



State of New Jersey
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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. 2020-05

v.

Long Branch Police Department (Monmouth)
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 Custodian lawfully denied access to the Complainant’s OPRA request seeking records, reports, and notifications generated from Long Branch Police Department’s Early Warning System, as same are exempt from disclosure pursuant to the Attorney General Law Enforcement Directive No. 2018-3. N.J.S.A. 47:12A-6; O’Shea v. Twp. of West Milford, 410 N.J. Super. 371, 382 (App. Div. 2009). Additionally, to the extent the Complainant seeks disciplinary records, same are exempt under OPRA’s personnel records exemption. N.J.S.A. 47:1A-10; Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 2004).
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 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. 2020-5

v.

**Long Branch Police Department (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “records, reports, and notifications showing and tracking the number of police officers who triggered the [Early Warning System (“EW System”)] performance indicators, the conduct that triggered the EW System, and the remedial actions and disciplinary actions that were taken by the police department against police officers from January 2018 to the present. Please feel free to redact the names and personal identifying information about specific police officers.”³

Custodian of Record: Kathy L. Schmelz⁴
Request Received by Custodian: November 22, 2019
Response Made by Custodian: January 3, 2020
GRC Complaint Received: January 10, 2020

Background⁵

Request and Response:

On November 22, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 3, 2020, the Custodian responded in writing, denying the request as seeking personnel records and internal affairs records which were exempt from disclosure pursuant to the Attorney General guidelines.

Denial of Access Complaint:

On January 3, 2020, the Complainant filed a Denial of Access Complaint with the

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

² Represented by Brian P. Trelease, Esq., of Rainone, Coughlin and Minchello, Attorneys at Law (Iselin, NJ).

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

⁴ The current Custodian of Record is Mary Moss.

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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Government Records Council (“GRC”). The Complainant asserted that the Attorney General Law Enforcement Directive No. 2018-3 (“Directive”) permits disclosure of the requested records if the identities of specific officers were not disclosed. The Complainant asserted that he specifically stated in the request that any personal or confidential information should be redacted. The Complainant therefore requested that the GRC compel the Long Branch Police Department (“LBPD”) to comply with the OPRA request with appropriate redactions of personal identifying information and confidential information.

Statement of Information:

On February 18, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on November 22, 2019. The Custodian certified that she responded to the Complainant in writing on January 3, 2020, denying access to the request as seeking personnel records and internal affairs records.

The Custodian asserted that the Directive unambiguously states that “all written reports created or submitted pursuant to this Directive that identify specific officers are confidential and not subject to public disclosure.”⁶ The Custodian argued that LBPD was required to fully comply with the express language of the Directive and could not deviate by disclosing EW System records with redactions made to the names of specific police officers.

The Custodian also asserted that the Complainant’s request sought the disciplinary actions and internal affairs records of police officers. The Custodian asserted that the Directive explicitly notes that it has no applicability on the disclosure and nondisclosure of said records, and therefore remain governed by N.J.S.A. 47:1A-10. The Custodian argued that the GRC has previously held that personnel records and internal affairs complaints were exempt from disclosure. See Wares v. Twp. of West Milford (Passaic), GRC Complaint No. 2014-274 (May 2015). The Custodian further asserted that the Attorney General guidelines exempted internal affairs records from disclosure, and that the GRC held that same have the force of law. See O’Shea v. Twp. of West Milford, 410 N.J. Super. 371, 382 (App. Div. 2009); Blaustein v. Lakewood Police Dep’t (Ocean), GRC Complaint No. 2011-102 (June 2012).

Additional Submissions:

On February 21, 2020, the Complainant filed a letter brief in opposition to the Custodian’s SOI. Therein, the Complainant maintained that LBPD should have provided the responsive records with redactions. The Complainant also asserted that in Dig. First Media v. Ewing Twp., 462 N.J. Super. 389 (App. Div. 2020), the Appellate Division held that redaction was a proper solution to balance the need for privacy and the public’s right to know.

Analysis

Unlawful Denial of Access

⁶ Directive at 5.

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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 provides that “[n]otwithstanding the provisions [OPRA] or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency . . . shall not be considered a government record . . .” N.J.S.A. 47:1A-10. OPRA begins with a presumption against disclosure and “proceeds with a few narrow exceptions that . . . need to be considered.” Kovalcik v. Somerset Cty. Prosecutor's Office, 206 N.J. 581 (2011). In Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 2004), the Council held that:

[t]he Complainant’s request to review the records of complaints filed against Officer Tuttle were properly denied by the Custodian. N.J.S.A. 47:1A-10 provides in pertinent [part] that “the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a public record and shall not be made available for public access” [emphasis omitted]. As a result, records of complaints filed against Officer Tuttle and/or reprimands he has received are not subject to public access.

[Id.]

In Rodriguez v. Kean Univ., GRC Complaint No. 2013-296 (June 2014), the Council held that “disciplinary actions are not specifically identified as personnel information subject to disclosure under OPRA.” Id. at 5. Furthermore, the Appellate Division has held that the personnel records exemption may apply to records that “. . . bear many of the indicia of personnel files.” North Jersey Media Grp. v. Bergen Cnty. Prosecutor’s Office, 405 N.J. Super. 386, 390 (App. Div. 2009). See also McGee, 416 N.J. Super. at 616 (noting that OPRA’s personnel records exemption “is not limited to the items included in a personnel file”).

In O’Shea, the Appellate Division held that Attorney General directives, like guidelines, “cannot be ignored” and are “binding and enforceable on local law enforcement agencies. . . .” 410 N.J. Super. at 382. Like the Internal Affairs Policy & Procedures (“IAPP”), the Directive derives its authority from Attorney General’s status as the chief law enforcement officer of the State and tasked with the general supervision of criminal justice. See N.J.S.A. 52:17B-97 to -117. Thus, the Directive has the force of law for police entities.

The purpose of the Directive was to require implementation of the EW System to all law enforcement agencies in New Jersey.⁷ The EW System is a management tool intended to detect trends in police conduct and help identify and remediate a potentially problematic officer before conduct escalates to becoming a substantial risk to public safety.⁸ The Directive provides a

⁷ Directive at 1.

⁸ Id.

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minimal set of “performance indicators” monitored by the EW System.⁹ The Directive also provides guidelines on a tracking system, how an incident may trigger one of the performance indicators, and the types of remedial action taken when an officer triggers the EW System review process.¹⁰ Notably, the Directive states that the EW System “should be administered by the agency’s internal affairs unit.”¹¹

Furthermore, the Directive provides in part:

All EW System policies adopted by law enforcement agencies shall be made available to the public upon request and shall be posted on the agency’s website. Annual reports from the County Prosecutors to the Attorney General (as required by Section II.I above) also shall be made available to the public upon request and shall be posted on the agency’s website.

All written reports created or submitted pursuant to this Directive that identify specific officers are confidential and not subject to public disclosure.¹²

In the instant matter, the Complainant asserted that the Directive permits the disclosure of “records, reports, and notifications showing and tracking the number of police officers who triggered the [EW System] performance indicators, the conduct that triggered the EW System, and the remedial actions . . . that were taken by [LBPD],” so long as the names of specific officers are redacted. The Custodian asserted that the Directive did not give LBPD the discretion to deviate from nondisclosure of such records by redacting police officer’s names.

Upon review, the underlying records produced under the Directive are integrally related to the internal personnel management of police officers. The Directive’s confidentiality section should therefore be read through the lens of personnel records, which favor a presumption against disclosure. See Kolvalcik, 206 N.J. 581. Thus, the Directive’s plain language indicates that the requested records and reports are deemed confidential and not subject to public disclosure other than the expressly identified “EW System polices” and the “annual report” provided to the Attorney General from the County Prosecutor. Just as internal affairs records are deemed confidential in their entirety under the IAPP, so too are the underlying records generated from the EW System pursuant to the Directive. Furthermore, to the extent that the Complainant seeks records and records detailing any disciplinary actions taken against police officers flagged via the EW System, such records are exempt from disclosure via Merino, GRC 2003-110.

Accordingly, the Custodian lawfully denied access to the Complainant’s OPRA request seeking records, reports, and notifications generated from LBPD’s EW System, as same are exempt from disclosure pursuant to the Directive. N.J.S.A. 47:12A-6; O’Shea, 410 N.J. Super. at 382. Additionally, to the extent the Complainant seeks disciplinary records, same are exempt under OPRA’s personnel records exemption. N.J.S.A. 47:1A-10; Merino, GRC 2003-110.

⁹ Id. at 2.

¹⁰ Id. at 3-4.

¹¹ Id. at 3.

¹² Id. at 4-5.

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 disclose the requested records with redactions to personal and confidential information. However, the evidence in the record demonstrates that the requested records are exempt in their entirety pursuant to the Directive. 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 OPRA request seeking records, reports, and notifications generated from Long Branch Police Department’s Early Warning System, as same are exempt from disclosure pursuant to the Attorney General Law Enforcement Directive No. 2018-3. N.J.S.A. 47:12A-6; O’Shea v. Twp. of West Milford, 410 N.J. Super. 371, 382 (App. Div. 2009). Additionally, to the extent the Complainant seeks disciplinary records, same are exempt under OPRA’s personnel records exemption. N.J.S.A. 47:1A-10; Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 2004).

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

March 23, 2021