



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

May 30, 2023 Government Records Council Meeting

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

Complaint No. 2021-105

v.

Borough of National Park (Gloucester)
Custodian of Record

At the May 30, 2023 public meeting, the Government Records Council (“Council”) considered the May 23, 2023 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. Recognizing that the Custodian’s April 20, 2021 response to the Complainant OPRA request may be lawful pursuant to Owoh v. City of Camden, 2023 N.J. Super. Unpub. LEXIS 597 (App. Div. 2023); her response was nonetheless unlawful at that time because it was inconsistent with the prevailing case law prior to the court’s ruling. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-6; Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010); and Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). Thus, the Custodian shall obtain the responsive records from the Township and provide same to the Complainant.
2. **The Custodian shall comply with conclusion No. 2 above within ten (10) business days from receipt of the Council’s Final Decision. In the circumstance where the records ordered for disclosure are not provided to the Complainant, the Council’s Final Decision may be enforced in the Superior Court of New Jersey. N.J. Court Rules, R. 4:67-6; N.J.A.C. 5:105-2.9(c).**
3. The Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a 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, the Custodian was ordered to locate, retrieve, and provide the requested records to the Complainant. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is 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. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be**

paid to Complainant within twenty (20) business days. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

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 May 2023

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: June 6, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 30, 2023 Council Meeting**

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

GRC Complaint No. 2021-105

v.

**Borough of National Park (Gloucester)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 Susan Parvin, Esq. (Woodburg, 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: Joy Gunn

Request Received by Custodian: April 20, 2021

Response Made by Custodian: April 20, 2021

GRC Complaint Received: May 19, 2021

Background³

Request and Response:

On April 20, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. That same day, the Custodian responded in writing stating that the Borough of National Park (“Borough”) possessed no responsive records since the Borough had a shared services agreement with the Township of West Deptford (“Township”).

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 the Custodian has not provided any records or requested an extension of time to respond within the allotted period. The Complainant asserted that the Custodian violated OPRA by not retrieving the records, considering the shared services agreement that existed between the Borough and Township. The Complainant argued that he should be declared a prevailing party and awarded counsel fees.

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 4, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on April 20, 2021. The Custodian certified that she responded in writing that same day stating that the Borough had no responsive records due to having a shared services agreement with the Township.

In support of her certification, the Custodian attached copies of signed shared services agreements dated from 2008 to present.

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.

Generally, the GRC does not retroactively apply court decisions to complaints pursuant to Gibbons v. Gibbons, 86 N.J. 515 (1981). There the Court held that “it is a fundamental principle of jurisprudence that retroactive application of new laws involves a high risk of being unfair.” Id. at 522. In Moore v. N.J. Dep’t of Corr., GRC Complaint No. 2009-144 (Interim Order dated October 26, 2010), the custodian denied access to responsive records in 2009 based upon a then existing Executive Order, the custodial agency’s proposed regulations, and prior Council decisions relying on same. During the pendency of the complaint, the Appellate Division in 2010 reversed a separate Council decision relying on the Executive Order and proposed regulations. The Council held that while the custodian’s basis for denial was no longer valid, the denial was not unlawful since at the time the request was consistent with prior GRC case law. See also Biss v. Borough of New Providence Police Dep’t (Union), GRC Complaint No. 2009-21 (February 2010); Sallie v. N.J. Dep’t of Law & Public Safety, Div. of Criminal Justice, GRC Complaint No. 2008-21 (Interim Order dated June 23, 2009).

At the time of the Complainant’s OPRA request and the Borough’s April 20, 2021 response, Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010) maintained the position that a public agency has an obligation to obtain responsive records from third party entities which maintained government records. In that case, the Appellate Division determined that the defendant, Gloucester County, was required to obtain settlement agreements from its insurance broker. Id. at 508-09. The court’s decision largely rested on the fact that there was no question that the broker was working on behalf of the defendant to execute settlement agreements. Id. The court noted that it previously held that although a third party such as insurance broker or outside counsel may execute settlement agreements, “they nonetheless bind the county as principal, and the agreements are made on its behalf.” Id. at 513.

The Council subsequently expanded the court's holding in Burnett to public agencies which held a shared services agreement with other agencies. See Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). In that case, the complainant sought police dispatch logs from the Borough of Helmetta ("Helmetta"). The custodian asserted that Helmetta did not maintain the records as dispatch calls were routed through the Spotswood Police Department ("SPD"). The Council held that since Helmetta entered into a shared services agreement with the Borough of Spotswood to operate Helmetta's dispatch log, the custodian was obligated to obtain the requested records from SPD. The Council found that SPD "made, maintained, or kept on file" the dispatch logs on behalf of Helmetta pursuant to the shared services agreement. See Burnett, 415 N.J. Super. at 517.

During the pendency of this complaint, the Appellate Division revisited this issue in Owoh v. City of Camden, 2023 N.J. Super. Unpub. LEXIS 597 (App. Div. 2023).⁴ In that case, the Complainant maintained that the City of Camden ("City") was obligated under Burnett to retrieve law enforcement records from Camden County, who provided the City with policing via a police services agreement ("PSA"). The court found that the facts in the matter were distinguishable from Burnett in that the PSA was made between two (2) distinct public entities, rejecting the Complainant's argument that there was no difference between them, or to disregard any distinctions that may exist. Slip op. at 13. The court further found that in Burnett, the court identified a concern of a public agency outsourcing government records to third parties for the purposes of avoiding disclosure. Slip op. at 15. The court held that in this case, the City was not outsourcing records maintenance to the County to undermine transparency, but rather the City has no law enforcement branch, and the County created and maintained the requested records as part of its own duties. Id.

Since this Denial of Access Complaint was filed before Owoh, the GRC must determine the applicable law at the time of the response. See Moore, GRC 2009-144. Here, the Custodian responded on April 20, 2021, denying access. In the SOI, the Custodian argued that the Borough did not possess any of the requested records because it had a shared services agreement with the Township to provide police services. However, since the Custodian responded prior to the court's decision, the Borough remained obligated to obtain the responsive records from the Township pursuant to the shared services agreement. See Burnett, 415 N.J. Super. 506; Michalak, GRC 2010-220.

Therefore, recognizing that the Custodian's April 20, 2021 response to the Complainant OPRA request may be lawful pursuant to Owoh, slip op. at 13-15; her response was nonetheless unlawful at that time because it was inconsistent with the prevailing case law prior to the court's ruling. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-6; Burnett, 415 N.J. Super. 506; and Michalak, GRC 2010-220. Thus, the Custodian shall obtain the responsive records from the Township and provide same to the Complainant.

Prevailing Party Attorney's Fees

OPRA provides that:

⁴ This matter was on appeal from Owoh, Esq. (O.B.O. AADARI) v. City of Camden (Camden), GRC Complaint Nos. 2018-291 and 2018-306 (Interim Order dated October 27, 2020).
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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 (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.]

Here, the Complainant sought a multitude of law enforcement records. The Custodian argued that the Borough had a shared services agreement with the Township to provide police services and therefore did not possess the requested records. The Complainant filed the instant matter to assert that the Township had an obligation to retrieve the records.

In determining whether the Complainant is a prevailing party entitled to attorney’s fees, the GRC is satisfied that the evidence of record supports a conclusion in the affirmative. Ultimately, the Custodian was required to locate and obtain the requested records from the Township, which was the Complainant’s desired result in filing the instant complaint. Teeters, 387 N.J. Super. at 432. Thus, a causal nexus exists between this complaint and the change in the Custodian’s conduct. Mason 196 N.J. at 76. Accordingly, the Complainant is a prevailing party entitled to attorney’s fees.⁵

Therefore, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. at 432. Additionally, a 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, the Custodian was ordered to locate, retrieve, and provide the requested records to the Complainant. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is 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. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to**

⁵ The Council makes this determination with the understanding that the Complainant acted on behalf of a bona fide client at the time of the request. Although the Complainant’s status as representing an actual client has been previously challenged, the available evidence on the record is insufficient to address that issue herein. See Owoh, Esq. (O.B.O. AADARI) v. Neptune City Police Dep’t (Monmouth), GRC Complaint No. 2018-153 (April 2020) and Owoh, Esq. (O.B.O. AADARI) v. Freehold Twp. Police Dep’t (Monmouth), GRC Complaint No. 2018-155 (Interim Order dated September 29, 2020).

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Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Recognizing that the Custodian's April 20, 2021 response to the Complainant OPRA request may be lawful pursuant to Owoh v. City of Camden, 2023 N.J. Super. Unpub. LEXIS 597 (App. Div. 2023); her response was nonetheless unlawful at that time because it was inconsistent with the prevailing case law prior to the court's ruling. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-6; Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010); and Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). Thus, the Custodian shall obtain the responsive records from the Township and provide same to the Complainant.
2. **The Custodian shall comply with conclusion No. 2 above within ten (10) business days from receipt of the Council's Final Decision. In the circumstance where the records ordered for disclosure are not provided to the Complainant, the Council's Final Decision may be enforced in the Superior Court of New Jersey. N.J. Court Rules, R. 4:67-6; N.J.A.C. 5:105-2.9(c).**
3. The Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a 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, the Custodian was ordered to locate, retrieve, and provide the requested records to the Complainant. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is 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. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Prepared By: Samuel A. Rosado
Staff Attorney

May 23, 2023