



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

November 14, 2017 Government Records Council Meeting

Stuart Alterman, Esq.
(o/b/o Police Benevolent Association
Local 167 (Mercer County Corrections Officers))
Complainant

Complaint No. 2016-57

v.
County of Mercer
Custodian of Record

At the November 14, 2017 public meeting, the Government Records Council (“Council”) considered the November 8, 2017 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. Requested item Nos. 1, 2, and 5 are invalid because the Complainant neglected to include a specific time frame within which the Custodian could narrow his search. The items would thus have required the Custodian to conduct research of every shared services agreement in order to determine which records were responsive. 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); Love v. Spotswood Police Dep’t (Middlesex), GRC Complaint No. 2014-223 (Interim Order dated March 31, 2015). Moreover, requested item Nos. 3, 4, and 6 are invalid under OPRA because the Complainant failed to include a date or range of dates for the responsive letters and memoranda to which he sought access. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2013-118 (January 2014). The Custodian therefore lawfully denied access to those request items. N.J.S.A. 47:1A-6.
2. The Custodian has borne his burden of proof that he lawfully denied access to any inmate shared services agreements with Essex because he certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; *see* Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
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 Complainant's request was invalid and no responsive records existed. 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. 432, and Mason, 196 N.J. 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 14th Day of November, 2017

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: November 17, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 14, 2017 Council Meeting**

**Stuart Alterman, Esq.¹
(On Behalf of Police Benevolent Association
Local 167 (Mercer County Corrections Officers))
Complainant**

GRC Complaint No. 2016-57

v.

**County of Mercer²
Custodial Agency**

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

1. Any and all shared services agreements between Mercer County (“Mercer”) and/or County of Mercer Correctional Center (“MCCC”) and Essex County (“Essex”) and/or Essex County Correction Center/Jail (“ECCC”).
2. Any and all agreements, shared services agreements, and/or all agreements under New Jersey statutes pertaining to shared services between Mercer and any county in the State for transfer and/or housing of inmates.
3. Any and all correspondence, e-mails, and/or written communications between any employee and independent contractor, written for or on behalf of Mercer to any entity (public or private) pertaining to the transfer, housing and/or incarceration, and holding of Mercer prison or jail inmates.
4. Any and all communications, requests for qualification, memoranda, or letters (electronic and written) to any employee of Essex pertaining to the transfer, receipt, or care of MCCC inmates previously housed there.
5. Any and all proposals per shared services agreements between Mercer, the State and any county therein, including but not limited to Essex, for housing and/or transfer of inmates from Mercer to Essex.
6. Any and all written and/or electronic communications between Mercer and Cumberland County (“Cumberland”), including but not limited to any agent, servant or employee of Burlington County (“Burlington”) and Cumberland referring to the establishment of a regional jail.

Custodian of Record: Paul R. Adezio
Request Received by Custodian: January 21, 2016
Response Made by Custodian: January 25, 2016
GRC Complaint Received: February 17, 2016

¹ The Complainant (Marlton, NJ) represents Police Benevolent Association Local 167.

² No legal representation listed on record.

Stuart Alterman, Esq. (On Behalf of Policemen’s Benevolent Association Local 167 (Mercer County Corrections Officers)) v. County of Mercer, 2016-57 – Findings and Recommendations of the Executive Director

Background³

Request and Response:

On January 21, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 25, 2016, the Custodian responded in writing, denying the OPRA request concerning item No. 6 as overly broad and thus invalid. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Lagerkvist v. Office of the Governor, 443 N.J. Super. 230 (App. Div. 2015). The Custodian noted that requests seeking “any and all” government records are invalid. *See Spectraserve, Inc. v. Middlesex Cnty. Util. Auth.*, 416 N.J. Super. 565 (App. Div. 2010). Additionally, the Custodian stated that the Complainant’s OPRA request sought “inter-agency or intra-agency advisory, consultative, or deliberative” (“ACD”) material exempt from access under OPRA. On January 28, 2016, the Custodian sent a second (2nd) response for item Nos. 1-5, again advancing the above arguments in support of Mercer’s denial of these items.

Denial of Access Complaint:

On February 17, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that his request was not invalid because it sought shared services agreements between Mercer and/or MCCC and communications regarding the transfer of inmates. The Complainant argued that, even if any part of the request was unclear, a shared services agreement was sufficiently specific and MAG, 375 N.J. Super. 546 did not apply. The Complainant also contended that the request did not require research.

Moreover, the Complainant disputed that any responsive records fell within the ACD exemption. The Complainant argued that shared services agreements are contracts and do not represent advice, consultation materials, or deliberative documents. The Complainant contended that even if some portion of the requested records contained ACD material, the Custodian unlawfully denied access to those remaining records that were not ACD in nature.

Supplemental Response:

On February 19, 2016, the Custodian sent a letter to the Complainant, questioning the need for the instant Denial of Access Complaint. The Custodian noted that the Complainant was aware that Mercer reached an agreement with Hudson County, not Essex, concerning transfer of inmates. The Custodian also noted that he is not sure whether item No. 6 sought a copy of a 2015 agreement between Mercer, Cumberland, Burlington, Camden, and Atlantic Counties concerning a regional jail study. The Custodian stated that he was providing that agreement and a June 25, 2015 Mercer Freeholder resolution authorizing the agreement. The Custodian noted that the Complainant’s OPRA request was not clear on this point. The Custodian thus requested that the Complainant “revisit” his decision to file the instant complaint.

³ 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. *Staurt Alterman, Esq. (On Behalf of Policemen’s Benevolent Association Local 167 (Mercer County Corrections Officers)) v. County of Mercer*, 2016-57 – Findings and Recommendations of the Executive Director

Statement of Information:⁴

On April 6, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on January 21, 2015. The Custodian certified that he responded in writing on January 25, 2016, denying requested item No. 6 as invalid. The Custodian certified that he responded again on January 28, 2016, denying access to item Nos. 1 through 5 for the same reason. The Custodian affirmed that he subsequently disclosed a 2015 agreement concerning a regional jail study (and an accompanying resolution) to the Complainant on February 19, 2016.

The Custodian contended that the complaint is without merit because the subject OPRA request was invalid. MAG, 375 N.J. Super. 546; Spectraserv, Inc., 416 N.J. Super. 565; Lagerkvist, 443 N.J. Super. 230; Elcavage v. Twp. of West Milford (Passaic), GRC Complaint No. 2009-07 (April 2010). The Custodian also certified that there were no responsive records to provide concerning any purported inmate agreement between Mercer and Essex because no agreement exists.

Analysis

Validity of Request

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.

⁴ The complaint was referred to mediation on February 29, 2016. Following unsuccessful efforts by the parties to mediate the matter, the complaint was referred back from mediation on March 17, 2016. Staurt Alterman, Esq. (On Behalf of Policemen’s Benevolent Association Local 167 (Mercer County Corrections Officers)) v. County of Mercer, 2016-57 – Findings and Recommendations of the Executive Director

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 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).

In Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), the Appellate Division evaluated a request for “[a]ny and all settlements, releases or similar documents entered into, approved or accepted from 1/1/2006 to present.” Id. at 508 (emphasis added). The Court determined that the request was not overly broad because it sought a specific type of document. Id. at 515-16.

However, a valid OPRA request for a specific type of document or subject matter must be accompanied by a sufficient amount of identifying information. See Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012). In Love v. Spotswood Police Dep’t (Middlesex), GRC Complaint No. 2014-223 (Interim Order dated March 31, 2015), the complainant sought “police reports and/or complainants signed against” a particular individual. The Council held that, while the complainant’s request for “police reports” and “complainants” reasonably described the subject matter, the complainant failed to provide a specific date or range of dates within his request. Id. at 3. The Council therefore found that the Complainant’s request was overly broad.

Further, the GRC has established specific criteria deemed necessary under OPRA to request an e-mail communication. See Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). The Council determined that, to be valid, such requests must contain: (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. See Elcavage, GRC 2009-07; Sandoval v. NJ State Parole Bd., GRC Complaint No. 2006-167 (Interim Order March 28, 2007). The Council has also applied the criteria set forth in Elcavage to other forms of correspondence, such as letters. See Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). The GRC notes that the Council has determined that requests seeking correspondence but omitting the specific date or range of dates are invalid. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2013-118 (January 2014) (holding that a requested item seeking “correspondence” was invalid because it lacked a date or range of dates).

Regarding item Nos. 1, 2, and 5, the Complainant sought a specific type of record (shared services agreements and proposals) between Mercer and Essex, as well as the MCCC and ECCC. The request items did not, however, include a relevant time frame within which the Custodian could focus his search. The absence of a time frame would have required the Custodian to search every shared service agreement in Mercer’s history to determine whether any referred to Essex

⁵ Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

Stuart Alterman, Esq. (On Behalf of Policemen’s Benevolent Association Local 167 (Mercer County Corrections Officers)) v. County of Mercer, 2016-57 – Findings and Recommendations of the Executive Director

or ECCC. These requested items are dissimilar to the request in Burnett and should be viewed in light of the Council's decision in Love, GRC 2014-223.

Further, requested item Nos. 3, 4, and 6 sought both written and electronic communications about the agreements. The request items contained sender, recipients, and the subject or content of the communications. However, the requested items did not include a date range; such information was required per the criteria set forth in Elcavage, GRC 2009-07. Further, the Council's decision in Kohn, GRC 2013-118, is on point with the instant complaint; the Complainant's failure to include a date or range of dates for those three (3) requested items rendered them invalid.

Accordingly, requested item Nos. 1, 2, and 5 are invalid because the Complainant neglected to include a specific time frame within which the Custodian could narrow his search. The items would thus have required the Custodian to conduct research of every shared services agreement in order to determine which records were responsive. 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; Love, GRC 2014-223. Moreover, requested item Nos. 3, 4, and 6 are invalid under OPRA because the Complainant failed to include a date or range of dates for the responsive letters and memoranda to which he sought access. Elcavage, GRC 2009-07; Kohn, GRC 2013-118. The Custodian therefore lawfully denied access to those requested items. N.J.S.A. 47:1A-6.

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.

Notwithstanding that the OPRA request has been deemed invalid, the Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. *See* Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Notwithstanding the invalid nature of the OPRA request items 1, 2, and 5, the Custodian certified in the SOI that no records existed. Specifically, the Custodian certified that Mercer never entered into any inmate shared services agreement with Essex. Further, there is no evidence in the record to refute the certification.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to any inmate shared services agreements with Essex because he certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; *see* Pusterhofer, GRC 2005-49.

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. 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.

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.

Here, the Complainant filed the instant complaint on behalf of his client, arguing that, contrary to the Custodian's denial of access, the subject OPRA request was valid. Further, the Complainant contended that, at the very least, the request reasonably identified shared services agreements, which should have been disclosed. In the SOI, the Custodian reiterated his initial response that the request was invalid. Also, the Custodian certified that no inmate agreements between Mercer and Essex existed. Based on the evidence of record, the Council should conclude that the Complainant's request is invalid and that no records exist. Thus, the Complainant is not a prevailing party entitled to an award of 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 Complainant's request was invalid and no responsive records existed. 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. 432, and Mason, 196 N.J. 51.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Requested item Nos. 1, 2, and 5 are invalid because the Complainant neglected to include a specific time frame within which the Custodian could narrow his search. The items would thus have required the Custodian to conduct research of every shared services agreement in order to determine which records were responsive. 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); Love v. Spotswood Police Dep't (Middlesex), GRC Complaint No. 2014-223 (Interim Order dated March 31, 2015). Moreover, requested item Nos. 3, 4, and 6 are invalid under OPRA because the Complainant failed to include a date or range of dates for the responsive letters and memoranda to which he sought access. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2013-118 (January 2014). The Custodian therefore lawfully denied access to those request items. N.J.S.A. 47:1A-6.
2. The Custodian has borne his burden of proof that he lawfully denied access to any inmate shared services agreements with Essex because he certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; *see* Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
 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 Complainant's request was invalid and no responsive records existed. 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. 432, and Mason, 196 N.J. 51.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

November 8, 2017