



State of New Jersey

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JACQUELYN A. SUÁREZ
Commissioner

FINAL DECISION

June 25, 2024 Government Records Council Meeting

Tucker M. Kelley
Complainant

v.

Rockaway Township (Morris)
Custodian of Record

Complaint No. 2021-359

At the June 25, 2024 public meeting, the Government Records Council (“Council”) considered the June 18, 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 did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).
2. Notwithstanding the Custodian’s “deemed” denial, because the requested dashcam footage was the subject of an ongoing internal affairs (“IA”) investigation, the record was exempt from access under the Internal Affairs Policy & Procedures’ confidentiality provision for records that are the nature and source of an IA investigation. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(b); IAPP. See also Rivera v. Union Cnty. Prosecutor’s Office, 250 N.J. 124, 142-43 (2022); Gannett Satellite Info. Net., LLC v. Twp. of Neptune, 467 N.J. Super. 385, 404-05 (App. Div. 2021).
3. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters v. DYFS, 387 N.J. Super. 423, 436 (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). 76. Specifically, the Custodian certified that the requested dashcam footage was the subject of an ongoing internal affairs investigation, and therefore not subject to public access. 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 436, and Mason, 196 N.J. at 76.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 25th Day of June 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: June 27, 2024

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 25, 2024 Council Meeting**

**Tucker M. Kelley¹
Complainant**

GRC Complaint No. 2021-359

v.

**Rockaway Township (Morris)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of: “any/all dash cam video including audio of the incident related to summons/ticket numbers E21001842, E21001843, E21001844, and case number 2021-22013. To assist in narrowing the search please use the time period of September 24, 2021 between 7:00PM to 9:30PM.”

Custodian of Record: Christina Clipperton³
Request Received by Custodian: December 15, 2021
Response Made by Custodian: December 28, 2021
GRC Complaint Received: December 29, 2021

Background⁴

Request and Response:

On December 15, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 28, 2021, the eighth (8th) business day after receipt of the OPRA request, the Custodian responded in writing stating that an extension until January 24, 2022 was necessary to respond to the Complainant’s OPRA request. On December 29, 2021, the Complainant responded to the Custodian stating he did not consent to the Custodian’s extension as it was made after the end of the original deadline, and that an extension of twenty-eight (28) days is unacceptable.

Denial of Access Complaint:

On December 29, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant referred to the e-mail correspondence

¹ Represented by Walter M. Luers, Esq., of Cohn, Lifland, Pearlman, Herrmann & Knopf, LLP (Saddle Brook, NJ).

² Represented by Jonathan N. Frodella, Esq., of Laddey, Clark & Ryan, LLP (Sparta, NJ).

³ The current Custodian of Record is Lisa Caruso.

⁴ 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.

dated December 15, 28, and 29, 2021 between himself and the Custodian regarding his claims of an unlawful denial of access.

Response:

On January 24, 2022, the Custodian responded in writing stating that the MVR recording was the subject of an internal affairs investigation and therefore exempt from disclosure.

Statement of Information:

On February 1, 2022, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on December 15, 2021. The Custodian certified that she forwarded the request to the Rockaway Township (“Township”) police department and forwarded responsive records to the Township Attorney. The Custodian certified that she responded in writing on January 24, 2022, denying the request as seeking records that were subject to an ongoing investigation, as well as Internal Affairs records.

The Custodian maintained that the MVR recording responsive to the Complainant’s request was the subject of an internal affairs investigation. The Custodian asserted she informed the Complainant of this in the January 24, 2022 response.

Additional Submissions:

On May 20, 2024, the GRC requested additional information from the current Custodian. Specifically, the GRC requested a copy of the January 24, 2022 correspondence the Custodian sent to the Complainant in response to the OPRA request.

On June 4, 2024, the GRC contacted the current Custodian, requesting a status update on providing a response to the GRC. That same day, the current Custodian provided a copy of the January 24, 2022 correspondence to the GRC. On June 5, 2024, Complainant’s Counsel noted that the current Custodian was supposed to provide a certification along with a copy of the correspondence.

On June 7, 2024, the current Custodian provided a certification to the GRC in response to the additional information request. The current Custodian certified that she was not the Records Custodian at the time of the request and became the Acting Township Clerk on May 14, 2024. The current Custodian certified that she was able to locate the January 24, 2022 correspondence in the files related to this matter at the Township Clerk’s Office.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id.

Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁵ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).

In this matter, the Complainant asserted that the Custodian committed a "deemed" denial of access on two (2) fronts: the first coming after the expiration of the initial seven (7) business days and the second coming from the alleged unreasonable extension of time sought by the Custodian. In the SOI, the Custodian certified that she received the Complainant's OPRA request on December 15, 2021, but did not seek an extension of time until December 28, 2021. When accounting for the Christmas Day holiday, December 28, 2021 represented the eighth (8th) business day after receipt. Thus, the evidence of record supports that the Custodian's initial response was beyond the statutorily mandated time frame and thus a "deemed" denial of access occurred.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

Additionally, the GRC notes that it does not reach the extension issue because the Complainant's OPRA request was already considered "deemed" denied at the time that the Custodian responded thereto on December 28, 2021.

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.

OPRA further provides that:

[w]here it shall appear that the record or records which are sought to be inspected, copied, or examined shall pertain to an investigation in progress by any public agency, the right of access provided for in [OPRA] may be denied if the inspection, copying or examination of such record or records shall be *inimical to the public interest*; provided, however, that this provision shall not be construed to allow any

⁵ A custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced.

[N.J.S.A. 47:1A-3(a) (emphasis added).]

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

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

Here, the Custodian certified that the requested dashcam footage was denied in its entirety because the record pertained to an ongoing investigation pursuant to N.J.S.A. 47:1A-3. However, the Custodian did not submit any competent, credible evidence that the records requested by the Complainant are part of any ongoing investigation(s). Moreover, the Custodian failed to certify that disclosure of the records would jeopardize the ongoing investigation(s) or were otherwise inimical to the public interest if disclosed. And because this provision of OPRA only allows denial of access if the requested records are inimical to the public interest, the Custodian cannot rely upon N.J.S.A. 47:1A-3(a) to deny access to the records.

However, the Custodian also stated that the requested records were part of an ongoing internal affairs investigation. The Custodian cited AG Directive 2021-13 via N.J.S.A. 47:1A-9(b) as the basis for denying access.

Although unpublished, the facts in Jones v. Paulsboro Police Dep’t, 2012 N.J. Super. Unpub. LEXIS 234 (Law Div. Jan. 12, 2012) are similar enough to warrant discussion. The court found that the requested surveillance video was properly denied pursuant to the existing Attorney General Guidelines since it was the subject of an ongoing internal affairs investigation. Jones, slip op. at *9-10. The court further found that the video footage was properly denied even if created prior to the investigation, asserting there was no evidence suggesting the record was ever available for public inspection beforehand, and that the need to protect the integrity of an ongoing investigation was greater than instances where the investigation was closed. Id., slip op. at *10-11.

Prevailing court case law and the GRC's prior decisions support the Custodian's denial of access to the dashcam footage. See O'Shea, 410 N.J. Super. at 382; Rivera, 250 N.J. at 142-43; Gannett, 467 N.J. Super. at 404-05. Specifically, both the courts and Council have held that records related to IA investigations were exempt from disclosure under the IAPP confidentiality provision. N.J.S.A. 47:1A-9(b). Like Jones, slip op., the dashcam footage that is the subject of the internal affairs investigation falls within the IAPP's confidentiality provision, notwithstanding its creation prior to the start of said investigation.

Accordingly, notwithstanding the Custodian's "deemed" denial, because the requested dashcam footage was the subject of an ongoing IA investigation, the record was exempt from access under the IAPP's confidentiality provision for records that are the nature and source of an IA investigation. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(b); IAPP. See also Rivera, 250 N.J. at 142-43; Gannett, 467 N.J. Super. at 404-05.

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 dashcam footage for a particular police incident. The Complainant then filed the instant complaint on December 29, 2021, asserting the Custodian failed to timely respond to his OPRA request. Subsequently after receiving the complaint, the Custodian responded to the Complainant stating that the footage was the subject of an IA investigation. Therefore, notwithstanding the deemed denial, the Custodian lawfully denied access. 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 the requested dashcam footage was the subject of an ongoing IA investigation, and therefore not subject to public access. 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 did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).
2. Notwithstanding the Custodian's "deemed" denial, because the requested dashcam footage was the subject of an ongoing internal affairs ("IA") investigation, the record was exempt from access under the Internal Affairs Policy & Procedures' confidentiality provision for records that are the nature and source of an IA investigation. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(b); IAPP. See also Rivera v. Union Cnty. Prosecutor's Office, 250 N.J. 124, 142-43 (2022); Gannett Satellite Info. Net., LLC v. Twp. of Neptune, 467 N.J. Super. 385, 404-05 (App. Div. 2021).
3. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423, 436 (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). 76. Specifically, the Custodian certified that the requested dashcam footage was the subject of an ongoing internal affairs investigation, and therefore not subject to public access. 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 436, and Mason, 196 N.J. at 76.

Prepared By: Samuel A. Rosado
Staff Attorney

June 18, 2024