



State of New Jersey

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JACQUELYN A. SUÁREZ
Acting Commissioner

FINAL DECISION

March 26, 2024 Government Records Council Meeting

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

Complaint No. 2022-10

v.

Borough of Hamburg Police Department (Sussex)
Custodian of Record

At the March 26, 2024 public meeting, the Government Records Council (“Council”) considered the March 19, 2024 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 December 15, 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 Borough of Hamburg and any separated police officer.
2. The Custodian did not unlawfully deny access to the portion of the Complainant’s December 1, 2021 OPRA request seeking disclosable personnel information. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, the Borough of Hamburg 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. The Custodian unlawfully denied access to the court order responsive to the Complainant’s December 1, 2021 OPRA request. N.J.S.A. 47:1A-6. Specifically, the court order comprised an agreement by a separated police officer which contained the reason for his separation from the Borough of Hamburg. However, the Council declines to order disclosure since the record demonstrates that the Custodian provided a copy on February 7, 2022, as part of the Statement of Information.
4. 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 unlawfully denied access to a responsive record at the time of the request. 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. 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.**

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 26th Day of March 2024

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: April 1, 2024

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 26, 2024 Council Meeting**

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

GRC Complaint No. 2022-10

v.

**Borough of Hamburg Police Department (Sussex)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: Doreen Schott

Request Received by Custodian: December 1, 2021

Response Made by Custodian: December 15, 2021

GRC Complaint Received: January 20, 2022

Background³

Request and Response:

On December 1, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 7, 2021, the Custodian extended the time to respond to until December 17, 2021. On December 15, 2021, the Custodian responded to the Complainant in writing providing a document containing the requested

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

² Represented by Richard J. Clemack, Esq. (Ringwood, 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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personnel information. In the document, one officer's identified reason for separation stated, "plea agreement."

Denial of Access Complaint:

On January 20, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the records did not provide the reasons for separation. The Complainant also contended that the response did not include a copy of the plea agreement identified in the record.

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

Statement of Information:

On February 7, 2022, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that the Borough of Hamburg ("Borough") received the Complainant's OPRA request on December 1, 2021. The Custodian certified that her search included contacting the Borough's Chief Financial Officer and Chief of Police to obtain the relevant information. The Custodian also certified that she conducted a search for any agreements between the Borough and separated officers and none were located. The Custodian certified that she responded to the Complainant in writing on December 15, 2021, providing a document containing the requested personnel information.

The Custodian contended that she misspoke when she stated that one of the officers separated due to a plea agreement. The Custodian argued that the officer terminated his position as a result of a court order and attached a copy of same to the SOI. The Custodian contended that the officer was not subject to any charges or disciplinary action from the Borough but was instead charged by the Sussex County Prosecutor's Office and resigned thereafter.

The Custodian argued that beyond the aforementioned mistake, the response was proper at the time of the request. The Custodian maintained that the Complainant sought only agreements, and to identify the reasons for separation, and not records of separation. The Custodian thus asserted that because no agreements exist, there was no unlawful denial.

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).

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 document containing the requested personnel information. However, the Custodian's response did not indicate whether any "agreement" existed between the Borough and the officers. 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. Further, it was not until the SOI where the Custodian certified she conducted a search for any "agreement" between the Borough and separated officers and that no records were located. 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 December 15, 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 Borough 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 December 1, 2021. On December 15, 2021, the Custodian responded in writing providing a document 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 Borough possessed same at the time of the request.

Accordingly, the Custodian did not unlawfully deny access to the portion of the Complainant's December 1, 2021 OPRA request seeking disclosable personnel information. 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.*

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). However, competent, credible evidence exist to refute a legal certification, the Council held that a custodian violated OPRA. See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012). In Welenc v. N.J. State Police, GRC Complaint No. 2017-134 (Interim Order dated February 26, 2019), the Council looked to Carter, GRC 2011-76 in determining that an unlawful denial of access may have occurred therein. The Council reasoned that although the Custodian certified that the New Jersey State Police (“NJSP”) did not maintain pension information on five (5) officers, he disclosed pension information for one of them. The Council was also persuaded by this disclosure to order the custodian to perform additional searches to ensure that the NJSP did not maintain any of the information sought.

Here, the Custodian maintained that no agreements were located, and that the apparent “plea agreement” referenced in the provided record was in fact a court order. However, a review of the court order indicates understandings consented to between the officer and the Sussex County Prosecutor’s Office (“SCPO”). Among the conditions would be the officer’s resignation from the Borough police department, partly in exchange for the SCPO to not move forward with a criminal prosecution. Further, the court order was signed by multiple parties, including the officer, his attorney, and a prosecutor with Sussex County. Therefore, while the court order is not a “plea agreement” in that the officer received an agreed-upon criminal sentence in exchange for a plea of guilty to criminal charges, the court order is an agreement evidencing the reason why the officer resigned from the Borough. This record falls within the portion of the Complainant’s request seeking any “court agreement . . . that require[s] officers to be separated from your police department and or law enforcement jobs”. Thus, as in Welenc, GRC 2017-134, an unlawful denial occurred because the evidence supports the existence of a responsive record.

Therefore, the Custodian unlawfully denied access to the court order responsive to the Complainant’s December 1, 2021 OPRA request. N.J.S.A. 47:1A-6. Specifically, the court order comprised an agreement by a separated police officer which contained the reason for his separation from the Borough. However, the Council declines to order disclosure since the record demonstrates that the Custodian provided a copy on February 7, 2022, as part of the SOI.

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 a spreadsheet containing the requested personnel information. The Complainant then filed the instant complaint on January 20, 2022, asserting the Custodian failed to provide the “real reason” for the officers’ separations. The Complainant also contended that the Custodian failed to provide the “plea agreement” that was listed as the reason for separation for one of the officers.

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. The Custodian initially provided a response to the request seeking personnel information, and in the SOI asserted that the document identified as a plea agreement was instead a court order, and therefore contended that no responsive agreements exist. However, while the Custodian mischaracterized the court order as a “plea agreement,” it clearly evidenced an agreement by the officer to resign from his position with the Borough in exchange for the SCPO to not move forward with criminal charges. Therefore, the court order was a responsive record that should have been provided to the Complainant. 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.⁴

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. 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. 51. Specifically, the Custodian unlawfully denied access to a responsive record at the time of the request. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to

⁴ 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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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 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. The Custodian's December 15, 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 Borough of Hamburg and any separated police officer.
2. The Custodian did not unlawfully deny access to the portion of the Complainant's December 1, 2021 OPRA request seeking disclosable personnel information. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, the Borough of Hamburg 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. The Custodian unlawfully denied access to the court order responsive to the Complainant's December 1, 2021 OPRA request. N.J.S.A. 47:1A-6. Specifically, the court order comprised an agreement by a separated police officer which contained the reason for his separation from the Borough of Hamburg. However, the Council declines to order disclosure since the record demonstrates that the Custodian provided a copy on February 7, 2022, as part of the Statement of Information.
4. 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 unlawfully denied access to a responsive record at the time of the request. 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. 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.**

Prepared By: Samuel A. Rosado
Staff Attorney

March 19, 2024