



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS
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TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lieutenant Governor

JACQUELYN A. SUÁREZ
Commissioner

FINAL DECISION

May 21, 2024 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o Delores Simmons,
Baffi Simmons & Grace Woko)
Complainant

Complaint No. 2021-108

v.

Middletown Township Police Department (Middlesex)
Custodian of Record

At the May 21, 2024 public meeting, the Government Records Council (“Council”) considered the May 14, 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 March 18, 2024, 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 Middletown Township and any separated police officer.
2. Notwithstanding the Custodian’s insufficient response, she has borne her burden of proof that she lawfully denied access to the Complainant’s OPRA request item Nos. 3, 9, 11, 12, 14 in part, 16, and 17 seeking various records pertaining to Middletown Township and its police department. N.J.S.A. 47:1A-6. Specifically, both the original and current 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).
3. The Custodian did not unlawfully deny access the Complainant’s OPRA request item Nos. 8, 14 in part, and 15 seeking the personnel information of and complaints filed against Middletown Township Police Department police officers. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that Middletown Township 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).
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 Middletown Township's possession and that no agreements between the Township 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 21st Day of May 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: May 23, 2024

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 21, 2024 Council Meeting**

**Rotimi Owoh, Esq. (on Behalf of Delores Simmons,
Baffi Simmons & Grace Woko)¹
Complainant**

GRC Complaint No. 2021-108

v.

**Middletown Township Police Department (Middlesex)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:³

3. “[A]rrest listings” or “arrest summaries” or “booking records” showing the name, sex, and race of the individuals who were charged with jaywalking by your police department from January 2020 to present.
8. [C]omplaints that were filed against your police department or police officers for misconduct, harassment, excessive use of force and/or discrimination from 2014 to present. Request includes complaints that were filed with your police department, filed in courts and/or filed in administrative agencies.
9. [S]ettlement agreements entered by your police department and or municipality to resolve complaints and allegations of any misconduct(s), harassment, hostile work environment, use of force, discrimination in the last seven (7) years.
11. [S]ettlement agreements entered between your police department or municipality with any one of your current and former police officers in the last seven (7) years.
12. [C]ancelled checks and invoices relating to items [8 and 9] above.
14. 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 in the last seven (7) years from your police department. N.J.S.A. 47:1A-10. This request also includes any agreement entered with each one of the separated police officer(s).
15. Names, rank, date of hire, date of demotion and reason for demotion and salary if individuals who were demoted in the last seven (7) years by your police force.
16. Name, rank, date of hire and date of separation of the three (3) police officers who used force the greatest number of times when compared to other police officers within your police department in the last three (3) years (2016 through 2021). It is our understanding that the Use of Force Reports include the number of times each officer used force during the time period. Hence, it should be easy to identify the three (3) (officers) based of the annual use of force report(s).

¹ The Complainant represents Delores and Obafemi Simmons, and Grace Woko.

² Represented by Brian M. Nelson, Esq., of Archer & Greiner, P.C. (Red Bank, NJ).

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

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17. Name, rank, date of hire and date of separation of the police officers who used DEADLY force in the last seven (7) years. Please include how many times each one of the officers used deadly force in the last five (5) years.⁴

Custodian of Record: Heidi R. Brunt

Request Received by Custodian: March 1, 2021

Response Made by Custodian: March 10, 2021; March 18, 2021; March 23, 2021

GRC Complaint Received: May 20, 2021

Background⁵

Request and Response:

On March 1, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 10, 2021, Middletown Township’s (“Township”) “Next Request” OPRA portal responded to the Complainant in writing via e-mail providing a link to the responsive records. On March 15, 2021, the Complainant e-mailed the Custodian directly, stating he was unable to navigate the portal and requested the records sent directly via e-mail. On March 18, 2021, the Custodian responded to the Complainant in writing providing a spreadsheet responsive to request item No. 14. The Custodian also stated that for request item Nos. 9, 11, and 12, no responsive records exist. The Custodian then stated that the remaining request items would be covered by the Middletown Township Police Department (“MPD”) or by contacting the Middletown Municipal Court. The Custodian further stated she was aware the Complainant received an e-mail from MPD on March 9, 2021 stating that an extension of time was needed to respond.

On March 19, 2021, the Complainant responded to the Custodian inquiring when he should expect a response from MPD. On March 23, 2021, Lt. Antonio Ciccone with the MPD responded on the Custodian’s behalf in writing, attaching records responsive to item Nos. 8 and 15. Lt. Ciccone then stated that no responsive records exist for Item Nos. 3, 16 and 17. Lt. Ciccone further stated that item Nos. 9, 11, 12, and 14 were previously forwarded to the Township Clerk for review.

Denial of Access Complaint:

On May 20, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the burden was on the Custodian to demonstrate she fully complied with the OPRA request. The Complainant specifically stated that the Custodian failed to provide a complete response to request item No. 14, asserting the Custodian did not provide the “real reasons” why the officers were terminated.

The Complainant requested the GRC compel the Township to provide the real reasons for separation and fully comply with the remaining request items. The Complainant also requested the GRC should declare same a prevailing party and award counsel fees.

⁴ The Complainant sought additional records that are not at issue in this complaint.

⁵ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

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Statement of Information:

On June 17, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on March 1, 2021. The Custodian certified that upon receipt, she uploaded the request into the Township’s OPRA request portal. The Custodian certified that on March 3, 2021, the request was transmitted to eleven (11) Township employees in various departments to review and reply with responsive records. The Custodian certified that responsive records were uploaded, reviewed for redactions, and cleared for release. The Custodian certified that all responsive records were released to the Complainant on March 10, March 18, and March 23, 2021.

The Custodian asserted that the Complainant’s objections were unclear and difficult to address. The Custodian asserted that she was only responsible for providing responsive records, rather than answering questions on the “real reasons” why certain Township employees were no longer employed, citing MAG Entm’t, LLC v. Div. of Alcohol Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005).

Additional Submissions:

On April 11, 2024, the GRC requested additional information from the Custodian. Specifically, the GRC asked whether the Custodian conducted a search for agreements responsive to request item No. 14 at the time of the request. The GRC further inquired whether the personnel information provided in response to item No. 14 was maintained via an electronic database, or if the information was collected via physical files.

On April 18, 2024, the Custodian responded to the GRC, providing a certification. The Custodian certified that at the time of the request, the Township conducted a search for agreements responsive to item No. 14, and that none were located. The Custodian then certified that the information containing in the spreadsheet provided in response to item No. 14 was maintained via an electronic database.

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). Request item No. 14

Upon review, the GRC is satisfied that the Custodian provided an insufficient response. Here, the Custodian responded to the Complainant's OPRA request on March 18, 2024 providing a spreadsheet containing the requested personnel information. However, the Custodian's response did not indicate whether any "agreement" existed between the Township and separated police officers that was responsive to item No. 14. It was not until the GRC's request for additional information that the current Custodian certified she conducted a search for any "agreement" between the Township 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 March 18, 2024 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 Township 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.

Request item Nos. 3, 9, 11, 12, 14 in part, 16, and 17

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, the Complainant sought in part arrest listings, logs, personnel information, various categories of settlement agreements, as well as cancelled checks and invoices pertaining to the Township and current or former police officers. In response, the Custodian and Lt. Ciccone stated that no responsive records exist for item Nos. 3, 9, 11, 12, 16, and 17. Then Custodian further certified in the SOI that all responsive records were provided. Additionally, in response to the GRC's request for additional information, the current Custodian certified no agreements responsive to item No. 14 were located at the time of the request. Additionally, the Complainant failed to present any evidence that the Township 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 item Nos. 3, 9, 11, 12, 14 in part, 16, and 17 seeking various records pertaining to the Township and its police department. N.J.S.A. 47:1A-6. Specifically, both the original and current Custodian certified, and the record reflects, that no such records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

Request item Nos. 8, 14 in part, 15

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 OPRA request item Nos. 8, 14, and 15 sought personnel information of certain MPD police officers, as well as complaints filed against MPD police officers. On March 18, 2024, the Custodian provided the Complainant with a spreadsheet containing the requested personnel information. On March 23, 2021, Lt. Ciccone responded to the Complainant providing records responsive to item Nos. 8 and 15. The Custodian later certified in the SOI that all responsive records were provided for those request items, and the Complainant failed to provide sufficient evidence that the Township possessed additional responsive records at the time of the request.

Accordingly, the Custodian did not unlawfully deny access the Complainant's OPRA request item Nos. 8, 14 in part, and 15 seeking the personnel information of and complaints filed against MPD police officers. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that the Township provided all responsive records containing the requested information. See Danis, GRC 2009-156, *et seq.*

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), cert. 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 various records pertaining to MPD police officers. In response, the Custodian and Lt. Ciccone provided responsive records to some of the request items and stated that no responsive records exist for the remaining items. The Complainant then filed the

instant complaint on May 20, 2021, asserting the Custodian failed to provide the “real reason” for the officers’ separations. However, the Custodian certified in the SOI and in response to the GRC’s request for additional information that the Township did not possess any additional records, nor any agreements between the Township and separated officers. 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 Township’s possession and that no agreements between the Township 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 March 18, 2024, 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 Middletown Township and any separated police officer.
2. Notwithstanding the Custodian’s insufficient response, she has borne her burden of proof that she lawfully denied access to the Complainant’s OPRA request item Nos. 3, 9, 11, 12, 14 in part, 16, and 17 seeking various records pertaining to Middletown Township and its police department. N.J.S.A. 47:1A-6. Specifically, both the original and current 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).
3. The Custodian did not unlawfully deny access the Complainant’s OPRA request item Nos. 8, 14 in part, and 15 seeking the personnel information of and complaints filed against Middletown Township Police Department police officers. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that Middletown Township 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).
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 Middletown Township's possession and that no agreements between the Township 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

May 14, 2024