



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

June 30, 2020 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o Baffis Simmons and
African American Data and Research Institute)
Complainant

Complaint No. 2018-200

v.

Borough of Woodbine (Cape May)
Custodian of Record

At the June 30, 2020 public meeting, the Government Records Council (“Council”) considered the June 23, 2020 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 was under no obligation to obtain and disclose records created by the New Jersey State Police resulting from law enforcement activities within the Borough of Woodbine. Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 38-39 (App. Div. 2005); N.J.S.A. 53:2-1. Thus, the Custodian lawfully denied access to the subject OPRA request. N.J.S.A. 47:1A-6.
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 Complainant failed to achieve the relief sought in his Denial of Access Complaint. 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 30th Day of June 2020

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: July 2, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 30, 2020 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of¹
Baffis Simmons and African American Data
& Research Institute)**

GRC Complaint No. 2018-200

v.

**Borough of Woodbine (Cape May)²
Custodial Agency**

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

1. Driving While Intoxicated/Driving Under the Influence (“DWI/DUI”) complaints prepared and filed by the Police Department from January 2017 through present.
2. Drug possession complaints prepared and filed by the Police Department from January 2017 through present.
3. Police Department’s “Arrest Listings” from January 2017 through present.
4. Drug paraphernalia complaints and summonses prepared by the Police Department from January 2017 through present.

Custodian of Record: Lisa Garrison
Request Received by Custodian: August 26, 2018
Response Made by Custodian: August 27, 2018
GRC Complaint Received: September 10, 2018

Background³

Request and Response:

On August 26, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 27, 2018, the Custodian responded in writing stating that the Borough of Woodbine (“Borough”) did not have a local police department. The Complainant replied that same day, stating that he still expected to receive the records since the Borough was covered by a police department. The Custodian responded stating that the Complainant needed to contact the New Jersey State Police (“NJSP”).

¹ The Complainant represents the African American Data and Research Institute.

² Represented by Richard P. Tonetta, Esq., of the Law Offices of Richard P. Tonetta, Esq. (Vineland, N.J.).

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.

Rotimi Owoh, Esq. (On Behalf of Baffis Simmons and African American Data & Research Institute) v. Borough of Woodbine (Cape May), 2018-200 – Findings and Recommendations of the Executive Director

Denial of Access Complaint:

On September 10, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that as of September 8, 2018, the Custodian has not provided any responsive records or requested an extension of time to respond. The Complainant requested that the Council find that the Custodian violated OPRA in accordance with Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010); Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). The Complainant also requested that the Council award him counsel fees.

Statement of Information:

On September 26, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on August 26, 2018. The Custodian certified that no search was conducted since the Borough did not have a police department and was serviced by NJSP. The Custodian certified that she responded on August 27, 2018, stating that the Borough did not have a police department.

The Custodian asserted that NJSP provided police coverage for the Borough. The Custodian asserted that the Borough did not “make, maintain, or keep on file any of the requested records, and therefore did not have records to present. N.J.S.A. 47:1A-1.1. The Custodian asserted that pursuant to Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 38 (App. Div. 2005) she was not obligated to conduct a search for records held by outside agencies.

The Custodian’s Counsel submitted a letter brief to the SOI asserting that unlike Burnett, the Borough did not have an agency relationship with NJSP. 415 N.J. Super. at 516. Counsel asserted that the Borough did not have a separate municipal court but had a shared services agreement with Middle Township Municipal Court (“Court”). Counsel asserted that the Borough did not dictate NJSP’s actions regarding the issuance of summonses or their conduct of police investigations. Counsel also asserted that the maintenance of criminal records was the exclusive responsibility of NJSP as part of its core functions, and that tickets and summonses issued by NJSP were not at the Borough’s behest. Counsel therefore argued that the requested records were not the Borough’s government records but rather NJSP’s.

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.

In Burnett, 415 N.J. Super. 506, the Appellate Division determined that the defendant was required to obtain settlement agreements from its insurance broker. The court’s decision largely

rested on the fact that there was no question that the broker was working on behalf of the defendant to execute settlement agreements. The court noted that it previously held that although a third party, such as insurance broker or outside counsel, may execute settlement agreements, “they nonetheless bind the county as principal, and the agreements are made on its behalf.” Id. at 513. In determining that the defendant had an obligation to obtain responsive records from the insurance broker, the court distinguished Bent, 381 N.J. Super. at 38-39 from the facts before it. The court reasoned that:

In Bent, the requester sought records and information regarding a criminal investigation of his credit card activities conducted jointly by the Stafford Township Police Department [(“STPD”)], the United States Attorney for New Jersey and a special agent of the Internal Revenue Service. As part of his request, Bent sought “discrete records of the 1992 criminal investigation conducted by the STPD,” which were fully disclosed. Id. at 38. Additionally, he sought a “[c]opy of contact memos, chain of custody for items removed or turned over to third parties of signed Grand Jury reports and recommendations.” Bent v. Stafford Twp. Police Dept., GRC 2004-78, final decision (October 14, 2004). Affirming the determination of the [GRC], we stated: “to the extent Bent's request was for records that either did not exist or were not in the custodian's possession, there was, of necessity, no denial of access at all.” Bent, supra, 381 N.J. Super. at 38 . . . We continued by stating:

“Of course, even if the requested documents did exist, the custodian was under no obligation to search for them beyond the township's files. OPRA applies solely to documents ‘made, maintained or kept on file in the course of [a public agency's] official business,’ as well as any document ‘received in the course of [the agency's] official business.’ N.J.S.A. 47:1A-1.1. Contrary to Bent's assertion, although OPRA mandates that ‘all government records . . . be subject to public access unless exempt,’ the statute itself neither specifies nor directs the type of record that is to be ‘made, maintained or kept on file.’ In fact, in interpreting OPRA's predecessor statute, the Right to Know Law, we found no requirement in the law concerning ‘the making, maintaining or keeping on file the results of an investigation by a law enforcement official or agency into the alleged commission of a criminal offense. . . Thus, even if the requested documents did exist in the files of outside agencies, Bent has made no showing that they were, by law, required to be ‘made, maintained or kept on file’ by the custodian so as to justify any relief or remedy under OPRA. N.J.S.A. 47:1A-1.1.”

[T]he circumstances presented in Bent [are] far removed from those existing in the present matter because, as we have previously concluded, the settlement agreements at issue here were “made” by or on behalf of the Board in the course of its official business. Were we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply delegate their creation to

third parties or relinquish possession to such parties, thereby thwarting the policy of transparency that underlies OPRA. N.J.S.A. 47:1A-1.

[Id. at 516-517.]

The Council subsequently expanded the court's holding in Burnett to agencies entering into a shared services agreement. See Michalak, GRC 2010-220. However, the Council took a different approach where the evidence did not support a custodian's obligation to obtain records. See Hittinger v. N.J. Transit, GRC Complaint No. 2013-324 (July 2014) (holding that the custodian was not required to obtain contracts from an outside vendor because the vendor maintained sole control over those documents).

Also, it must be noted that NJSP's ability to patrol within municipal limits is set forth in N.J.S.A. 53:2-1:

The members of the State Police shall be subject to the call of the Governor. They shall be peace officers of the State, *shall primarily be employed in furnishing adequate police protection to the inhabitants of rural sections*, shall give first aid to the injured and succor the helpless, and shall have in general the same powers and authority as are conferred by law upon police officers and constables.

They shall have power to prevent crime, to pursue and apprehend offenders and to obtain legal evidence necessary to insure the conviction of such offenders in the courts. They shall have power to execute any lawful warrant or order of arrest issued against any person, and to make arrests without warrant for violations of the law committed in their presence, and for felonies committed the same as are or may be authorized by law for other peace officers.

[Id. (emphasis added).]

In the matter before the Council, the Complainant sought access to summonses and complaints for DWI/DUI and drug offenses, as well as a Borough arrest listing. On the basis that the Borough did not have a police department, the Custodian denied access to the OPRA request and directed the Complainant to NJSP who provided police services for the Borough. This complaint ensued, wherein the Complainant contended that the Custodian had an obligation to obtain and disclose the responsive records under Burnett and Michalak, GRC 2010-220. In the SOI, the Custodian maintained the position that she was under no obligation to obtain and disclose records the Borough did not possess and had no authority to compel NJSP to turn over the requested records.

The crux of this complaint is whether the Custodian had an obligation to contact NJSP to obtain records issued by NJSP as part of their patrol coverage of the Borough. Upon reviewing this issue closely, the facts of this complaint depart from Burnett, 415 N.J. Super. 506 and Michalak, GRC 2010-220.

First, in contrast to Michalak, GRC 2010-220, there is no evidence of any contractual or shared services-type agreement between the Borough and NJSP. Instead, N.J.S.A. 53:2-1 grants NJSP the ability to patrol certain areas as it deems necessary to ensure adequate police protection. Thus, in the absence of a shared services agreement, there is no evidence supporting that NJSP is making or maintaining summons, complaints, or arrest listings on behalf of the Borough. Additionally, there is similarly no evidence in the record to support that Middle Township was providing police services to the Borough through a shared services agreement.

Second, there is no evidence to suggest that NJSP was making or maintaining records on behalf of the Borough. Burnett, 415 N.J. Super. 506. Further, the evidence of record does not support that NJSP provided the Borough with copies of those records associated with DWI/DUI or drug issues, or arrests occurring within municipal limits. Instead, it is likely those records were filed directly with the Court for adjudication purposes. While the Borough is sharing services with Middle Township for court services, OPRA does not apply to the Judiciary. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-7(g).

Thus, the relationship between NJSP and the Borough is not like the relationships between the parties in Burnett and Michalak. Specifically, the NJSP was neither a third-party vendor for the Borough, nor had it entered into a shared services agreement with the Borough for its police services. For this reason, the GRC concludes that the Borough is in no way involved in making, maintaining, or submitting the records sought.

Instead, the facts here are more closely aligned with those in Bent, 381 N.J. Super. 30. Specifically, the evidence of record supports that the Borough and NJSP are separate public agencies operating within the State. Further, there is no evidence supporting that the Borough has any control over NJSP's operations within its municipal limits. Instead, NJSP provides law enforcement to the area and operates within its capacity as provided in N.J.S.A. 53:2-1. Further, that statute does not include any requirement that NJSP provide law enforcement records to a municipality wherein it has assumed full law enforcement duties. For these reasons, the GRC is persuaded that the Custodian was not required to contact other agencies to obtain records that were clearly beyond the Borough's own files. Bent, 381 N.J. Super. at 38.

Accordingly, the Custodian was under no obligation to obtain and disclose records created by the NJSP resulting from law enforcement activities within the Borough. Bent, 381 N.J. Super. 30; N.J.S.A. 53:2-1. Thus, the Custodian lawfully denied access to the subject OPRA request. 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 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.]

The Complainant filed the instant complaint requesting that the GRC require the Custodian to obtain and disclose the requested records to him. However, the evidence of record indicates that the Custodian was under no obligation to obtain and disclose said records. Bent, 318 N.J. Super. 30. Thus, the Complainant has not achieved the desired result and it 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. 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 failed to achieve the relief sought in his Denial of Access Complaint. 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. The Custodian was under no obligation to obtain and disclose records created by the New Jersey State Police resulting from law enforcement activities within the Borough of Woodbine. Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 38-39 (App. Div. 2005); N.J.S.A. 53:2-1. Thus, the Custodian lawfully denied access to the subject OPRA request. N.J.S.A. 47:1A-6.
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 Complainant failed to achieve the relief sought in his Denial of Access Complaint. 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: Samuel A. Rosado
Staff Attorney

June 23, 2020