



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. 2021-279

v.

Point Pleasant Police Department (Ocean)
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. The Custodian did not unlawfully deny access to the Complainant’s October 13, 2021 OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that the Borough of Point Pleasant provided all responsive records containing the requested information. See Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010).
2. The Custodian lawfully denied access to the Complainant’s October 13, 2021 OPRA request seeking internal affairs records that may contain the “reason for separation”. N.J.S.A. 47:1A-6. Specifically, internal affairs records are explicitly deemed confidential pursuant to the Internal Affairs Policy and Procedures and not subject to access under OPRA. See N.J.S.A. 47:1A-9(b); Rivera v. Union Cnty. Prosecutor’s Office, 250 N.J. 124, 142-43 (2022); Gannett Satellite Info. Net., LLC v. Twp. of Neptune, 467 N.J. Super. 385, 404-05 (App. Div. 2021). Because internal affairs records are exempt via N.J.S.A. 47:1A-9(b), the Council declines to address the other defenses against disclosure raised by the Custodian.
3. 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 Custodian certified that no additional records exist which contained the requested information. 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. 2021-279

v.

**Point Pleasant Police Department (Ocean)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 2014 to the present. N.J.S.A. 47:1A-10.

- a. This request includes any agreement entered with each one of the separated police officer(s).
- b. 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.
- c. Some police officers separate due to internal affairs investigations within the police departments.

Custodian of Record: Lt. David L. Radsniak

Request Received by Custodian: October 13, 2021

Response Made by Custodian: November 4, 2021

GRC Complaint Received: November 9, 2021

Background³

Request and Response:

On October 13, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 4, 2021, the Custodian responded in writing providing a list containing the requested information, noting the reasons for separation. The Custodian further stated that no responsive records existed for

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

² Represented by Patrick F. Varga, Esq., of Dasti, Murphy, McGuckin, Ulaky, Koutsouris & Connors (Forked River, NJ).

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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separation agreements. The Custodian also denied access to any records stemming from internal affairs (“IA”) investigations pursuant to the New Jersey Attorney General’s Internal Affairs Policy and Procedures (“IAPP”) § 9.6.1.

Denial of Access Complaint:

On November 9, 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 23, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on November 1, 2021. The Custodian certified that his search included contacting the Borough of Point Pleasant’s (“Borough”) Finance Department to obtain the information pertaining to the officers’ salary, payroll record, and pension information. The Custodian certified that he then reviewed the officers’ own files to ascertain the reason for separation and any separation agreements. The Custodian certified he responded in writing on November 4, 2021, providing a spreadsheet containing the requested information, and stating that no other responsive records exist.

The Custodian first argued that he fulfilled his obligations under N.J.S.A. 47:1A-10 and was under no obligation to prepare a detailed explanation of the reasons why officers separated from the Borough. The Custodian also maintained that the Borough possessed no additional responsive records, inclusive of any agreements made between the separated officers and the Borough.

Regarding records stemming from IA investigations, the Custodian argued that such records were confidential and exempt from disclosure pursuant to N.J.S.A. 47:1A-9, N.J.A.C. 13:1E-3.2(a)(4) and IAPP §§ 9.6.1, 9.12.1, and 9.12.2. The Custodian argued that the records were also exempt from disclosure pursuant to Libertarians for Transparent Gov’t v. Cumberland Cnty., 465 N.J. Super. 11 (App. Div. 2020).

Lastly, the Custodian contended that the records were properly provided to the Complainant electronically as originally requested.⁴

⁴ The Custodian made additional arguments against disclosure under the “common law ‘right to access public records’.” However, the GRC notes that it 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.

Personnel Information

In Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010), the Council found that the custodian did not unlawfully deny access to the requested records based on the custodian’s certification that all such records were provided to the complainant. The Council held that the custodian’s certification, in addition to the lack of refuting evidence from the complainant, was sufficient to meet the custodian’s burden of proof. See also Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015).

Here, the Complainant’s OPRA request sought the “[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 2014 to the present.” The Complainant also requested any “agreement” between the Borough and any separated officer that would provide the “reason for separation,” and included examples of such agreements within subparts (a) and (b) of the request.

The Custodian responded to the Complainant on November 4, 2021, providing the requested information, which included the stated “reason for separation” as “terminated”, or “retired” for all identified officers. In the SOI, the Custodian certified that no additional responsive records exist, inclusive of any of the types of “agreements” listed by the Complainant. Thus, although the Complainant identified instances where other municipalities possessed such agreements elaborating on the “reason for separation,” he failed to present any evidence that the Borough possessed same at the time of the request.

Accordingly, the Custodian did not unlawfully deny access to the Complainant’s October 13, 2021 OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that the Borough provided all responsive records containing the requested information. See Danis, GRC 2009-156, *et seq.*

Internal Affairs Records

OPRA further provides that same “shall not abrogate or erode any executive or legislative privilege or *grant of confidentiality* heretofore established or recognized by the Constitution of this State, *statute*, court rule or judicial case law.” N.J.S.A. 47:1A-9(b) (emphasis added).

The Appellate Division has held that Attorney General Guidelines have the force of law for police entities. See O’Shea v. Twp. of West Milford, 410 N.J. Super. 371, 382 (App. Div. 2009). In particular, the IAPP is bound upon all law enforcement agencies in New Jersey pursuant to statute. See N.J.S.A. 40A:14-181. Further, the IAPP explicitly provides that “[t]he nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information.” IAPP at 9.6.1 (August 2020). Consistent with the IAPP, the Council held in Wares v. Passaic Cnty. Prosecutor’s Office, GRC Complaint No. 2014-330 (June 2015) that IA records are not subject to access under OPRA (citing N.J.S.A. 47:1A-9). See also Camarata v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2014-127 (June 2015); Rivera v. Borough of Keansburg Police Dep’t (Monmouth), GRC Complaint No. 2007-222 (June 2009). More recently, the State’s Appellate and Supreme Courts have similarly reaffirmed that IA records are not disclosable under OPRA. Gannett Satellite Info. Net., LLC v. Twp. of Neptune, 467 N.J. Super. 385, 404-05 (App. Div. 2021); Rivera v. Union Cnty. Prosecutor’s Office, 250 N.J. 124, 142-43 (2022) (citing N.J.S.A. 47:1A-9(b)).

Here, the Complainant’s OPRA request suggested that records which may contain the “reason for separation” may be from within IA investigations. In the SOI, the Custodian maintained that IA records were not disclosable under OPRA per the IAPP, N.J.S.A. 47:1A-9, and N.J.A.C. 13:1E-3.2(a)(4).

Prevailing court case law and the GRC’s prior decisions support the Custodian’s denial of this portion of the request. See O’Shea, 410 N.J. Super. at 382; Rivera, 250 N.J. at 142-43; Gannett, 467 N.J. Super. at 404-05. Specifically, both the courts and Council have held that records related to IA investigations were exempt from disclosure under the IAPP confidentiality provision. N.J.S.A. 47:1A-9(b). Thus, it follows that any responsive records generated via IA investigations are exempt, notwithstanding whether such records contain the “reason for separation.”

Therefore, the Custodian lawfully denied access to the Complainant’s October 13, 2021 OPRA request seeking IA records that may contain the “reason for separation”. N.J.S.A. 47:1A-6. Specifically, IA records are explicitly deemed confidential pursuant to the IAPP and not subject to access under OPRA. See N.J.S.A. 47:1A-9(b); Rivera, 250 N.J. at 142-43; Gannett, 467 N.J. Super. at 404-05. Because IA records are exempt via N.J.S.A. 47:1A-9(b), the Council declines to address the other defenses against disclosure raised by the Custodian.

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 the “[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 2014 to the present,” as well as any “agreement” providing the “reason for separation.” The Custodian provided a list which stated the “reason for separation” as “terminated” or “retired” for all identified officers. The Complainant then filed the instant complaint, asserting that the Custodian failed to provide the “real reason” for the officers’ separations. However, the Custodian certified in the SOI that the Borough did not possess any additional records, including any “agreement” described within the Complainant’s request. Thus, 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 Complainants’ filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 71. Specifically, the Custodian certified that no additional records exist which contained the requested information. 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not unlawfully deny access to the Complainant’s October 13, 2021 OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that the Borough of Point Pleasant provided all responsive records containing the requested information. See Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010).
2. The Custodian lawfully denied access to the Complainant’s October 13, 2021 OPRA request seeking internal affairs records that may contain the “reason for separation”. N.J.S.A. 47:1A-6. Specifically, internal affairs records are explicitly deemed confidential pursuant to the Internal Affairs Policy and Procedures and not subject to access under OPRA. See N.J.S.A. 47:1A-9(b); Rivera v. Union Cnty. Prosecutor’s Office, 250 N.J. 124, 142-43 (2022); Gannett Satellite Info. Net., LLC v. Twp. of Neptune, 467 N.J. Super. 385, 404-05 (App. Div. 2021). Because internal affairs records are exempt via N.J.S.A. 47:1A-9(b), the Council declines to address the other defenses against disclosure raised by the Custodian.

3. 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 Custodian certified that no additional records exist which contained the requested information. 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