



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

July 25, 2023 Government Records Council Meeting

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

Complaint No. 2021-265

v.

Secaucus Police Department (Hudson)
Custodian of Record

At the July 25, 2023 public meeting, the Government Records Council (“Council”) considered the July 18, 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 October 26, 2021 response to the Complainant’s September 15, 2021 OPRA request is no longer a lawful denial pursuant to Libertarians for Transparent Gov’t v. Cumberland Cnty., 250 N.J. 46, 56-57 (2022); his response was nonetheless lawful at that time because it was consistent with the prevailing case law prior to the Court’s ruling. N.J.S.A. 47:1A-6; Libertarians for Transparent Gov’t v. Cumberland Cnty., 465 N.J. Super. 11 (App. Div. 2020); Moore v. N.J. Dep’t of Corr., GRC Complaint No. 2009-144 (Interim Order dated October 26, 2010). Thus, the Council declines to order disclosure here.
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, the evidence of record supports that the Custodian’s response was lawful at the time. 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 25th Day of July 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: July 27, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 25, 2023 Council Meeting**

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

GRC Complaint No. 2021-265

v.

**Secaucus Police Department (Hudson)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of: Names, date of hire, date of separation and reason for separation, salary at the time of separation who either resigned or retired or terminated or otherwise separated from 2008 to the present. N.J.S.A. 47:1A-10. This request includes any agreement entered with each one of the separated police officer(s).

- a. When stating the reason for separation, please note that some police officers separate due to plea deal, criminal convictions, criminal charges, sentences, and or other court agreement or court proceedings that require officers to be separated from your police department and or law enforcement jobs.
- b. Some police officers separate due to internal affairs investigations within the police departments.³

Custodian of Record: Michael Marra

Request Received by Custodian: September 15, 2021

Response Made by Custodian: October 26, 2021

GRC Complaint Received: November 3, 2021

Background⁴

Request and Response:

On September 15, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 28, 2021, the Custodian extended the time to respond to the Complainant’s OPRA request by twenty (20) business days. On October 26, 2021, the Custodian responded in writing providing a record containing the requested information, noting the reason for separation as “retired” or “terminated”.

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

² Represented by Kristin Bohn, Esq., of Chasan, Lamparello, Mallon, & Cappuzzo, P.C. (Secaucus, NJ).

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

⁴ 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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The Custodian noted that that the record contained payroll information from 2018, and if the Complainant required earlier information, a special service charge may be imposed. The Custodian also stated that with regard to parts (a) and (b) of the request, they sought personnel records beyond what was required under N.J.S.A. 47:1A-10 and was therefore denied. Libertarians for Transparent Gov't v. Ocean Cnty. Prosecutor's Office, 2018 N.J. Super. Unpub. LEXIS 25 (App. Div.) cert. denied, 235 N.J. 407 (2018). The Custodian also stated that internal affairs and internal disciplinary records were exempt from disclosure. Libertarians for Transparent Gov't v. Cumberland Cnty., 465 N.J. Super. 11 (App. Div. 2020).

Denial of Access Complaint:

On November 3, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the provided records did not provide the reasons for separation. The Complainant contended that simply stating "terminated", "resigned", or "retired," was insufficient under N.J.S.A. 47:1A-10.

The Complainant requested that the GRC compel the Custodian to comply fully with the OPRA request and award counsel fees.

Statement of Information:

On November 22, 2021, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on September 15, 2021. The Custodian certified that his search included consulting with the Secaucus Police Department ("SPD"), the Town Attorney, Payroll, and Human Resources to provide responsive records. The Custodian certified he responded in writing on October 26, 2021, providing a spreadsheet containing the requested information.

The Custodian asserted that the record provided the requested information, including the reason for separation. The Custodian noted that the record even included greater detail on the circumstances surrounding the separation for some of the officers. The Custodian stated that the Town of Secaucus ("Town") was not obligated to provide details or explanation of the circumstances of an officer's separation from employment. Libertarians, slip op. The Custodian maintained that to provide more than what was given would violate the confidentiality provisions of N.J.S.A. 47:1A-10. The Custodian also argued there were no "agreements" to provide as well.

The Custodian stated that he fully complied with his obligations under OPRA and requested the GRC to dismiss the complaint.

Additional Submissions:

On November 22, 2021, the Complainant submitted a brief in response to the Complainant's SOI. The Complainant asserted that the Custodian failed to provide the "real reasons" for separation in response to his OPRA request.

The Complainant initially argued that the terms “terminated”, “retired”, or “resigned,” did not sufficiently provide the “reason for separation” because they were merely types of employment separations and did not adequately describe the underlying basis thereof. The Complainant argued that the “reason” for separation was likely located within a separate document constituting a government record, and the Custodian was obligated to retrieve that record, rather than create a spreadsheet or list containing the words “terminated”, “retired”, or “resigned.”

The Complainant next asserted that in many instances where a police officer is charged with crimes, they may enter a plea agreement which may require them to leave the police department or be removed from employment because of a conviction. The Complainant argued that it was insufficient for the Custodian to merely state the terms “retired”, “resigned”, or “terminated” as the reason for separation if the “real reason” was that the officer was compelled to separate as part of a plea agreement or sentence. The Complainant thus argued that the Custodian violated OPRA by not providing the “real reasons” for any of the separations listed.

The Complainant asserted that a guilty plea agreement between an officer and prosecutor is akin to a settlement agreement normally entered into in civil proceedings. Libertarians, 465 N.J. Super. 11. The Complainant argued that civil settlement agreements are subject to OPRA, and therefore guilty plea agreements should also be subject to OPRA in accordance with Libertarians.

The Complainant contended the Borough did not want to provide the “real reasons” for separation due to the pervasive culture and predisposition to protect officers convicted of misconduct. The Complainant argued that providing single word descriptions was only partially truthful and did not promote OPRA’s goal of transparency.

The Complainant asserted that as an example of police departments’ culture, he noted that in response to a similar OPRA request, Millville Police Department stated that two (2) officers “resigned” from the department. The Complainant asserted that in fact the officers pleaded guilty to criminal charges and as part of the agreement and sentencing they were required to be separated from the department.

The Complainant requested that the GRC compel the Custodian comply fully and truthfully with the OPRA request. The Complainant also requested the GRC declare the Complainant a prevailing party and award counsel fees.⁵

On November 23, 2021, Custodian’s Counsel e-mailed the GRC. Counsel first asserted that the Complainant’s response was unsolicited from the GRC. Counsel next asserted that notwithstanding, the response failed to bring up any fact, allegation, or legal citation that the Complainant could not have raised in his complaint. Counsel argued that the Complainant’s submission therefore be stricken from consideration.

⁵ The Complainant further noted that access to the records should have been granted under the “common law ‘right to access public records’.” However, the GRC does not have the authority to address a requestor’s common law right to access records. N.J.S.A. 47:1A-7(b); Rowan, Jr. v. Warren Hills Reg’l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013); Kelly v. N.J. Dep’t of Transp., GRC Complaint No. 2010-215 (November 2011). Thus, the GRC cannot address any common law right of access to the requested records.

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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.

Settlement Agreements

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).

In the instant matter, the Complainant requested the “[n]ames, date of hire, date of separation and reason for separation and salary of individuals who either resigned or were terminated from your police department from 2008 to the present” on September 15, 2021. The Complainant also requested any settlement agreements entered between the Town and any separated officer. On October 26, 2021, the Custodian provided responsive records pertaining to personnel information subject to disclosure under N.J.S.A. 47:1A-10 (“Section 10”). In the SOI, the Custodian asserted he was not obligated to pursuant to Libertarians, slip op.

At the time of the Complainant’s OPRA request and the Town’s October 26, 2021 response, Libertarians, 465 N.J. Super. 11 was the precedential decision on an agency’s obligation to disclose personnel records containing information subject to disclosure under N.J.S.A. 47:1A-10 (“Section 10”). In that case, the plaintiffs discovered through meeting minutes that a corrections officer was involved in a misconduct investigation along with several other officers. Id. at 13-14. The officer was to be terminated originally but was allowed to “retire in good standing” after cooperating with the investigation in accordance with a settlement agreement. Id. The plaintiffs then submitted an OPRA request seeking the settlement agreement referenced in the minutes, and the officer’s “name, title, position, salary, length of service, date of separation and the reason therefore” in accordance with Section 10. Id. The defendants declined to provide the settlement agreement, claiming it was a personnel record exempt from access. Id.

The plaintiffs challenged the denial of access to the settlement agreement, asserting that the defendants “misrepresent[ed] the ‘reason’ for Ellis’s separation from public employment” and improperly withheld a government record. Id. at 15. The trial court ordered disclosure of the settlement agreement with redactions, and the Appellate Division reversed, finding that the record was exempt as a personnel record under Section 10.

During the pendency of this complaint, the New Jersey Supreme Court reversed the Appellate Division and ordered disclosure of the settlement agreement with redactions. Libertarians, 250 N.J. 46. The Court found that under OPRA, custodians were required to disclose the actual records containing the information required to be disclosed under Section 10. Id. at 56. The Court thus held that because the requested settlement agreement contained Section 10 information, the defendants were obligated to disclose the record with appropriate redactions. Id. at 57.

Since this Denial of Access Complaint was filed after the Libertarians decision, the GRC must determine the applicable law at the time of the response. See Moore, GRC 2009-144. Here, the Custodian responded on October 26, 2021, providing the requested information pursuant to Section 10. In the SOI, the Custodian argued while the Town did not possess any “agreements”, such records would not be subject to disclosure in any event. Since the Custodian responded prior to the Supreme Court’s decision, the Town was not obligated to provide the Complainant with personnel and disciplinary records which contained the “reasons” for separation. See Libertarians, 465 N.J. Super. 11; Moore, GRC 2009-144.

Therefore, recognizing that the Custodian’s October 26, 2021 response to the Complainant’s September 15, 2021 OPRA request is no longer a lawful denial pursuant to Libertarians, 250 N.J. at 56-57; his response was nonetheless lawful at that time because it was consistent with the prevailing case law prior to the Court’s ruling. N.J.S.A. 47:1A-6; Libertarians, 465 N.J. Super. 11; Moore, GRC 2009-144. Thus, the Council declines to order disclosure here.

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 (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 “[n]ames, date of hire, date of separation and reason for separation, salary at the time of separation who either resigned or retired or terminated or otherwise separated from 2008 to the present,” as well as any “agreement” providing the “reason for separation.” The Custodian provided a list which stated the “reason for separation” for the officers, along with the other Section 10 information. The Complainant then filed the instant complaint on October 26, 2021, asserting the Custodian failed to provide the “real reason” for the officers’ separations. On March 7, 2022, the Court overturned the Appellate Division in Libertarians, 250 N.J. 46. However, because the Custodian’s denial of access was proper at the time of the response, 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, the evidence of record supports that the Custodian’s response was lawful at the time. 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Recognizing that the Custodian’s October 26, 2021 response to the Complainant’s September 15, 2021 OPRA request is no longer a lawful denial pursuant to Libertarians for Transparent Gov’t v. Cumberland Cnty., 250 N.J. 46, 56-57 (2022); his response was nonetheless lawful at that time because it was consistent with the prevailing case law prior to the Court’s ruling. N.J.S.A. 47:1A-6; Libertarians for Transparent Gov’t v. Cumberland Cnty., 465 N.J. Super. 11 (App. Div. 2020); Moore v. N.J. Dep’t of Corr., GRC Complaint No. 2009-144 (Interim Order dated October 26, 2010). Thus, the Council declines to order disclosure here.
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, the evidence of record supports that the Custodian’s response was lawful at the time. 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

July 18, 2023