



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

July 28, 2020 Government Records Council Meeting

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

Complaint No. 2018-264

v.

Township of Logan Police Department (Gloucester)
Custodian of Record

At the July 28, 2020 public meeting, the Government Records Council (“Council”) considered the July 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, finds that:

1. The Custodian lawfully denied access to the Complainant’s October 9, 2018 OPRA request. N.J.S.A. 46:1A-6. Specifically, the Custodian certified, and the record reflects, that the Township does not possess or maintain the requested “Arrest Listings.” See 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 evidence of record demonstrates that no responsive records exist for the Complainant’s OPRA request. 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 28th Day of July 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: July 30, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 28, 2020 Council Meeting**

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

GRC Complaint No. 2018-264

v.

**Township of Logan Police Department (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of Township of Logan Police Department's ("LPD") "Arrest Listings" from January 2017 through present.³

Custodian of Record: Robert T. Leash⁴

Request Received by Custodian: October 9, 2018

Response Made by Custodian: October 22, 2018

GRC Complaint Received: November 13, 2018

Background⁵

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 11, 2018, the Custodian responded in writing seeking an extension of time to October 23, 2018 to respond. On October 22, 2018, the Custodian responded in writing stating that the requested records do not exist and were not an identified government records required to be maintained on file. N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On November 13, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the Township of Logan

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

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

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

⁴ The current Custodian of Record is Joseph Lombardo.

⁵ 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.

Rotimi Owoh, Esq. (On Behalf of African American Data and Research Institute and Baffi Simmons) v. Township of Logan Police Department (Gloucester), 2018-264 – Findings and Recommendations of the Executive Director

(“Township”) failed to provide the requested records despite other police departments disclosing same without issue. The Complainant asserted that the State’s Records Retention and Disposition Schedule⁶ required police departments to retain copies of “Arrest Listings” for one (1) year after entry.

The Complainant requested that the Council find that the Custodian violated OPRA and to him award counsel fees.

Statement of Information:

On November 28, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on October 5, 2018. The Custodian certified that he responded to the Complainant’s request on October 22, 2018, stating that no records exist.

The Custodian asserted that “Arrest Listings” were not records maintained, reviewed, or filed by LPD. The Custodian argued that the fact that the record was listed in the State’s retention schedules was not proof that the agency must maintain the record. The Custodian argued that the retention schedules provided guidance for the maintenance and destruction of those records that were kept by the agency, as well as the mandated retention period. The Custodian noted that the retention schedules identified “Traffic Warnings” and “Taxi Cab Inspections” and their retention requirements as well as “Arrest Listings.” The Custodian asserted, however, that LPD did not issue written warnings or conduct taxi cab inspections, and thus did not maintain said records.

Additional Submissions:

On December 9, 2018, the Complainant filed a letter brief in opposition to the Custodian’s SOI. Therein, the Complainant argued that police departments across the State possessed records identifying individuals arrested for various offenses along with their race and other characteristics, regardless of whether LPD titled the record an “Arrest Listing.” The Complainant noted that LPD was required to comply with the State’s Uniform Crime Reporting (“UCR”) program and could not do so without possessing a responsive record.

The Complainant argued that based upon LPD’s required legal compliance with the UCR program, the Custodian violated OPRA by not timely providing a record showing the arrest’s number and date, and the arrestee’s offense, name, sex, and race. The Complainant asserted that as of December 9, 2018, he has not received the requested records from the Custodian.

The Complainant finally contended that based on the forgoing, the Council should order the Township to disclose to him the responsive records. The Complainant further asserted that the GRC should award him prevailing party attorney’s fees. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006).

⁶ The Complainant included an excerpt of the retention schedule as part of his complaint. Rotimi Owoh, Esq. (On Behalf of African American Data and Research Institute and Baffi Simmons) v. Township of Logan Police Department (Gloucester), 2018-264 – Findings and Recommendations of the Executive Director

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).

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. Ibid. 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.” N. Jersey Media Grp., Inc., 229 N.J. at 568.

In the current matter, the Complainant initially asserted that the State’s retention schedules required LPD to possess copies of the requested records for the stated period. The Custodian certified that LPD did not possess or maintain the requested records and that the retention schedules did not require the applicable agency to maintain every identified record. The Complainant then argued that LPD’s obligation to the UCR program necessitated the existence of records containing the information within the “Arrest Listings” sought by the Complainant.

Based upon the prevailing law, the Complainant’s reliance on the retention schedules as a legal requirement to keep and maintain “Arrest Listings” is misplaced. 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 do not counter the Custodian’s certification that LPD does not possess or maintain the requested records. Additionally, while the UCR program requires law enforcement agencies to provide crime data to the Office of the Attorney General (“OAG”) for publication, it does not specify how that data is transmitted from the law enforcement agency to the OAG.

Accordingly, the Custodian lawfully denied access to the Complainant’s October 9, 2018 OPRA request. N.J.S.A. 46:1A-6. Specifically, the Custodian certified, and the record reflects, that the Township does not possess or maintain the requested “Arrest Listings.” See 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, 387 N.J. Super. at 432, 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. 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 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 also 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 (2008).]

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, [certif. denied] (1984).

[Id. at 76.]

Here, the Complainant filed this complaint asserting that the Township failed to provide responsive records to his OPRA request. The Complainant requested that the GRC order the Custodian to disclose to the Complainant the responsive records and determine that the Complainant was a prevailing party entitled to reasonable attorney’s fees pursuant to N.J.S.A. 47:1A-6.

In determining whether the Complainant is a prevailing party, the evidence of record must establish a casual nexus existed between the filing of this complaint and disclosure of records. Having reviewed the evidence, the GRC does not find that such a casual nexus exists. Based the evidence of record, the GRC determined that no responsive records exist. Thus, at the time of the subject OPRA request, no unlawful denial of access occurred.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters, 387 N.J. Super. 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 demonstrates that no responsive records exist for the Complainant’s OPRA request. 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian lawfully denied access to the Complainant's October 9, 2018 OPRA request. N.J.S.A. 46:1A-6. Specifically, the Custodian certified, and the record reflects, that the Township does not possess or maintain the requested "Arrest Listings." See 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 evidence of record demonstrates that no responsive records exist for the Complainant's OPRA request. 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

July 21, 2020