



State of New Jersey

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JACQUELYN A. SUÁREZ
Acting Commissioner

FINAL DECISION

December 12, 2023 Government Records Council Meeting

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

Complaint No. 2021-338

v.

Harrison Town Police Department (Bergen)
Custodian of Record

At the December 12, 2023 public meeting, the Government Records Council (“Council”) considered the December 5, 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’s November 8, 2021 response was insufficient because she failed to address each request item. N.J.S.A. 47:1A-5(g); see Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008); Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013). Specifically, the Custodian failed to indicate whether responsive settlements existed between the Town of Harrison and any separated police officer.
2. The Custodian did not unlawfully deny access to the portion of the Complainant’s November 5, 2021 OPRA request seeking disclosable personnel information. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that the Town of Harrison 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).
3. Notwithstanding the Custodian’s insufficient response, she has borne her burden of proof that he lawfully denied access to the Complainant’s OPRA request seeking the “reason for separation”, “amount and type of pension”, and any “agreement[s]” between the Town of Harrison and separated police officers. Specifically, the Custodian certified, and the record reflects, that no such records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
4. 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 she provided the Complainant with all responsive records in the Town of Harrison possession and that no agreements between the Town and separated officers exist. 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 12th Day of December 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: December 14, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 12, 2023 Council Meeting**

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

GRC Complaint No. 2021-338

v.

**Harrison Town Police Department (Bergen)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, payroll record, amount and type of pension of individuals 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: Paul J. Zarbetski

Request Received by Custodian: November 5, 2021

Response Made by Custodian: November 8, 2021

GRC Complaint Received: December 16, 2021

Background³

Request and Response:

On November 5, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 8, 2021, the Custodian responded to the Complainant in writing via e-mail providing a spreadsheet containing the requested personnel information.

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

² No representation listed on record.

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.

Rotimi Owoh, Esq. (on Behalf of African American Data & Research Institute) v. Harrison Town Police Department (Hudson), 2021-338 – Findings and Recommendations of the Executive Director

Denial of Access Complaint:

On December 16, 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.⁴

Statement of Information:

On January 26, 2022, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on November 5, 2021. The Custodian certified that her search included reviewing personnel records from the Town of Harrison (“Town”) database. The Custodian certified that she responded to the Complainant in writing on November 8, 2021, attaching the responsive spreadsheet.

The Custodian asserted that she provided a spreadsheet containing the requested personnel information. The Custodian maintained that the Town provided a completed response in accordance with New Jersey law in providing the reason for separation within the spreadsheet.

The Custodian nevertheless contended that the Town did not possess documents stating the reasons behind any of the “retired” separations. The Custodian asserted that when receiving notice of the officer’s retirement, the application does not ask for the applicant’s reasoning behind their desire to retire. The Custodian also stated that this applies to officers who applied for disability retirement. The Custodian next asserted that no officers were separated due to termination, and the single officer who resigned was not required to provide a reason.

The Custodian further argued that a search was conducted and that no agreements exist between the Town and any of the separated officers.

Analysis

Sufficiency of Response

OPRA provides that if a “custodian is unable to comply with a request for access, the custodian *shall indicate the specific basis therefor . . .* on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5(g) (emphasis added). In Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the Council held that “. . . [t]he Custodian’s response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g).” See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013).

⁴ The Complainant did not raise an objection to the redactions made to the provided payroll records.
Rotimi Owoh, Esq. (on Behalf of African American Data & Research Institute) v. Harrison Town Police Department (Hudson), 2021-338 – Findings and Recommendations of the Executive Director

Upon review, the GRC is satisfied that the Custodian provided an insufficient response. Here, the Custodian responded to the Complainant's OPRA request by providing a spreadsheet attached to an e-mail. However, the e-mail failed to identify whether the Custodian was denying access to any records and further failed to address each request item. Instead, the Custodian disclosed a spreadsheet which appeared to be responsive to the request for personnel information. It was not until the Custodian certified in the SOI that the records contained in the correspondence were responsive to the request for personnel information under N.J.S.A. 47:1A-10.

Additionally, the Custodian's response failed to indicate whether any "agreement" existed between the Town. It was not until the Custodian certified in the SOI a search was conducted and that no agreements between the Town and separated officers exist. The facts here are on point with those in Paff; thus, it follows there was an insufficient response in the instant complaint.

Therefore, the Custodian's November 8, 2021 response was insufficient because she failed to address each request item. N.J.S.A. 47:1A-5(g); see Paff, GRC 2007-272; Lenchitz, GRC 2012-265. Specifically, the Custodian failed to indicate whether responsive settlements existed between the Town and any separated police officer.

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).

In the instant matter, the Complainant requested the "[n]ames, 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 2014 to the present" on November 5, 2021. On November 8, 2021, the Custodian responded in writing providing a spreadsheet containing the requested information. In the SOI, the Custodian certified that she provided a fully responsive record and that no portion of the OPRA request was denied. Although the Complainant identified instances where other municipalities possessed records elaborating on the "reason for separation," he failed to present any evidence that the Town possessed same at the time of the request.

Accordingly, the Custodian did not unlawfully deny access to the portion of the Complainant's November 5, 2021 OPRA request seeking disclosable personnel information. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that the Town provided all responsive records containing the requested information. See Danis, GRC 2009-156, *et seq.*

Agreements

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Here, in addition to the requested personnel information, the Complainant sought any "agreement" between the Town and any separated officer that would contain the "reason for separation." In the SOI, the Custodian certified and confirmed that no other records exist at the time of the request, inclusive of any agreements. Additionally, the Complainant failed to present any evidence that the Town possessed same at the time of the request, or to refute the Custodian's certification.

Accordingly, notwithstanding the Custodian's insufficient response, she has borne her burden of proof that she lawfully denied access to the Complainant's OPRA request seeking any "agreement" between the Town and separated officers. Specifically, the Custodian certified, and the record reflects, that no such records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

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, payroll record, amount and type of pension of individuals 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.” In response, the Custodian provided records containing the requested personnel information. The Complainant then filed the instant complaint on December 16, 2021, asserting the Custodian failed to provide the “real reason” for the officers’ separations. However, the Custodian certified in the SOI that a complete response was provided, and the Town did not possess any agreements between itself and separated officers, or any other records that would contain the “reason for separation.” 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 Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 76. Specifically, the Custodian certified that she provided the Complainant with all responsive records in the Town’s possession and that no agreements between the Town and separated officers exist. 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. The Custodian’s November 8, 2021 response was insufficient because she failed to address each request item. N.J.S.A. 47:1A-5(g); see Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008); Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013). Specifically, the Custodian failed to indicate whether responsive settlements existed between the Town of Harrison and any separated police officer.
2. The Custodian did not unlawfully deny access to the portion of the Complainant’s November 5, 2021 OPRA request seeking disclosable personnel information. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that the Town of Harrison 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).
3. Notwithstanding the Custodian’s insufficient response, she has borne her burden of proof that he lawfully denied access to the Complainant’s OPRA request seeking the “reason for separation”, “amount and type of pension”, and any “agreement[s]” between the Town of Harrison and separated police officers. Specifically, the Custodian certified, and the record reflects, that no such records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
4. 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 she provided the Complainant with all responsive records in the Town of Harrison possession and that no agreements between the Town and separated officers exist. 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

December 5, 2023