



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

April 27, 2021 Government Records Council Meeting

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

Complaint No. 2019-256

v.

Borough of East Newark (Hudson)
Custodian of Record

At the April 27, 2021 public meeting, the Government Records Council (“Council”) considered the April 20, 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 lawfully denied access to the Complainant’s December 9, 2019 OPRA request. N.J.S.A. 46:1A-6. Specifically, both the original and current Custodian certified, and the record reflects, that no responsive records exist. 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 27th Day of April 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 29, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 27, 2021 Council Meeting**

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

GRC Complaint No. 2019-256

v.

**Borough of East Newark (Hudson)²
Custodial Agency**

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

1. Drug possession complaints and summonses prepared and filed by the Police Department from January 2019 through present.
2. Drug paraphernalia complaints and summonses prepared and filed by the Police Department from January 2019 through present.

Custodian of Record: Brigitte Goncalves⁴
Request Received by Custodian: December 9, 2019
Response Made by Custodian: December 10, 2019
GRC Complaint Received: December 23, 2019

Background⁵

Request and Response:

On December 9, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 10, 2019, the Custodian responded in writing, indicating that no responsive records exist for the above records. That same day, the Complainant e-mailed the Custodian requesting clarification that the Borough of East Newark’s Police Department (“ENPD”) did not possess the requested records.

On December 11, 2019, the Complainant e-mailed the Custodian again, requesting clarification on the response. The Complainant stated that he would have no choice but to file a complaint if no clarification was provided.

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

² Represented by John M. Johnson, Esq. of Johnson & Johnson, Esqs. (Florham Park, NJ).

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

⁴ The current Custodian of Record is Kevin D. Harris, Esq.

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.

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Denial of Access Complaint:

On December 23, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian directed the Complainant to obtain the responsive records from the municipal court and did not respond to the Complainant’s request for reconsideration.

The Complainant asserted that New Jersey police departments have direct access to eCDR as well as the ATS/ACS database. The Complainant argued that police departments did not need the assistance or permission of the municipal court to access the database which contain the responsive records. The Complainant contended that electronically stored records were subject to OPRA. See Paff v. Galloway Twp., 229 N.J. 340 (2017).

The Complainant also asserted that the Records Retention Schedule for both Municipal Police Departments and Municipal Prosecutors required retention of the requested records. The Complainant also contended that several superior court judges have held that complaint-summons prepared by police departments were subject to disclosure under OPRA. The Complainant therefore requested the GRC compel ENPD to comply with the OPRA request and to award counsel fees.

Statement of Information:

On January 27, 2020, the Custodian filed a Statement of Information (“SOI”) attaching a certification from. The Custodian certified that she received the Complainant’s OPRA request on December 9, 2019 and forwarded same to Chief Anthony Monteiro to search for records. The Custodian certified that on December 10, 2019, she responded to the Complainant stating that no responsive records exist.

The Custodian asserted that they did not receive the Complainant’s December 11, 2019 e-mail seeking clarification as the Borough’s e-mail address was misspelled. The Custodian asserted that the Borough and its employees could not be held accountable for not replying to an e-mail that was not sent to the correct address.

Additional Submissions:

On February 3, 2020, the Complainant filed a letter brief in opposition to the Custodian’s SOI. Therein, the Complainant first argued that the because ENPD officers “made” the complaints upon issuing them, they qualified as “government records” under OPRA. Further, the Complainant contended that according to an Attorney General Directive, if the complaints were unable to be entered electronically, police officers were required to prepare the complaints manually and then transmitted to the municipal court for filing.

The Complainant next 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 after disposition. The Complainant argued that because ENPD officers and municipal prosecutors were City employees, their records were subject to access under OPRA and should have been disclosed accordingly. The Complainant noted that if the responsive records were in storage or otherwise unavailable, the Custodian had an obligation to extend the response time frame but failed to do so.

The Complainant also argued that in accordance with Paff v. Galloway Twp., 229 N.J. 340 (2017), agencies were required to provide access to electronically stored information. The Complainant asserted that eCDR was set up by the New Jersey State Police (“NJSP”) in cooperation with the Administrative Office of the Courts (“AOC”), and that eCDR was a separate system from eCourts. Notwithstanding, the Complainant contended that since ENPD officers had direct access to the database maintaining the records and could retrieve and print the records without any assistance, help, or permission from the Court, they were obligated to retrieve same. The Complainant submitted letters, e-mails, and certifications from various police departments to demonstrate that all police departments in New Jersey can retrieve and print the requested summonses and complaints without any assistance or permission from the Court.

The Complainant further argued that he specifically requested records that were prepared by the police department, and not the Judiciary. Additionally, the Complainant asserted that R. 1:38 was inapplicable since the request was made directly to an executive branch agency. The Complainant asserted that they had the right to decide where to send their request to the Judiciary or Executive branch.

The Complainant further noted that ENPD’s obligation to disclose responsive records was not diminished simply because the Judiciary also made them available to the public. See Keddie v. Rutgers Univ., 144 N.J. 377 (1996). 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 should not be used as “a money generating scheme (another form of taxation) for government.” The Complainant thus argued that ENPD should be required to disclose the responsive records.

The Complainant also argued that ENPD should not be allowed to erect technological barriers as means to deny access to government records. The Complainant contended that the complaints should remain subject to access under OPRA regardless of whether they were prepared manually in the past but now entered electronically. The Complainant asserted that the standard under OPRA was not “actual possession” but rather “access” to the requested records, citing Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), and Verry v. Franklin Fire Dist. No. 1, 230 N.J. 285 (2017).

The Complainant also noted that several other judges have ruled that summons and complaints prepared by police officers were subject to disclosure and ordered counsel fees as a

⁶ The Complainant noted that his experience was 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.

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result. The Complainant asked the GRC to take notice of the decisions in favor of AADARI in AADARI v. Woodbridge Police Dep't, Docket No. MID-L-02052-18, AADARI v. Atlantic Highlands Police Dep't, Docket No. MON-L-002797-18, AADARI v. East Greenwich Police Dep't, Docket No. GLO-L-001309-18, AADARI v. City of Bridgeton Police Dep't, Docket No. CUM-L-745-18, AADARI v. City of Asbury Park, Docket No. MON-L-2578-18, and AADARI v. City of Millville, Docket No. CUM-L-712-18.⁷

On April 8, 2021, the GRC submitted a request for additional information from the Custodian. Specifically, the GRC asked the Custodian:

1. Do the [ENPD] police officers keep or maintain copies of the requested summonses and complaints upon submission to the [Court]?
2. Does the [Borough's] municipal prosecutor keep or maintain copies of summonses and complaints as part of a "Municipal Prosecutor's Case File"?
3. Does the [Borough] keep or maintain copies of the requested summonses and complaints in archives or storage?
4. Please describe the search undertaken to look for the requested complaints and summonses.

On April 16, 2021, the current Custodian responded to the GRC's request for additional information. Regarding the first question, the current Custodian certified that once an officer issues a summons and/or claim to the Court, the Deputy Municipal Court Administrator makes a copy of same and returns it to the officer. The current Custodian certified that the Chief of ENPD verified this information.

Next, the current Custodian certified that the municipal prosecutor utilizes the complaints and summonses within the Court's folder when dealing matters scheduled for court on a given day. The current Custodian certified that the related police folder the municipal prosecutor also uses contains police reports and motor vehicle abstracts. The current Custodian then immediately returns the police folder to ENPD and does not keep or retain an individual copy. The current Custodian certified that this information was verified by Michael A. Cifelli, Esq., the Municipal Prosecutor for the Borough.

Regarding the third and fourth inquiries, the current Custodian certified that if the documents requested exist then they would be kept in archives and storage. The current Custodian added that the Borough can access summonses and complaints through its computer search database ("CAD") maintained by ENPD. The current Custodian certified that once he received the GRC's request for additional information, he asked the Chief of Police to conduct a search using the previously mentioned CAD. The current Custodian certified that there were no summonses and/or complaints issued for the requested period for either request item. The current Custodian included screenshots of the CAD systems demonstrating same.

On April 19, 2021, the Complainant submitted a transcript of oral arguments in Simmons. The Complainant asserted that the attorney for the municipality realized that his arguments were

⁷ This matter was reversed on appeal, Simmons v. Mercado, 464 N.J. Super. 77 (App. Div.), certif. granted, 2020 LEXIS 1218 (Oct. 26, 2020).
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not getting traction from the New Jersey Supreme Court, and that the clear issue was access to the eCDR database.

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.

In the current matter, the Custodian responded to the Complainant’s OPRA request indicating that no responsive records exist. The Complainant responded to the Custodian seeking clarification on whether ENPD possessed any responsive records for the 2019 year. However, it appears that the Complainant misspelled the Borough’s e-mail address, and therefore the Custodian did not receive the Complainant’s email requesting additional information about ENPD’s records. The Custodian later certified that the Borough provided all responsive records to the Complainant in a timely manner.

The Complainant’s reply brief asserted that the requested records should be available through eCDR or through the municipal prosecutor. In response to the GRC’s request for additional information, the current Custodian certified that ENPD officers did create copies of the requested summonses and/or complaints once submitted to the Court and could access same through ENPD’s own electronic database. However, the current Custodian certified that upon asking the Chief of Police to conduct an additional search, he certified that no responsive records exist during the requested period. The current Custodian also provided screenshots of the results of the database search.

Accordingly, the Custodian lawfully denied access to the Complainant’s December 9, 2019 OPRA request. N.J.S.A. 46:1A-6. Specifically, both the original and current Custodian certified, and the record reflects, that no responsive records exist. 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 no responsive records exist for the requested period. Pusterhofer, GRC 2005-49. 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 December 9, 2019 OPRA request. N.J.S.A. 46:1A-6. Specifically, both the original and current Custodian certified, and the record reflects, that no responsive records exist. 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

April 20, 2021