



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

November 13, 2018 Government Records Council Meeting

Nancy C. Ferro, Esq.
(o/b/o Walli Williams)
Complainant

Complaint No. 2017-77

v.

NJ Department of Corrections
Custodian of Record

At the November 13, 2018 public meeting, the Government Records Council (“Council”) considered the November 7, 2018 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 responsive surveillance video responsive to the Complainant’s January 3, 2017 OPRA request is exempt from disclosure under OPRA pursuant to New Jersey Department of Corrections’ regulations. N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(14). Thus, the Custodian lawfully denied access to the request record. N.J.S.A. 47:1A-6. Further, because the responsive record is exempt from disclosure under DOC’s regulations, the GRC declines to address whether the other asserted exemptions apply.
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; thus, no relief was achieved. 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 13th Day of November, 2018

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 15, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
November 13, 2018 Council Meeting**

**Nancy C. Ferro, Esq.
(On Behalf of Walli Williams)¹
Complainant**

GRC Complaint No. 2017-77

v.

**New Jersey Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: Hard copy via U.S. mail of a video tape showing an incident in the mess hall at New Jersey State Prison (“NJSP”) on February 14, 2014 at approximately 4:51 p.m.

Custodian of Record: John Falvey
Request Received by Custodian: January 3, 2017
Response Made by Custodian: January 10, 2017
GRC Complaint Received: April 12, 2017

Background³

Request and Response:

On January 3, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 10, 2017, the Custodian responded in writing advising that he received the request and would respond by January 20, 2017. On January 18, 2017, the Custodian responded in writing denying the request under N.J.S.A. 47:1A-1.1, N.J.A.C. 10A:22-2.3(a)(14), and Gilleran v. Twp. of Bloomfield, 227 N.J. 159 (2016).

Denial of Access Complaint:

On April 12, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contested the Custodian’s denial of access to the requested video. The Complainant asserted that her client sought a copy of the video to aid him in a future parole hearing.

¹ The Complainant represents Walli Williams.

² Represented by Deputy Attorney General Suzanne Davies.

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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

Nancy C. Ferro, Esq. (On Behalf of Walli Williams) v. New Jersey Department of Corrections, 2017-77 – Findings and Recommendations of the Council Staff

Statement of Information:

On May 12, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on January 3, 2017. The Custodian certified that he obtained the responsive video from NJSP’s Special Investigation Division (“SID”). The Custodian certified that he initially responded on January 10, 2017 advising the Complainant that he would respond by January 20, 2017. The Custodian affirmed that he subsequently responded in writing on January 18, 2017 denying the OPRA request under OPRA, New Jersey Department of Corrections’ (“DOC”) regulations, and prevailing case law.

The Custodian argued that he lawfully denied access to the responsive records under the security and surveillance exemptions contained in OPRA. N.J.S.A. 47:1A-1.1. The Custodian argued that it was these exemptions that the Supreme Court imposed in determining that security footage from a public building were exempt. Gilleran, 227 N.J. 159. Finally, the Custodian averred that DOC regulations expressly exempted “[s]urveillance footage of areas located within a correctional facility's secured perimeter.” N.J.A.C. 10A:22-2.3(a)(14). The Custodian certified that the video footage came from secured areas within NJSP; thus, he lawfully denied access to said footage.

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.

OPRA also provides that its provisions:

[S]hall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; *regulation promulgated under the authority of any statute or Executive Order of the Governor*; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

[N.J.S.A. 47:1A-9(a) (emphasis added).]

DOC’s regulations provide that “the following records shall not be considered government records subject to public access . . . [s]urveillance footage of areas located within a correctional facility's secured perimeter. N.J.A.C. 10A:22-2.3(a)(14) (emphasis added).

In the complaint before the Council, the Complainant sought access to surveillance video footage from the mess hall in NJSP. The Custodian denied access to the responsive record under, among other exemptions, DOC regulations. In response to the Denial of Access Complaint, the

Custodian certified in the SOI that the surveillance footage came from a secured area within NJSP. The Custodian argued that he thus lawfully denied access to the responsive footage.

GRC case law recognizes exemptions contained in DOC regulations as a lawful denial of access under OPRA. See Robinson v. N.J. Dep't of Corr., GRC Complaint No. 2012-129 (2013) (holding that the custodian lawfully denied access to a preliminary incident report under DOC's regulations); Riley v. N.J. Dep't of Corr., GRC Complaint No. 2013-345 (July 2014) (holding that the custodian lawfully denied access to mental health records under N.J.A.C. 10A:22-2.3(a)(4)); Edwards v. N.J. Dep't of Corr., GRC Complaint No. 2014-8 (September 2014) (holding that the complainant could not have access to records pertaining to the person accused of assaulting him under N.J.A.C. 10A:22-2.3(b)). Most recently, in December 2017, DOC promulgated new OPRA regulations that included five (5) new exemptions. One of these exemptions was the surveillance footage exemption. Based on the forgoing, it is clear that the requested record is exempt from disclosure under OPRA. N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(14).

Accordingly, the responsive surveillance video responsive to the Complainant's January 3, 2017 OPRA request is exempt from disclosure under OPRA pursuant to DOC's regulations. N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(14). Thus, the Custodian lawfully denied access to the request record. N.J.S.A. 47:1A-6. Further, because the responsive record is exempt from disclosure under DOC's regulations, the GRC declines to address whether the other asserted exemptions apply.

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, [certif. denied] (1984).

[Id. at 76.]

Here, the Complainant contested the Custodian's denial of access to the responsive record. Conversely, the Custodian argued that he lawfully denied access to the records because they were exempt from disclosure under DOC's regulations. Upon review of the facts and an application of

the OPRA and prevailing case law, the GRC has agreed: the records are exempt from disclosure under N.J.S.A. 47:1A-9(a) and N.J.A.C. 10A:22-2.3(a)(14). For this reason, 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, 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 Custodian lawfully denied access to the requested record; thus, no relief was achieved. 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 Council Staff respectfully recommends the Council find that:

1. The responsive surveillance video responsive to the Complainant's January 3, 2017 OPRA request is exempt from disclosure under OPRA pursuant to New Jersey Department of Corrections' regulations. N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(14). Thus, the Custodian lawfully denied access to the request record. N.J.S.A. 47:1A-6. Further, because the responsive record is exempt from disclosure under DOC's regulations, the GRC declines to address whether the other asserted exemptions apply.
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; thus, no relief was achieved. 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
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November 7, 2018