



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

December 13, 2022 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o Delores Simmons
and Obafemi Simmons)
Complainant

Complaint No. 2021-103

v.

Township of Holland (Hunterdon)
Custodian of Record

At the December 13, 2022 public meeting, the Government Records Council (“Council”) considered the December 6, 2022 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’s response to the Complainant’s OPRA request was sufficient, as the Township of Holland made public its policy designating a Custodian of Record specifically within the Holland Police Department via its website prior to the Complainant’s request. See N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-5(h); Paff v. Twp. of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008). Thus, there was no unlawful denial of access. N.J.S.A. 47:1A-6.
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 13th Day of December 2022

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: December 15, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 13, 2022 Council Meeting**

**Rotimi Owoh, Esq. (on Behalf of Delores Simmons
and Obafemi Simmons)¹
Complainant**

GRC Complaint No. 2021-103

v.

**Township of Holland (Hunterdon)²
Custodial Agency**

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

1. “[A]rrest listings” or “arrest summaries” or “booking records” showing the name, sex, and race of the individuals who were charged with drug paraphernalia by your police department from January 2020 to present.
2. “[A]rrest listings” or “arrest summaries” or “booking records” showing the name, sex, and race of the individuals who were charged with jaywalking by your police department from January 2020 to present.
3. [C]omplaints and summonses prepared by your police department relating to individuals who were charged with drug possession and or drug paraphernalia by your police department from January 2020 to present.
4. DWI/DUI summonses and complaints prepared and or issued by your police department from January 2020 to present.
5. [C]omplaints and summonses prepared by your police department relating to individuals who were charged with jaywalking by your police department from January 2020 to present.
6. [C]omplaints that were filed against your police department and or police officers for misconduct, harassment, excessive use of force and or discrimination from 2014 to present.
7. [S]ettlement agreements entered by your police department and or municipality to resolve complaints and allegations of any misconduct(s), harassment, hostile working environment, use of force, discrimination from 2014 to present.
8. [S]ettlement agreements entered between your police department or municipality with any one of your current and former police officers from 2014 to present.
9. [S]ettlement agreements your municipality entered with any one of your police officers who challenged his or her termination in court or through arbitration from 2014 to present.
10. [A]ny agreement your municipality entered into with any of your present or former officers promising the officer(s) that your police department will give positive employment reference of “good standing” to future employers despite taking adverse employment action against the officer(s) such as termination or asking the officer(s) to resign or retire.

¹ The Complainant represents Delores and Obafemi Simmons.

² Represented by Matthew P. Lyons, Esq., of Gebhardt & Kiefer (Clinton, NJ).

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11. PDNA issue by your police department from 2014 to present.
12. [C]ancelled checks and invoices your police department and or municipality used to settle sexual harassment allegations within your police department from 2014 to present.
13. Names, date of hire, date of separation and reason for separation, salary, payroll record, amount and type of pension of individuals who either resigned or retired or terminated or otherwise separated from 2002 to 2017. N.J.S.A. 47:1A-10. This request also includes any agreement entered with each one of the separated police officer(s).
14. Records relating to allegation of ticket fixing and or station house discharge in the last 7 years.
15. Use of Force reports from 2018 to 2021.
16. Names, rank, date of hire, date of demotion and reason for demotion and salary of individuals who were demoted in the last 7 years by your police force.
17. Name, rank, date of hire, and reason for separation of the police officers who used deadly force in the last 7 years.
18. Records, reports and notifications showing and tracking the number of police officers who triggered the [Early Warning (“EW”)] performance indicators, the conducts that triggered the EW system, and the remedial actions and disciplinary actions that were taken by your police department against the police officers from 2016 through the present.

Custodian of Record: Catherine M. Miller

Request Received by Custodian: April 29, 2021

Response Made by Custodian: April 30, 2021

GRC Complaint Received: May 19, 2021

Background³

Request and Response:

On April 29, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 30, 2021, the Custodian responded in writing, stating that the Complainant should send the request directly to Holland Township Police Administrator Colleen Pursell, as the request sought law enforcement records. The Custodian also listed Ms. Pursell’s e-mail address. That same day, the Complainant responded to the Custodian via e-mail, stating he would not send the request to anyone else.

Denial of Access Complaint:

On May 19, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that in 2020, he submitted an OPRA request to the same Custodian and received responsive records, and therefore the e-mail address he used for the instant request was correct. The Complainant asserted that the statutory time to respond has passed and he has not received responsive records. The Complainant argued that the Custodian violated OPRA, and he should be declared a prevailing party.

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.

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Statement of Information:

On June 3, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on April 29, 2021. The Custodian certified that she responded in writing on April 30, 2021, stating that the Complainant should submit his OPRA request directly to Ms. Purcell at Holland Township Police Department (“HPD”).

The Custodian asserted that in September 2020, HPD’s Police Chief requested that all OPRA requests seeking law enforcement records should be sent directly to Ms. Purcell, who was the Deputy Custodian of Police Records. The Custodian asserted that due to the COVID-19 pandemic in 2020 and 2021, this procedure was believed to be the most efficient way to respond to OPRA requests seeking law enforcement records.

The Custodian asserted that since October 2020, she has followed the policy and believes it has been successful in completing the requests quickly and efficiently. The Custodian argued that when she received the Complainant’s April 30, 2020 response, she interpreted it to mean the Complainant was no longer interested in continuing the request. As part of the SOI, the Custodian provided copies of other OPRA requests seeking police records along with the Custodian’s responses directing same to Ms. Purcell.

The Custodian further asserted that Ms. Purcell has since received the OPRA request and was advised that an additional two (2) weeks from June 3, 2021 was needed to complete the request.

Supplemental Response:

On July 15, 2021, the Custodian e-mailed the Complainant, providing responsive records to the Complainant’s OPRA request.

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 also provides that that the custodian of government records in a municipality is the municipal clerk. See N.J.S.A. 47:1A-1.1. However, some municipalities have chosen to designate additional custodians for specific departments within their governmental structure, such as police departments. Where applicable and appropriate, and where the evidence of record supports such a determination, the GRC has exercised its discretion to recognize such custodians when they are specifically and clearly identified, in order to make it easier for requestors to seek and obtain

government records in an expeditious manner consistent with OPRA. See, e.g., L.D. v. Bayonne Police Dep't, GRC Complaint No. 2004-64 (August 2004); Barron v. Highland Park Police Dep't, GRC Complaint No. 2004-145 (January 2005); Serrano v. New Brunswick Police Dep't, GRC Complaint No. 2004-151 (April 2005); Morris v. Trenton Police Dep't, GRC Complaint No. 2007-160 (May 2008).

In Paff v. Twp. of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008), the complainant requested in part law enforcement records pertaining to disciplinary actions. The custodian initially responded by stating that records were “not available.” The Council held that the custodian failed to forward the request to proper custodian at the Berkeley Heights Police Department (“BHPD”) under N.J.S.A. 47:1A-5(h). The Council noted that BHPD’s website identified its custodians of record and provided a downloadable version of its OPRA request form, distinct from Berkeley Heights’ form.

In the instant matter, the Custodian responded to the Complainant stating that he needed to submit his OPRA request directly to HPD. The Complainant filed the instant matter, stating that he previously submitted OPRA requests seeking the same or similar records directly to the Custodian and received records without issue. In the SOI, the Custodian certified that on or around October 2020, the Township began a policy where OPRA requests seeking police records were to be sent directly to Ms. Purcell at HPD.

Upon review, the GRC finds that the Custodian adequately responded to the Complainant. On the Township’s website, www.hollandtownshipnj.gov, the Municipal Clerk’s page identifies the Custodian as responsible for “maintaining [T]ownship records.” Further, the website’s HPD section states that OPRA requests for police reports should be submitted to Deputy Records Custodian Amanda Muller via e-mail or directly to HPD’s address via U.S. mail. However, the GRC notes that unlike Paff, HPD does not provide requestors with its own version of the Township’s OPRA request. Nor does the Municipal Clerk’s page inform requestors that requests for police records should be sent directly to HPD. Thus, the Township and HPD could better reinforce this new policy through addressing the above.

Accordingly, the Custodian’s response to the Complainant’s OPRA request was sufficient, as the Township made public its policy designating a Custodian of Record specifically within HPD via its website prior to the Complainant’s request. See N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-5(h); Paff, GRC 2007-271. Thus, there was no unlawful denial of access. N.J.S.A. 47:1A-6.

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 the instant matter, the Complainant filed the instant complaint asserting that the Custodian did not respond to his OPRA request but instead directed him to the custodian for HPD. However, the evidence of record demonstrates that the Township publicized its designation of a records custodian specifically for HPD prior to the Complainant's OPRA request. Therefore, the Custodian's response was sufficient and did not represent an unlawful denial of access to the subject OPRA request.

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. 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. 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's response to the Complainant's OPRA request was sufficient, as the Township of Holland made public its policy designating a Custodian of Record specifically within the Holland Police Department via its website prior to the Complainant's request. See N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-5(h); Paff v. Twp. of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008). Thus, there was no unlawful denial of access. N.J.S.A. 47:1A-6.
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

December 6, 2022