litigation. The Custodian also certified that the litigation occurred prior to the Simmons decision.

Lastly, the Custodian certified that EPD did not provide routine notifications to the municipal prosecutor for Court matters. The Custodian also certified that summonses and complaints were not provided with the standard discovery to defense counsel since they were not kept on file with EPD's investigative file.

On September 25, 2020, the Complainant e-mailed the GRC in response to the Custodian. The Complainant included a copy of a discovery package he received as defense counsel in a separate matter that included the associated complaints. The Complainant therefore asserted that the Custodian's certification that complaints and summonses were not provided as part of discovery was incorrect. The Complainant maintained that the discovery package as well as the complaints and summonses received in March and May 2020 contradicted the Custodian's certifications.

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.

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). In Merino, 2003-110, the custodian argued that the requested complaints and summonses were not subject to access since they were dated beyond the required retention period via the State's retention schedule. The Council held that if the agency in fact possessed the responsive records, they were subject to access under OPRA even if they were supposed to have been destroyed in accordance with the retention schedule.

Additionally, the New Jersey Supreme Court has held that retention schedules created in accordance with the Destruction of Public Records Law, N.J.S.A. 47:3-15 to -32, did not satisfy the “required by law” standard under OPRA. See N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 568 (2017), aff’g in relevant part and rev’g in part, 441 N.J. Super. 70, 106-07 (App. Div. 2015). The Court found that if the retention schedules carried the force of law, parts of OPRA would be rendered meaningless due to the retention schedules’ comprehensive list of records. Id. The Court therefore held that “the retention schedules adopted by the State Records Committee [do not] meet the ‘required by law’ standard for purposes of OPRA.” Id.

Furthermore, although decided during the pendency of this complaint, the GRC finds the Appellate Division’s holding in Simmons relevant and binding. In Simmons, the Complainant requested the same records as those at issue in the instant matter, with the custodian asserting that the records were not maintained by the Millville Police Department (“MPD”) once its officers created and submitted the records through eCDR. 464 N.J. Super. at 80. The court found that notwithstanding MPD’s access to eCDR, “it does not alter the fact that the [requested complaints and summonses are] maintained by the judiciary.” Id. at 86. The court noted that although an MPD officer initiates the creation of the responsive records, “the document is completed by eCDR and the finished product is maintained by the municipal court, or, in a larger sense, the judiciary.” Id. at 85-86.

In the current matter, the Custodian responded and later certified in the SOI that the Borough did not possess or maintain the requested records and directed the Complainant to request them from the Court. Additionally, the Custodian certified that the Borough’s municipal prosecutor did not keep or maintain the requested records within a Municipal Prosecutor’s Case File, nor did the Borough keep or maintain the records in archives or storage. The Custodian also certified that EPD did not notify the municipal prosecutor regarding court matters, nor were complaints and summonses included in standard discovery to defense counsel.

The Complainant asserted that the retention schedules required police departments and municipal prosecutors to possess copies of the requested records for the stated period. Furthermore, the Complainant provided copies of summonses and complaints received from the Custodian in response to separate requests in March and May 2020 to demonstrate that the Borough had access to the requested records. The Complainant also provided a recently received discovery package in a separate matter that contained copies of the associated summons and complaints.

Initially, the GRC addresses the Complainant’s arguments pertaining to the retention schedules. Upon review, the Complainant’s reliance on Merino, GRC 2003-110 to contend that EPD and the Borough’s municipal prosecutor are required by law to maintain the requested records based upon the retention schedules ignores the prevailing caselaw. Instead, the retention schedules determine how records that may be in an agency’s possession are to be maintained, and are not a legal requirement to make, maintain, or keep on file every identified record. See N. Jersey Media Grp. Inc., 229 N.J. at 568. Therefore, the retention schedules alone do not counter the Custodian’s certification that the Borough does not possess or maintain the requested records.

Lastly, the Complainant’s contention that the Custodian has access to the requested records based upon production via subsequent requests ignores the fact that EPD provided the records prior

to the Simmons decision. Thus, notwithstanding whether EPD has electronic access to the records via eCDR, the Custodian is not obligated to conduct a search for records maintained by the judiciary. Simmons, 464 N.J. at 86.

Accordingly, the Custodian lawfully denied access to the Complainant's July 17, 2018 OPRA request. N.J.S.A. 46:1A-6. Specifically, the Custodian certified, and the record reflects, that EPD does not possess or maintain the requested complaints and summonses. See Simmons, 464 N.J. at 86; Pusterhofer, GRC 2005-49.

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, 432 (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. 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. [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).

[Id. at 76.]

The Complainant filed the instant complaint requesting that the GRC require the Custodian to obtain and disclose the requested records to him. However, the evidence of record indicates that the Custodian did not possess or maintain the requested records, and properly directed the Complainant to obtain the records from the Court. Schlosser, GRC 2009-45. Thus, the Complainant has not achieved the desired result and it not a prevailing party in this complaint.

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. 423. Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Complainant failed to achieve the relief sought in his Denial of Access Complaint. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian lawfully denied access to the Complainant's July 17, 2018 OPRA request. N.J.S.A. 46:1A-6. Specifically, the Custodian certified, and the record reflects, that Eatontown Police Department does not possess or maintain the requested complaints and summonses. See Simmons v. Mercado, 464 N.J. Super. 77 (App. Div. 2020), certif. granted, 2020 LEXIS 1218 (Oct. 26, 2020); Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

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, 432 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Complainant failed to achieve the relief sought in his Denial of Access Complaint. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 71.

Prepared By: Samuel A. Rosado
Staff Attorney

December 8, 2020