



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

March 30, 2021 Government Records Council Meeting

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

Complaint No. 2019-251

v.
City of Camden (Camden)
Custodian of Record

At the March 30, 2021 public meeting, the Government Records Council (“Council”) considered the March 23, 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 evidence of record shows that the Custodian did not receive the Complainant’s November 25, 2019 OPRA requests, and the Complainant’s evidence is insufficient to overcome the Custodian’s certification. Thus, the Custodian did not unlawfully deny access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. See Martinez v. Morris Cnty. Prosecutor’s Office, GRC Complaint No. 2014-2 (September 2014), and Valdes v. N.J. Dep’t of Educ., GRC Complaint No. 2012-19 (April 2013).
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, 76 (2008). Specifically, there was no unlawful denial of access prior to the complaint filing since the Custodian did not receive 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 76.

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 30th Day of March 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: April 1, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 30, 2021 Council Meeting**

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

GRC Complaint No. 2019-251

v.

**City of Camden (Camden)²
Custodial Agency**

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

1st OPRA Request:

1. Drug Recognition Evaluation/Expert (“DRE”) Rolling Log from January 2019 through present.
2. Summonses and complaints that were prepared by the Police Department relating to each of the defendants listed in the DRE Rolling Logs mentioned in item No. 1 above.
3. Driving While Intoxicated/Driving under the Influence (“DWI/DUI”) complaints and summonses prepared and filed by the Police Department from January 2019 through present.
4. Drug possession complaints and summonses prepared and filed by the Police Department from January 2019 through present.
5. Drug paraphernalia complaints and summonses prepared by the Police Department from January 2019 through present.
6. Police Department’s “Arrest Listings” from January 2019 to present.

2nd OPRA Request:

1. Police Department’s “Law Enforcement Drug Testing Policy.”
2. In connection with item No. [2] above, records showing dates of drug testing for a period of 12 months, the number of sworn police officers employed by the Police Department, the number of sworn police officers tested, and the number of sworn police officers who tested positive.
3. In connection with item No. 3 above, a copy of the required written notice that the Police Department prepared on or around December 31, 2018.
4. Copy of the Police Department’s police relating to the “Early Warning System” (“EW System”) that is designed to detect patterns and trends in police conduct.
5. Records, reports, and notifications showing and tracking the number of police officers who triggered the “EW System” performance indicators, the conducts that triggered the EW

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

² Represented by Timothy J. Galanaugh, Esq. (Camden, NJ).

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system, and the remedial actions and disciplinary actions that were taken by the Police Department against police officers from January 2018 through present.

Custodian of Record: Luis Pastoriza

Request Received by Custodian: November 25, 2019

Response Made by Custodian: N/A

GRC Complaint Received: December 20, 2019

Background³

Request and Response:

On November 25, 2019, the Complainant submitted two (2) OPRA requests to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On December 20, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to respond to his OPRA requests in the statutory time frame. The Complainant also included an excerpt from a completed Statement of Information (“SOI”) form filed by the Custodian pertaining to a separate matter.⁴ The Complainant asserted that the excerpt confirmed that the OPRA requests at issue were sent to the correct e-mail addresses.

Statement of Information:

On January 3, 2020, the Custodian filed an SOI. The Custodian certified that he did not receive the Complainant’s November 25, 2019 OPRA requests. The Custodian also stated the requested records were maintained by Camden County (“County”) and not the City of Camden (“City”).

Additional Submissions:

On January 14, 2020, the Complainant submitted a letter response to the SOI. The Complainant asserted that the OPRA request was sent to the same e-mail addresses that the City used to communicate with the GRC and the Complainant in Owoh, Esq., GRC 2018-291, *et al.* The Complainant maintained that the request was sent to the correct addresses. Complainant also contended that he did not receive an error message or undeliverable notice after submitting his request.

³ 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.

⁴ The matter is Owoh, Esq. (On Behalf of AADARI & Baffi Simmons) v. City of Camden (Camden), GRC Complaint No. 2018-291, *et al.*, (Interim Order dated February 26, 2021). The matter is currently pending appeal. Rotimi Owoh, Eq. (On Behalf of African American Data & Research Institute) v. City of Camden (Camden), 2019-251 – Findings and Recommendations of the Executive Director

The Complainant asserted that the Custodian had an obligation to obtain the requested records from the County in light of the service agreement between the parties, or forward the request to same. Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010); Michalak v. Borough of Helmetta, GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). The Complainant also noted that an agency had an obligation to obtain responsive records even if they were not in actual possession, so long as they had access to same. See Verry v. Franklin Fire Dist. No. 1, 230 N.J. 285 (2017).

The Complainant requested that the GRC compel compliance with the OPRA request. The Complainant also requested the GRC award attorneys' fees pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken, 196 N.J. 51 (2008).

On February 19, 2021, the GRC requested additional information from the Custodian. Specifically, the GRC requested detailed information on what search, if any, was conducted to locate the Complainant's November 25, 2019 e-mail containing his OPRA requests.

On February 23, 2021, the Custodian's Counsel responded on behalf of the Custodian, providing a certification from the Custodian. The Custodian certified that upon receipt of the instant complaint, he initiated a search for the e-mail dated November 25, 2019. The Custodian certified that the search included an examination of his e-mail history and that of the members of his staff who were involved in responding to OPRA requests. The Custodian certified that the search confirmed that his office did not receive the e-mail at issue.

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.

OPRA further provides that, "a request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian." N.J.S.A. 47:1A-5(g). OPRA further provides that, "the council shall make a determination as to whether the complaint is within its jurisdiction or frivolous or *without any reasonable factual basis*." N.J.S.A. 47:1A-7(e) (emphasis added).

In Martinez v. Morris Cnty. Prosecutor's Office, GRC Complaint No. 2014-2 (September 2014), the complainant contended that the custodian should have received his OPRA request and provided a photocopy of the certified mail receipt as evidence. The certified mail receipt identified the date of delivery and confirmed that the address was correct. The Council held that the certified mail receipt was insufficient to show that the custodian received the request.

Furthermore, in Valdes v. N.J. Dep't of Educ., GRC Complaint No. 2012-19 (April 2013), the complainant filed a complaint after not receiving a response to his OPRA request. As part of his Denial of Access Complaint, the complainant included a certified mail receipt stamped "State of NJ – Capital Post Office." The Council determined that the custodian did not unlawfully deny access to the complainant's OPRA request because same was never received. The Council reasoned that "the Custodian did not sign the receipt and there is no indication that [the Department of Education] received the request, only that the State received it . . . it is entirely possible that the Custodian never received the OPRA request." Id. See also Bey v. State of New Jersey, Office of Homeland Security & Preparedness, GRC Complainant No. 2013-237 (February 2014) (complainant's certified mail return receipt sufficient only to show that the State received the request, not the custodian).

In the instant matter, the Complainant contended that he submitted his OPRA requests to the Custodian on November 25, 2019 and provided a copy of his e-mail indicating same. The Complainant also argued that he did not receive an error message and confirmed that the e-mail address he sent his OPRA requests to be the same used by the Custodian in a prior GRC complaint. The Custodian certified in the SOI that he did not receive the Complainant's e-mail containing his OPRA requests. In response to the GRC's request for additional information, the Custodian re-certified that he reviewed his e-mail records as well as his staff's and found no evidence of receiving the e-mail containing the requests.

The facts in this matter are analogous to those in Martinez, GRC 2014-2 and Valdes, GRC 2012-19. Like the certified mail receipts, the Complainant's e-mail copy is evidence that the e-mail was sent to the correct e-mail address but does not confirm that the Custodian received the e-mail on his server. Furthermore, the contention that the Complainant did not receive an error message is not positive evidence that the Custodian received the e-mail. Thus, the Complainant's evidence is insufficient to overcome the Custodian's certification that the City never received the e-mail containing the Complainant's November 25, 2019 OPRA request after searching his e-mail records, along with those of his staff.

Therefore, the evidence of record shows that the Custodian did not receive the Complainant's November 25, 2019 OPRA requests, and the Complainant's evidence is insufficient to overcome the Custodian's certification. Thus, the Custodian did not unlawfully deny access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. See Martinez, GRC 2014-2, and Valdes, GRC 2012-19.

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. 423, 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.]

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 receive the Complainant’s OPRA request prior to receiving notice of the Denial of Access Complaint. Thus, as there was no unlawful denial of access prior to the complaint filing, the Complainant has not achieved the desired result and is 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. at 432. Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 76. Specifically, there was no unlawful denial of access prior to the complaint filing since the Custodian did not receive 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. 432, and Mason, 196 N.J. 51.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The evidence of record shows that the Custodian did not receive the Complainant’s November 25, 2019 OPRA requests, and the Complainant’s evidence is insufficient to overcome the Custodian’s certification. Thus, the Custodian did not unlawfully deny access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. See Martinez v. Morris Cnty. Prosecutor’s Office, GRC Complaint No. 2014-2 (September 2014), and Valdes v. N.J. Dep’t of Educ., GRC Complaint No. 2012-19 (April 2013).
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, 76 (2008). Specifically, there was no unlawful denial of access prior to the complaint filing since the Custodian did not receive 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 76.

Prepared By: Samuel A. Rosado
Staff Attorney

March 23, 2021