



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

September 28, 2021 Government Records Council Meeting

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

Complaint No. 2018-249

v.

Borough of Elmer (Salem)
Custodian of Record

At the September 28, 2021 public meeting, the Government Records Council (“Council”) considered the September 21, 2021 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 Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the allotted time frame results in a “deemed” denial of the said request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007). However, the GRC declines to order disclosure because the Custodian did so on November 1, 2018.
2. The Custodian failed to timely respond to the Complainant’s OPRA request. See N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), N.J.S.A. 47:1A-6. However, the Custodian ultimately disclosed responsive records to the Complainant’s OPRA request on November 1, 2018. 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, 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 evidence of record supports that the Borough of Elmer intended to provide the requested complaints and summonses prior to the complaint filing. 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 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 28th Day of September 2021

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: September 30, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 28, 2021 Council Meeting**

**Rotimi Owoh, Esq., (On Behalf of African American
Data and Research Institute & Baffis Simmons)¹
Complainant**

GRC Complaint No. 2018-249

v.

**Borough of Elmer (Salem)²
Custodial Agency**

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

1. Driving While Intoxicated (“DWI”)/Driving Under the Influence (“DUI”) complaints and summonses that were prepared by the Borough of Elmer Police Department (“EPD”) from January 2017 through present.
2. Drug possession complaints prepared and filed by the EPD from January 2017 through present.
3. Drug paraphernalia complaints and summonses prepared by the EPD from January 2017 through present.

Custodian of Record: Sarah D. Walker

Request Received by Custodian: October 8, 2018

Response Made by Custodian: October 15, 2018

GRC Complaint Received: October 22, 2018

Background⁴

Request and Response:

On October 5, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 15, 2018, the Custodian responded to the Complainant in writing providing information she received from the Borough of Elmer Police Department (“EPD”) pertaining to an unrelated portion of the request and identifying the number of arrests made for DUI/DWI and for controlled dangerous substance

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

² Represented by Brian J. Duffield, Esq., of the Law Office of Brian J. Duffield (Mullica Hill, NJ).

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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("CDS"). The Complainant replied to the Custodian that same day stating that he needed the actual copies of the complaints and summonses.

Additional Correspondence:

On October 17, 2018, the Custodian received the Complainant's reply, and forwarded the message to Custodian's Counsel. On October 19, 2018, Counsel responded to the Custodian notifying that the records could be released.

Denial of Access Complaint:

On October 22, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant contended that the Custodian violated OPRA by not making the request items available and by failing to seek an extension of time within the allotted period. The Complainant contended that other police departments in New Jersey have provided responsive records without issue. The Complainant further argued that prior GRC case law supports the disclosure of summonses and complaints. See Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004). The Complainant requested the GRC find that the Custodian violated OPRA and award counsel fees.

Supplemental Response:

On October 22, 2018, the Custodian responded to the Complainant stating that she was still working on the request and was waiting to hear from Counsel as to what could be redacted from the records. The Custodian also stated that she should be able to provide the records by October 29, 2018. On October 29, 2018, the Custodian informed the Complainant that additional time was needed to respond and would have the records ready by November 5, 2018.

On November 1, 2018, the Complainant provided the responsive records to the Complainant via e-mail. On November 6, 2018, the Custodian e-mailed the GRC, stating that she provided the responsive records to the Complainant on November 1, 2018.

Statement of Information:

On November 15, 2018, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's request on October 8, 2018. The Custodian certified that she discussed the request with EPD's Police Chief that afternoon and was told that he believed the arrest records could not be disclosed but could provide information contained therein. The Custodian certified that on October 15, 2018, she responded to the Complainant providing the letter she received from the Police Chief.

The Custodian certified that she did not receive the Complainant's reply until Wednesday, October 17, 2018, as she was out of the office on October 16, 2018.⁵ The Custodian certified that

⁵ The Custodian noted that she worked for the Borough part-time on Mondays, Wednesdays, and Thursdays. The Custodian added that she did not typically work on Tuesdays or Fridays and did not have an employee to cover her position when not at the office.

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she forwarded the request to Counsel that same day who replied on Friday, October 19, 2018 informing that the requested records could be released.

The Custodian certified that she did not receive Counsel's e-mail until Monday, October 22, 2018, the same day she received the instant complaint. The Custodian certified that she e-mailed the Complainant stating that she was working on the request and that a response would be coming on Monday, October 29, 2018. The Custodian certified that on October 29, 2018, she notified the Complainant that an additional extension was need until November 5, 2018. The Custodian certified that she received all responsive records from the Police Chief on November 1, 2018 and forwarded them to the Complainant that same day.

Additional Submissions:

On November 17, 2018, the Complainant filed a brief in response to the Custodian's SOI. The Complainant acknowledged receipt of the responsive records and asserted that the only outstanding issue was the award of counsel fees. The Complainant asserted that based upon the "catalyst" theory outlined in Teeters v. DYFS, 387 N.J. Super. 423, 429-31 (App. Div. 2006), a prevailing party must show that the lawsuit was causally related to securing the relief obtained, and that the relief granted had some basis in law. The Complainant argued that under Warrington v. Vill. Supermarkets, Inc., 328 N.J. Super. 410, 420 (App. Div. 2000), a prevailing party succeeds when the relief on the merits materially alters the relationship between the parties.

The Complainant asserted that the chronology of the instant matter demonstrated that he submitted the instant complaint on October 21, 2018, and the Custodian did not agree to provide the responsive records until the next day. The Complainant therefore argued that the complaint was the catalyst that prompted the Borough to disclose responsive records and he was a prevailing party entitled to a fee award. Warrington, 328 N.J. Super. at 420.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁶ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).

⁶A custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

OPRA also provides that:

[t]he custodian . . . shall permit the record to be inspected, examined, and copied by any person during regular business hours; or *in the case of a municipality having a population of 5,000 or fewer* according to the most recent federal decennial census . . . *during not less than six regular business hours over not less than three business days per week or the entity's regularly-scheduled business hours, whichever is less*

[N.J.S.A. 47:1A-5(a) (emphasis added).]

In the instant matter, the Custodian received the Complainant's OPRA request on October 8, 2018, and the Police Chief initially responded to the Complainant on October 15, 2018. When the Complainant stated that day that he requested actual copies of the complaints and summonses, the Custodian stated she did not read his response until October 17, 2018. Further, the Custodian did not request an extension of time until October 22, 2018, two (2) business days after the allotted deadline.

The Custodian noted that she worked part-time since the Borough was a small town of less than 1,400 people.⁷ The Custodian also asserted that she did not have an employee who could cover for her on the days she was not at the office. Thus, the Custodian appears to infer that the Borough was eligible to maintain limited OPRA hours as defined in N.J.S.A. 47:1A-5(a).

However, notwithstanding the Borough's eligibility under N.J.S.A. 47:1A-5(a), there is no evidence in the record demonstrating that the Borough publicly posted limited OPRA hours prior to the filing of the Complainant's OPRA request. See Morris v. Borough of Victory Gardens (Morris), GRC Complaint No. 2008-137 (Interim Order dated June 29, 2010). Therefore, there was a "deemed" denial of access since the Custodian's extension request was outside the initial deadline.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the allotted time frame results in a "deemed" denial of the said request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. However, the GRC declines to order disclosure because the Custodian did so on November 1, 2018.

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

⁷ According to the U.S. Census Bureau, the Borough's estimated population as of 2019 was 1,308. Rotimi Owoh, Esq. (On Behalf of African American Data and Research Institute & Baffis Simmons) v. Borough of Elmer (Salem), 2018-249 – Findings and Recommendations of the Executive Director

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 failed to timely respond to the Complainant’s OPRA request. See N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), N.J.S.A. 47:1A-6. However, the Custodian ultimately disclosed responsive records to the Complainant’s OPRA request on November 1, 2018. 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.

[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. *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.

[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.]

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 (7th) 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 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, 196 N.J. 51.

In the matter before the Council, the Complainant alleged that the Custodian did not agree to provide the actual copies of the complaints and summonses until after the complaint filing. The Custodian asserted that upon receiving the Complainant's response on October 17, 2018, she forwarded the e-mail to Counsel, who in turn notified her on October 19, 2018 that the records could be released. However, the Custodian did not receive Counsel's message until October 22, 2018, the same day she received instant complaint.

A review of the evidence indicates that the Custodian intended to provide responsive records to the Complainant, irrespective of the complaint filing. The Custodian's act of reaching out to Counsel for guidance stemmed from the Complainant's October 15, 2018 reply to the initial response. Furthermore, Counsel's guidance indicating that the records could be released occurred on October 19, 2018, two (2) calendar days prior to the complaint filing. Lastly, although submitted untimely, the Custodian's extension request pertained to potential redactions rather than the issue of access generally. Thus, the GRC finds that the complaint was not the catalyst for the Custodian's intended disclosure and that no causal nexus exists. Thus, the Complainant is not a prevailing party and is not entitled to an award of reasonable attorney's fees.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters, 387 N.J. Super. 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 71. Specifically, the evidence of record supports that the Borough intended to provide the requested complaints and summonses prior to the complaint filing. 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 did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the allotted time frame results in a "deemed" denial of the said request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007). However, the GRC declines to order disclosure because the Custodian did so on November 1, 2018.
2. The Custodian failed to timely respond to the Complainant's OPRA request. See N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), N.J.S.A. 47:1A-6. However, the Custodian ultimately disclosed responsive records to the Complainant's OPRA request on November 1, 2018. 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, 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 evidence of record supports that the Borough of Elmer intended to provide the requested complaints and summonses prior to the complaint filing. 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 71.

Prepared By: Samuel A. Rosado
Staff Attorney

September 21, 2021