



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

February 24, 2015 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2014-110

v.

NJ State Police
Custodian of Record

At the February 24, 2015 public meeting, the Government Records Council (“Council”) considered the February 17, 2015 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 unlawfully deny access to request item Nos. 1 and 2 because the Custodian initially responded that no records exist, subsequently certified to same in the Statement of Information, and there is no evidence in the record to refute the Custodian’s certification. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
2. The Complainant’s request item No. 3 is an invalid request that fails to seek identifiable government records and would have required the Custodian to research three (3) years of records to determine whether any reasonably fit within this criteria. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Edwards v. Hous. Auth. of Plainfiel (Union), GRC Complaint No. 2008-183 *et seq.* (Final Decision dated April 25, 2012); Steinhauer-Kula v. Twp. of Downe (Cumberland), GRC Complaint No. 2010-198 (March 2012). Thus, the Custodian did not unlawfully deny access to same. N.J.S.A. 47:1A-6.

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 GRC has declined to grant the Complainant’s requested relief based on the evidence of 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, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51.

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 24th Day of February, 2015

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: February 26, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 24, 2015 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2014-110

v.

**New Jersey State Police²
Custodial Agency**

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

1. All documents in the investigation file regarding a complaint lodged by Ed Adams (accompanied by Steve Moore) at the Port Norris Barracks about mismanagement of funds by Commercial Township officials in 2007, 2008, or 2009.
2. All documents that show the transfer or destruction of any records responsive to item No. 1 above.
3. The record evidencing Mr. Adams' and Mr. Moore's first visit to the Port Norris Barracks.

Custodian of Record: David Robbins
Request Received by Custodian: September 27, 2013
Response Made by Custodian: October 8, 2013
GRC Complaint Received: March 11, 2014

Background⁴

Request and Response:

On September 27, 2013, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On October 8, 2013, the Custodian responded in writing stating that no records responsive to OPRA request item Nos. 1 and 2 existed. Further, the Custodian denied access to OPRA request item No. 3 as invalid. Overall, the Custodian stated that the Complainant's OPRA request was overly broad and vague because it failed to identify with reasonable clarity those specific records sought. MAG Entm't,

¹ Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Clinton, NJ).

² Represented by Deputy Attorney Megan Shafranski.

³ The Complainant included in his OPRA request background information regarding the nature of the complaint lodged and subsequent interviews conducted by the Organized Crime Control South Bureau.

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.

LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Gannett N.J. Partners, L.P. v. Cnty. of Middlesex, 379 N.J. Super. 205, 212 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007).

Denial of Access Complaint:

On March 11, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that the purpose of OPRA “is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.” Times of Trenton Publ’g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005)(quoting Asbury Park Press v. Ocean Cnty. Prosecutor’s Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). The Complainant further stated that “[t]he ‘spirit’ of OPRA legislation is clear – transparency in government operations is statutorily required.” Paff v. Borough of Cliffside, 2014 N.J. Super. Unpub. LEXIS 437 (Law Div. 2014) at 1.

The Complainant contended that the Custodian’s denial of access was improper. Further, the Complainant argued that had he been given erroneous information regarding the complaint, the appropriate response would have been no records exist. However, the “overly broad” denial suggests that the complaint was filed, an investigation was conducted, and interviews were held. The Complainant asserted that the response was intended to convey that the Custodian could not identify the investigation file because of the apparent “vagueness” of the OPRA request.

The Complainant asserted that the Custodian’s characterization of his OPRA request as overly broad and vague is erroneous given the extensive amount of background he included in his OPRA request. The Complainant asserted that if the Custodian could not identify the responsive investigation file, he could have contacted Detective Anthony W. Carugno of the Organized Crime Control South Bureau. Thus, the Complainant asserted that while he could not be certain of whether there was an investigation, he is certain that the Custodian’s denial of access to the OPRA request as overly broad and vague is improper.

The Complainant requested that the GRC: 1) determine that the Custodian violated OPRA by improperly responding; 2) order the Custodian to either disclose all responsive records or, as an alternative, provide a proper denial; and 3) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees.

Statement of Information:

On April 4, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on September 27, 2013. The Custodian certified that his search consisted of reviewing the New Jersey State Police (“NJSP”) Records Management System and conducting a computer-aided dispatch search. Further, the Custodian certified that he had multiple phone conversations with Detective Carugno and contacted the New Jersey Department of Justice. The Custodian certified that he responded in writing on October 8, 2013 to deny the Complainant’s OPRA request because no records existed and because same was overly broad and vague.

The Custodian argued that he denied the Complainant's OPRA request on the grounds that no records exist, as well as because same was overly broad and thus invalid. The Custodian further argued that the Complainant's request was invalid for the reasons raised in his initial response. The Custodian asserted that it was impossible to discern whether records existed.

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.

The GRC first notes that the Custodian's response on the Government Records Request Receipt was broken into separate responses for each request item. Regarding item Nos. 1 and 2, the Custodian stated that no records existed. Regarding item No. 3, the Custodian stated that same was invalid. Further, the Custodian addressed the overall request as overly broad pursuant to MAG, 375 N.J. Super. at 546, Gannett, 379 N.J. Super. at 212, and NJ Builders, 390 N.J. Super. at 180. The Custodian reiterated these denials in his SOI.

Based on the organization of the responses, the GRC will address OPRA request items Nos. 1 and 2 together and item No. 3 separately.

OPRA request item Nos. 1 and 2

In Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant's request for billing records existed and the complainant submitted no evidence to refute the custodian's certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

In the instant matter, the Custodian initially responded advising that no records responsive to item Nos. 1 and 2 exist. The Custodian further certified to this fact in the SOI. This is contrary to the Complainant's Denial of Access Complaint assertion that the Custodian did not rely on non-existence of records.

Accordingly, the Custodian did not unlawfully deny access to request item Nos. 1 and 2 because the Custodian initially responded that no records exist, subsequently certified to same in the SOI, and there is no evidence in the record to refute the Custodian's certification. *See Pusterhofer*, GRC 2005-49.

The GRC notes that it has previously determined that requests seeking generic "documents" from investigation files are invalid. *See Feiler-Jampel v. Somerset Cnty. Prosecutor's*

Office, GRC Complaint No. 2007-190 (March 2008)(holding that the complainant’s request seeking “[a]ny and all documents and evidence” was overly broad); Tracey-Coll v. Elmwood Park. Bd. of Educ. (Bergen), GRC Complaint No. 2009-206 (June 2010)(holding that the complainant’s request seeking “all documents” regarding a playground installation was overly broad).

OPRA request item No. 3

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.” N.J.S.A. 47:1A-1.*

MAG, 375 N.J. Super. at 546 (emphasis added).

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

Id. at 549 (emphasis added).

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt In short, OPRA does not countenance open-ended searches of an agency's files.” Id. at 549 (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005),⁵ NJ Builders, 390 N.J. Super. at 180; Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

As an additional note, the request at issue in MAG, sought “all documents or records evidencing that the ABC sought, obtained, or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person in which such person, after leaving the licensed premises, was involved in a fatal auto accident” and “all documents or records evidencing that the ABC sought, obtained or ordered suspension of a liquor license exceeding 45

⁵ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

days for charges of lewd or immoral activity.” Id. at 539-540. The Court did note that plaintiffs failed to include additional identifiers such as a case name or docket number.

Here, the Complainant’s request item No. 3 sought a “record evidencing” Mr. Adams’ and Mr. Moore’s first visit to the Port Norris Barracks either in 2007, 2008, or 2009: the request clearly failed to identify a government record and the Custodian was under no obligation to research all of NJSP’s records for a three (3) year period to locate same. *See also* Steinhauer-Kula v. Twp. of Downe (Cumberland), GRC Complaint No. 2010-198 (March 2012)(holding that the complainant’s request item No. 2 seeking “[p]roof of submission . . .” was invalid). The GRC is satisfied that, although the Complainant did include some additional explanation about the issue for which he was seeking records, this information did not cure the deficiencies necessary for the Custodian to reasonably locate a responsive record or records. *See* Edwards v. Hous. Auth. of Plainfiel (Union), GRC Complaint No. 2008-183 *et seq.* (Final Decision dated April 25, 2012)(accepting the ALJ’s decision holding that an newspaper article attached to a subject OPRA request related to the records sought did not cure the deficiencies present in the request) Id. at 12-13.

Henceforth, the Complainant’s request item No. 3 is an invalid request that fails to seek identifiable government records and would have required the Custodian to research three (3) years of records to determine whether any reasonably fit within this criteria. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; NJ Builders, 390 N.J. Super. at 180; Schuler, GRC 2007-151; Edwards, 2008-183; Steinhauer-Kula, GRC 2010-198. Thus, the Custodian did not unlawfully deny access to same. N.J.S.A. 47:1A-6.

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 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, 196 N.J. at 71, (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 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 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.

Mason at 73-76 (2008).

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* (1984).

Id. at 76.

In this matter, the Complainant requested that the GRC determine that the Custodian violated OPRA by improperly responding. Further, the Complainant requested that the GRC order the Custodian to disclose the responsive records or, in the least, provide an appropriate response. However, the GRC has not granted the requested relief. Specifically, the evidence herein indicates that no records responsive to request item Nos. 1 and 2 exist and request item No. 3 is invalid. Accordingly, the Complainant could not have prevailed in this complaint and is not 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, 387 N.J. Super. 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. 51. Specifically, the GRC has declined to grant the Complainant's requested relief based on the evidence of 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, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not unlawfully deny access to request item Nos. 1 and 2 because the Custodian initially responded that no records exist, subsequently certified to same in the Statement of Information, and there is no evidence in the record to refute the Custodian's certification. *See* Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
2. The Complainant's request item No. 3 is an invalid request that fails to seek identifiable government records and would have required the Custodian to research three (3) years of records to determine whether any reasonably fit within this criteria. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Edwards v. Hous. Auth. of Plainfiel (Union), GRC Complaint No. 2008-183 *et seq.* (Final Decision dated April 25, 2012); Steinhauer-Kula v. Twp. of Downe (Cumberland), GRC Complaint No. 2010-198 (March 2012). Thus, the Custodian did not unlawfully deny access to same. N.J.S.A. 47:1A-6.
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 (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 GRC has declined to grant the Complainant's requested relief based on the evidence of 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, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51.

Prepared By: Frank F. Caruso
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Approved By: Dawn R. SanFilippo
Deputy Executive Director

February 17, 2015