



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

May 28, 2013 Government Records Council Meeting

Rashaun Barkley
Complainant

Complaint No. 2012-186

v.

Essex County Prosecutor's Office
Custodian of Record

At the May 28, 2013 public meeting, the Government Records Council ("Council") considered the May 21, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The requested record, if any, meets the criteria for a criminal investigatory record as set forth in N.J.S.A. 47:1A-1.1; therefore, it is not a government record as defined under OPRA and not subject to public access. Thus, the Custodian did not unlawfully deny access to said record. *See also Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice*, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004).
2. 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 (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 (2008). Specifically, the Custodian lawfully denied access to the requested record. 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, supra, and Mason, supra.* Moreover, there is nothing in the evidence of record to indicate that the Complainant was represented by legal counsel.

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 28th Day of May, 2013

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 5, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 28, 2013 Council Meeting**

**Rashaun Barkley¹
Complainant**

GRC Complaint No. 2012-186

v.

**Essex County Prosecutor's Office²
Custodian of Records**

Records Relevant to Complaint: New Jersey State proffer agreement between State witnesses Mr. Alfuquan Maing and Mr. Syhim Jackson, aka, Syhim Cobbs, in the criminal file of State v. Barkley, Ind. No. 1390-4-93, in or about the year 1993-1994; the agreement was between the Essex County Prosecutor's Office and the named witnesses.

Request Made: May 12, 2012

Response Made: May 21, 2012

GRC Complaint Filed: June 18, 2012³

Background⁴

Request and Response:

On May 12, 2012, the Complainant submitted an Open Public Records Act ("OPRA") request seeking the above-listed records. On May 21, 2012, the second (2nd) business day following the Custodian's receipt of said request, the Custodian responded in writing. The Custodian did not acknowledge that the requested record exists, but stated that if it does exist it is denied on the basis that it is a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1 and Kovalcik v. Somerset County Prosecutor's Office, 206 N.J. 581 (2011), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) and Janeczko v. Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004).

The Custodian further stated that the Complainant's OPRA request was denied because same is an invalid request for general data, information or statistics and that OPRA was not intended to provide "... a research tool ... to force government officials to identify and siphon useful information.." In support of her denial upon these grounds, the Custodian cited MAG

¹ No legal representation listed on record.

² Debra G. Simms, Custodian of Records. Represented by James Paganelli, Esq., of Office of the Essex County Counsel (Newark, NJ); however, there are no submissions from the Custodian's Counsel to the GRC on file.

³ The GRC received the Denial of Access Complaint on said date.

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.

Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), and the Council's decision in Reda v. Township of West Milford, GRC Complaint No. 2002-58 (July 2004).

Finally, the Custodian denied access on the basis that OPRA does not require disclosure of certain privileged materials defined as inter-agency or intra-agency advisory, consultative, or deliberative ("ACD") material, and cited N.J.S.A. 47:1A-1.1, as well as MAG, *supra*, and Bent, *supra*.

Denial of Access Complaint:

On June 18, 2012, the Complainant filed this Denial of Access Complaint challenging the Custodian's denial of his May 12, 2012, OPRA request.

Statement of Information:

On July 6, 2012, the GRC received the Custodian's Statement of Information ("SOI") in response to the Complainant's Denial of Access Complaint. The Custodian certified that she received the Complainant's OPRA request on May 17, 2012, and provided a written response to the request on May 21, 2012. The Custodian described the requested record as a criminal investigatory record and referred to her May 21, 2012 response to the OPRA request as the legal argument for denying the Complainant access to the requested record.

Additional Information:

On July 15, 2012, the Complainant filed a response to the Custodian's SOI alleging that the SOI is insufficient. First, the Complainant stated that the Custodian failed to describe the search undertaken to satisfy the records request. Second, the Complainant disputes the Custodian's claim that the request did not seek a specific document; the Complainant asserted that his request did seek a specific document and the Complainant recited his request to emphasize his assertion. Finally, the Complainant stated that the Custodian alleged that the requested record was confidential but failed to explain why it was confidential. The Complainant stated that he and his co-defendants will waive any right of confidentiality if necessary to obtain disclosure of the record. The Complainant stated that if he prevails in this complaint he wants prevailing party attorney's fees.

On May 10, 2013, in response to a May 7, 2013 request from the GRC, the Custodian submitted to the GRC a certification averring that she found no statute, regulation, or Attorney General Guideline or Directive requiring that proffers, such as the one requested by the Complainant, be made, maintained or kept on file. Accordingly, the Custodian certified that the requested record, if it exists, is not required by law to be made.

Analysis⁵

⁵ There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

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.

Criminal investigatory records are exempt from disclosure. N.J.S.A. 47:1A-1.1. A criminal investigatory record is defined as “...a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding...” Id.

The status of records purported to fall under the criminal investigatory records exemption pursuant to N.J.S.A. 47:1A-1.1 was examined by the GRC in Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004).⁶ In Janeczko, the Council found that under OPRA, “criminal investigatory records include records involving all manner of crimes, resolved or unresolved, and includes information that is part and parcel of an investigation, confirmed and unconfirmed.”

Here, although the records sought were part of an investigation conducted in 1993-1994, the criminal investigatory records exemption continues to survive the conclusion of the investigation. As the Council pointed out in Janeczko, supra:

“[the criminal investigatory records exemption] does not permit access to investigatory records once the investigation is complete. The exemption applies to records that conform to the statutory description, without reference to the status of the investigation and the Council does not have a basis to withhold from access only currently active investigations and release those where the matter is resolved or closed.”

Here, it is undisputed that the requested document pertains to a criminal investigation because the Complainant stated such in his record request by seeking a record “...in the criminal file of State v. Barkley, Ind. No. 1390-4-93...” This was confirmed by the Custodian’s certification in the SOI that the requested record is not required by law to be made, maintained or kept on file and is part of the criminal investigatory file of the Essex County Prosecutor’s Office. The Complainant’s arguments that the SOI was insufficient are not of significance because the GRC found the SOI, as supplemented by the Custodian’s submission dated May 10, 2013, to have sufficiently addressed the Complainant’s allegations.

Accordingly, the requested record, if any, meets the criteria for a criminal investigatory record as set forth in N.J.S.A. 47:1A-1.1; therefore, it is not a government record as defined under OPRA and not subject to public access. Thus, the Custodian did not unlawfully deny access to said record. *See also* Janeczko, supra.

⁶ Affirmed in an unpublished opinion of the Appellate Division in May 2004.

Since the requested record is exempt from disclosure as a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1, it is unnecessary for the Council to determine whether the requested record is also exempt from disclosure as ACD material or because the Complainant's request was not valid.

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 Court held that a complainant is a "prevailing party" if he/she 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 (2008), the Supreme 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." Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (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, but also over 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, *supra*, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, *supra*, 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.” (Footnote omitted.) Mason at 73-76 (2008).

The Court in Mason, *supra*, at 76, held that “requestors 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* (1984).”

Here, the Custodian lawfully denied the Complainant access to the requested record as a criminal investigatory record under OPRA, and as such the Complainant is not a prevailing party entitled to an award of reasonable attorney’s fees.

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, *supra*. Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, *supra*. Specifically, the Custodian lawfully denied access to the requested record. 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, *supra*, and Mason, *supra*. Moreover, there is nothing in the evidence of record to indicate that the Complainant was represented by legal counsel.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The requested record, if any, meets the criteria for a criminal investigatory record as set forth in N.J.S.A. 47:1A-1.1; therefore, it is not a government record as defined under OPRA and not subject to public access. Thus, the Custodian did not unlawfully deny access to said record. *See also* Janeczko v. NJ Department of Law and Public

Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004).

2. 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 (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 (2008). Specifically, the Custodian lawfully denied access to the requested record. 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, supra, and Mason, supra. Moreover, there is nothing in the evidence of record to indicate that the Complainant was represented by legal counsel.

Prepared By: John E. Stewart, Esq.

Approved By: Brandon D. Minde, Esq.
Executive Director

May 21, 2013