



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

TAHESHA L. WAY
Lieutenant Governor

JACQUELYN A. SUÁREZ
Commissioner

FINAL DECISION

July 30, 2024 Government Records Council Meeting

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

Complaint No. 2021-183

v.

Buena Borough Police Department (Atlantic)
Custodian of Record

At the July 30, 2024 public meeting, the Government Records Council (“Council”) considered the July 23, 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:

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.

1. The Custodian unlawfully denied access to the requested records on the basis that the Township of Franklin, with which Buena Borough had a shared services agreement, possessed the records. N.J.S.A. 47:1A-6; Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010); and Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). The Custodian had an obligation to obtain the responsive records from the Township and provide same to the Complainant. See Meyers, GRC 2005-127.
2. The Custodian unlawfully denied access to the requested complaints and summonses responsive to the Complainant’s June 22, 2021 OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian had an obligation to locate and retrieve responsive records created by the Township of Franklin. See Simmons v. Mercado, 247 N.J. 24, 42 (2021). However, the Council declines to order disclosure since the evidence of record demonstrates that the Custodian provided the Complainant with responsive records on August 26, 2021 and as part of the Statement of Information.
3. 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 did not provide the Complainant with the requested records until after the instant complaint was filed. 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(c).**

Final Decision Rendered by the
Government Records Council
On The 30th Day of July 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: August 1, 2024

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 30, 2024 Council Meeting**

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

GRC Complaint No. 2021-183

v.

**Buena Borough Police Department (Atlantic)²
Custodial Agency**

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

1. Complaints and summonses prepared by your police department relating to individuals who were charged with drug possession and or drug paraphernalia by your police department from January 2021 to present.
2. Driving While Intoxicated/Driving under the Influence (“DWI/DUI”) complaints and summonses prepared and or issued by your police department from January 2021 to present.

Custodian of Record: Pamela Johnston⁴

Request Received by Custodian: June 22, 2021

Response Made by Custodian: July 15, 2021

GRC Complaint Received: August 6, 2021

Background⁵

Request and Response:

On June 22, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the original Custodian seeking the above-mentioned records. On July 15, 2021, the original Custodian responded to the Complainant in writing, stating that requests for summonses and complaints would need to be made with the Franklin Joint Municipal Court (“Municipal Court”). The original Custodian also stated that she provided a copy of the Judiciary’s request form for convenience.

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

² Represented by Angela Maione Costigan, Esq., of Costigan and Costigan, LLC (Hammonton, NJ).

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

⁴ At the time of the request, the Custodian of Record was Maryann Coraluzzo.

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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Denial of Access Complaint:

On August 6, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian improperly denied access to the request items in the wake of the New Jersey Supreme Court’s decision in Simmons v. Mercado, 247 N.J. 24 (2021), rev’g 464 N.J. Super. 77 (App. Div. 2020). The Complainant requested the GRC compel the Buena Borough Police Department (“BPD”) to fully comply with the OPRA request and to award counsel fees.

Supplemental Response:

On or about August 26, 2021, the Custodian provided the Complainant with the responsive records.

Statement of Information:⁶

On March 30, 2022, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that the original Custodian received the Complainant’s OPRA request on June 22, 2021. The Custodian certified that the search for records included a request to the Township of Franklin’s (“Township”) Police Chief. The Custodian certified that the original Custodian responded in writing on July 15, 2021, stating that requests for complaints and summonses needed to be requested from the Municipal Court.

The Custodian asserted that Buena Borough (“Borough”) had a shared services agreement with the Township for police services, and therefore did not make, keep, or maintain police records. The Custodian included copies of the Borough’s shared services agreement with the Township. The Custodian also provided copies of the responsive records.

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.

Duty to Obtain Records

In Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), the Appellate Division determined that the defendant was required to obtain settlement agreements from its insurance broker. The court’s decision largely rested on the fact that there was no question that the broker was working on behalf of the defendant to execute settlement agreements. The court noted

⁶ On August 31, 2021, this complaint was referred to mediation. On January 28, 2022, this complaint was referred back to the GRC for adjudication.

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that it previously held that although a third party, such as insurance broker or outside counsel, may execute settlement agreements, “they nonetheless bind the county as principal, and the agreements are made on its behalf.” *Id.* at 513. In determining that the defendant had an obligation to obtain responsive records from the insurance broker, the court distinguished *Bent*, 381 *N.J. Super.* at 38-39, from the facts before it. The court reasoned that:

In *Bent*, the requester sought records and information regarding a criminal investigation of his credit card activities conducted jointly by the Stafford Township Police Department [“(STPD)”], the United States Attorney for New Jersey and a special agent of the Internal Revenue Service. As part of his request, Bent sought “discrete records of the 1992 criminal investigation conducted by the STPD,” which were fully disclosed. *Id.* at 38. Additionally, he sought a “[c]opy of contact memos, chain of custody for items removed or turned over to third parties of signed Grand Jury reports and recommendations.” *Bent v. Stafford Twp. Police Dept.*, GRC 2004-78, final decision (October 14, 2004). Affirming the determination of the [GRC], we stated: “to the extent Bent's request was for records that either did not exist or were not in the custodian's possession, there was, of necessity, no denial of access at all.” *Bent, supra*, 381 *N.J. Super.* at 38 . . . We continued by stating:

“Of course, even if the requested documents did exist, the custodian was under no obligation to search for them beyond the township's files. OPRA applies solely to documents ‘made, maintained or kept on file in the course of [a public agency's] official business,’ as well as any document ‘received in the course of [the agency's] official business.’ *N.J.S.A.* 47:1A-1.1. Contrary to Bent's assertion, although OPRA mandates that ‘all government records . . . be subject to public access unless exempt,’ the statute itself neither specifies nor directs the type of record that is to be ‘made, maintained or kept on file.’ In fact, in interpreting OPRA's predecessor statute, the Right to Know Law, we found no requirement in the law concerning ‘the making, maintaining or keeping on file the results of an investigation by a law enforcement official or agency into the alleged commission of a criminal offense. . . Thus, even if the requested documents did exist in the files of outside agencies, Bent has made no showing that they were, by law, required to be ‘made, maintained or kept on file’ by the custodian so as to justify any relief or remedy under OPRA. *N.J.S.A.* 47:1A-1.1.”

[T]he circumstances presented in *Bent* [are] far removed from those existing in the present matter because, as we have previously concluded, the settlement agreements at issue here were “made” by or on behalf of the Board in the course of its official business. Were we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply delegate their creation to third parties or relinquish possession to such parties, thereby thwarting the policy of transparency that underlies OPRA. *N.J.S.A.* 47:1A-1.

[Id. at 516-17.]

The Council subsequently expanded the court’s holding in Burnett to agencies which have a shared services agreement with each other. See Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). In that case, the complainant sought police dispatch logs from the Borough of Helmetta (“Helmetta”). The custodian asserted that Helmetta did not maintain the records as dispatch calls were routed through the Spotswood Police Department (“SPD”). The Council held that since Helmetta entered into a shared services agreement with the Borough of Spotswood to operate Helmetta’s dispatch log, the custodian was obligated to obtain the requested records from SPD. The Council found that SPD “made, maintained, or kept on file” the dispatch logs on behalf of Helmetta pursuant to the shared services agreement. See Burnett, 415 N.J. Super. at 517.

Moreover, in Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005), the complainant requested e-mails sent to various individuals regarding official business but located on the mayor’s home computer. The custodian alleged that due to the records’ location, they were not government records. The Council found that the definition of a government record was not restricted to its physical location. The Council further found that the requested records should be released in accordance with OPRA, to the extent they fell within the definition of a government record. Thus, the Council held that the location of a document was immaterial to its status as a government record.

At the time of the request, Burnett and Michalak were the prevailing case law. The Custodian provided a copy of the Borough’s shared services agreement with the Township wherein the Township would provide police services on behalf of the Borough. Thus, the requested records were created and maintained in the Township on behalf of the Borough. Additionally, the Custodian was obligated to retrieve the records from the Township, as their physical location was immaterial. See Meyers, GRC 2005-127.

Accordingly, the Custodian unlawfully denied access to the requested records on the basis that the Township, with which the Borough had a shared services agreement, possessed the records. N.J.S.A. 47:1A-6; Burnett, 415 N.J. Super. 506; and Michalak, GRC 2010-220. The Custodian had an obligation to obtain the responsive records from the Township and provide same to the Complainant. See Meyers, GRC 2005-127.

Access to Complaints & Summonses

Additionally, the Council has previously held that criminal complaints and summonses are subject to disclosure. Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004); see also Mawhinney v. Egg Harbor City Police Dep’t (Atlantic), GRC Complaint No. 2015-85 (January 2016).

In Simmons, the Complainant requested the same or similar records as those at issue in the instant matter, with the custodian asserting that the records were not maintained by the Millville Police Department (“MPD”) once its officers created and submitted the records through eCDR. 247 N.J. at 32. The Court reversed the Appellate Division and found that the requested records

were government records subject to disclosure under OPRA. Id. at 29. The Court found that notwithstanding which government branch created the CDR-1 and -2 forms, it is the information contained within those forms by MPD officers that is sought by AADARI. Id. at 40-41. Thus, the Court held that:

Because MPD officers create the completed CDR-1s by populating the forms with the information necessary to generate a summons and submit it to the court, there is no question that the CDR-1s are government records subject to disclosure pursuant to OPRA.

[Id.]

Additionally, the Court rejected MPD's argument that they did not maintain the records, holding that OPRA's definition of a government record is not restricted to records maintained by the agency, but rather includes records it creates, even if not maintained. Id. at 41. Thus, the Court found, "that the Judiciary might maintain on its servers the information that MPD made does not absolve MPD of its obligation to produce that information pursuant to a proper OPRA request made to MPD." Id. at 42.

In the instant matter, the Custodian denied access to the Complainant's OPRA request on July 15, 2021. The Complainant filed the instant matter on August 6, 2021, stating the Custodian's non-disclosure was contrary to the Simmons decision. In the SOI, the Custodian asserted that the Borough did not maintain the records and was informed by the Township's Police Chief that the records needed to be sought from the Municipal Court. Nevertheless, the Custodian stated that the responsive records were provided on August 26, 2021, and as part of the SOI.

When considering the Court's decision in Simmons, the Custodian maintained the obligation to provide the Complainant with responsive records created maintained by the Township on their behalf, rather than directing the Complainant to the Judiciary. Notwithstanding whether the Township maintained physical copies of same, the Court held that since police departments created the CDR-1s and CDR-2s when inputting information, they were government records even if the records were maintained by the Judiciary's electronic databases. Simmons, 247 N.J. at 42.

Accordingly, the Custodian unlawfully denied access to the requested complaints and summonses responsive to the Complainant's June 22, 2021, OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian had an obligation to locate and retrieve responsive records created by the Township. See Simmons, 247 N.J. at 42. However, the Council declines to order disclosure since the evidence of record demonstrates that the Custodian provided the Complainant with responsive records on August 26, 2021 and 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.]

In the instant matter, the Complainant sought complaints and summonses prepared by RPD pertaining to drug possession, drug paraphernalia, and DUI/DWI offenses. The Custodian responded on July 15, 2021, asserting that the records were maintained by the Municipal Court. The Complainant then filed the instant complaint on August 6, 2021, asserting that the original Custodian should have obtained the records via from the Township in accordance with Court's ruling. While the matter remained pending, the Custodian provided the Complainant with copies of the responsive records on August 26, 2021, and as part of the SOI.

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 original Custodian initially denied access to the Complainant's request by directing him to the Municipal Court. In the SOI, the Custodian then asserted that the records were maintained by the Township as part of a shared services agreement. Nonetheless, the Custodian certified that the Borough provided the Complainant with responsive records after the instant complaint was filed, and as part of the SOI. Moreover, the Custodian had an obligation to provide said records at the time of the request. 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.⁷

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. at 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. at 76. Specifically, the

⁷ 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).

Rotimi Owoh, Esq. (on Behalf of Delores Simmons, Obafemi Simmons, and Grace Woko) v. Buena Borough Police Department (Atlantic), 2021-183 – Findings and Recommendations of the Executive Director

Custodian did not provide the Complainant with the requested records until after the instant complaint was filed. 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(c).**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian unlawfully denied access to the requested records on the basis that the Township of Franklin, with which Buena Borough had a shared services agreement, possessed the records. N.J.S.A. 47:1A-6; Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010); and Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). The Custodian had an obligation to obtain the responsive records from the Township and provide same to the Complainant. See Meyers, GRC 2005-127.
2. The Custodian unlawfully denied access to the requested complaints and summonses responsive to the Complainant's June 22, 2021 OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian had an obligation to locate and retrieve responsive records created by the Township of Franklin. See Simmons v. Mercado, 247 N.J. 24, 42 (2021). However, the Council declines to order disclosure since the evidence of record demonstrates that the Custodian provided the Complainant with responsive records on August 26, 2021 and as part of the Statement of Information.
3. 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 did not provide the Complainant with the requested records until after the instant complaint was filed. 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(c).**

Prepared By: Samuel A. Rosado, Staff Attorney

July 23, 2024