



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 23, 2021 Government Records Council Meeting

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

Complaint No. 2018-201

v.

Lower Township Police Department (Cape May)
Custodian of Record

At the February 23, 2021 public meeting, the Government Records Council (“Council”) considered the February 16, 2021 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 lawfully denied access to the Complainant’s August 26, 2018 OPRA request. N.J.S.A. 46:1A-6. Specifically, the Custodian certified, and the record reflects, that Lower Township Police Department does not possess or maintain the requested complaints and summonses. See Simmons v. Mercado, 464 N.J. Super. 77 (App. Div. 2020), certif. granted, 2020 LEXIS 1218 (Oct. 26, 2020); Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
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, 432 (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, 71 (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. at 432, and Mason, 196 N.J. at 71.

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 23rd Day of February 2021

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 25, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 23, 2021 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of Baffis Simmons
& African American Data & Research Institute)¹
Complainant**

GRC Complaint No. 2018-201

v.

**Lower Township Police Department (Cape May)²
Custodial Agency**

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

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

Custodian of Record: Jania Bailey⁴

Request Received by Custodian: August 26, 2018

Response Made by Custodian: August 30, 2018

GRC Complaint Received: September 10, 2018

Background⁵

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 30, 2018, the Custodian responded in writing disclosing records to the Complainant. On the same day, the Complainant e-mailed the Custodian advising that he did not receive records responsive to OPRA request items at issue here and provided examples of the requested complaints and summonses. The Complainant asked the Custodian to advise when she would disclose the records. The Custodian

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

² Represented by Robert T. Belasco, Esq., of Stefankiewicz & Belasco, LLC. (North Wildwood, NJ).

³ The Complainant sought additional records that are not at issue in this complaint.

⁴ The current Custodian of Record is Captain William Priole.

⁵ 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.

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responded stating that the disclosed records listed all summonses, citations, and complaints for the listed charges beginning on page 23.

On August 31, 2018, the Custodian again e-mailed the Complainant advising that all information requested was contained within the disclosed records. The Custodian stated that the Complainant should contact the Lower Township Municipal Court (“Court”) if he sought additional information.

Denial of Access Complaint:

On September 10, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that the Custodian failed to properly respond to the subject OPRA request either providing records or obtaining an extension of time. The Complainant argued that prior court and GRC case law support that summonses and complaints are disclosable under OPRA. See Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004).

The Complainant thus requested that the GRC determine that the Custodian lawfully denied access to the responsive records. The Complainant further requested that the GRC find that he is a prevailing party entitled to an award of attorney’s fees.

Statement of Information:

On October 1, 2018, the Custodian filed a Statement of Information (“SOI”) attaching a certification from. The Custodian certified that she received the Complainant’s OPRA request on August 26, 2018. The Custodian certified that she searched the Lower Township Police Department (“LTPD”) database for the requested records using the applicable New Jersey Criminal Code citation. The Custodian certified that on August 30, 2018, she provided responsive records to the Complainant.

The Custodian argued that the summonses/complaints provided by the Complainant were examples printed off websites of other police departments. The Custodian asserted that the “Brigantine Summons” was a print-out from the Centralized Automated Dispatch (“CAD”) vendor Enforsys, which was maintained by that specific police department. The Custodian argued that LTPD did not utilize that specific CAD system and was therefore unable to print summonses similar in appearance. The Custodian argued that the provided records contained all the pertinent information sought by the Complainant.

The Custodian asserted that LTPD inputs arrest data into eCDR, which was maintained and managed by the New Jersey Judiciary. The Custodian asserted that eCDR would then generate a complaint or summons using the inputted arrest data. The Custodian asserted that a copy could be printed out by the LTPD but the process in obtaining same is onerous and time consuming since it requires the Custodian to perform an individual search and locate each specific case file and determine whether a record in the form requested by the complainant actually exists. The Custodian further argued that the requested records were made, maintained, and kept on file with

the New Jersey Judiciary. Thus, the Custodian directed the Complainant to the appropriate entity to obtain the requested records.

The Custodian therefore argued that the LTPD complied with the Complainant's August 30, 2018 OPRA request and the complaint should be dismissed.

Additional Submissions:

On October 2, 2018, the Complainant filed a letter brief in opposition to the Custodian's SOI. Therein, the Complainant contended that notwithstanding his request to the Custodian to reconsider the denial and filing of this complaint on July 19, 2018, the Custodian did not show a willingness to reconsider and instead directed the Complainant to contact the Court to obtain the records.

The Complainant argued that police departments in the State were required to retain summonses and complaints until thirty (30) days after disposition of same. M900000, Record Series No. 0082-0000.⁶ The Complainant further asserted that municipalities were required to retain these records for at least fifteen (15) years if they are part of a "Municipal Prosecutor's Case File." M170000, Records Series No. 0001-0000. The Complainant argued that because LTPD police officers and prosecutors were Township employees, their records were subject to access under OPRA and should have been disclosed accordingly. The Complainant argued that he sought records for the last two (2) years, and thus those records should have been disclosed. The Complainant further contended that if records were in storage, OPRA required the Custodian to obtain an extension of time to respond. The Complainant argued that instead of disclosing records, the Custodian denied access and required the Complainant to submit a request with the Court.

The Complainant next reiterated his Denial of Access Complaint argument that the Council already decided that summonses and complaints were subject to disclosure. The Complainant stated that in Merino, GRC 2003-110, the Council held that the custodian was required to disclose responsive summonses that existed regardless of whether they exceeded their retention period. The Complainant contended that the Council's decision supported his position that the Custodian should have disclosed all responsive summonses and complaints it retained. The Complainant further contended that Merino, GRC 2003-110 was consistent with court decisions where defendants argued that a requestor was required to obtain records from the courts. O.R. v. Plainsboro Twp., Docket No. MID-L-5752-16; AADARI v. Woodbridge Twp., Docket No. MID-L-2052-18 (August 1, 2018). The Complainant further noted that many other municipalities throughout the State have complied recently with identical requests. The Complainant identified thirteen (13) such agencies and argued that their actions prove that police departments in the State have access to summonses and complaints.

The Complainant further noted that LTPD's obligation to disclose responsive records was not diminished simply because Judiciary also made them available to the public. See Keddie v. Rutgers Univ., 144 N.J. 377 (1996). The Complainant also noted that it was far cheaper to obtain

⁶ The Complainant noted that his experience was that DUI/DWI or drug possession charges normally included sample testing by the New Jersey State Police. The Complainant alleged that this testing averaged between three (3) and six (6) months.

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the responsive records via OPRA than through R. 1:38. The Complainant argued that OPRA should not be used as “a money generating scheme (another form of taxation) for government.” The Complainant thus argued that LTPD should be required to disclose the responsive records.

The Complainant next argued that that in accordance with Paff v. Galloway Twp., 229 N.J. 340 (2017), agencies were required to provide access to electronically stored information. The Complainant contended that LTPD had access to an “e-ticketing system,” and therefore had an obligation to make electronically stored tickets available to the Complainant. Additionally, the Complainant asserted that LTPD could access the records from the third-party vendor supplying the e-ticketing system and make the records available to the Complainant. See 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 asserted that LTPD officers have access to the Automated Complaint System (“ACS”) to enter and generate complaints and could provide the responsive complaints and summonses through that system. See Burnett, 415 N.J. Super. 506; Michalak, GRC 2010-220. The Complainant also noted the Custodian’s statement in her SOI that LTPD could print out a copy of the requested complaints and summonses but that the process was onerous and time-consuming. The Complainant argued that if the process was difficult and time-consuming as claimed, then the solution was to impose a special service charge instead of not providing the requested records.

Lastly, the Complainant argued that in a letter dated April 11, 2018 from the Clerk of the Superior Court for the New Jersey Judiciary, the Woodbridge Police Department was told that they had to provide copies of the requested complaints and summonses, rather than the court. Thus, the Complainant renewed his request to order disclosure of the responsive records and that he be awarded prevailing party attorney’s fees. See Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006).

On November 25, 2020, the GRC requested additional information from the Custodian. Specifically, the GRC asked:

1. Do [LTPD] officers keep or maintain copies of the requested summonses and complaints upon submission to the Court?
2. Does the [Township’s] municipal prosecutor keep or maintain copies of the requested summonses and complaints as part of a “Municipal Prosecutor’s Case File”?
3. Does the [Township] keep or maintain copies of the requested summonses and complaints in archives or storage?

On December 10, 2020, the current Custodian responded to the GRC’s request, submitting a certification. The current Custodian certified that LTPD did not require individual officers to retain copies of summonses and/or complaints which they personally issue. The current Custodian also certified that the municipal prosecutor did not keep or maintain copies of summonses or complaints after disposition. The current Custodian certified that such records were retained with the Court. Lastly, the current Custodian certified that LTPD did not retain copies of the requested

summonses and complaints in archives or in storage and are disposed of in accordance with the State's retention schedule.

On January 28, 2021, the GRC requested additional information from the current Custodian. Specifically, the GRC asked:

1. Does LTPD generate and process tickets through a system provided by a third-party vendor?
2. If "yes" to question No. 1, does LTPD have access to copies of tickets generated through the system provided by the third-party vendor?
3. Please describe the process on how LTPD officers process a ticket from creation to submission to the municipal court.

On February 4, 2021, the current Custodian responded to the GRC's request, submitting a certification. The current Custodian certified that LTPD does not generate and process tickets through a third-party vendor and does not have an electronic ticketing system. The current Custodian certified that LTPD hand write a ticket, with copies given to the defendant and the Court. The current Custodian also certified that copies are given to the records clerks and filed by month and ticket number. Lastly, the current Custodian certified that LTPD officers also have a copy they can retain for future reference for Court notes.

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 Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). In Merino, 2003-110, the custodian argued that the requested complaints and summonses were not subject to access since they were dated beyond the required retention period via the State's retention schedule. The Council held that if the agency in fact possessed the responsive records, they were subject to access under OPRA even if they were supposed to have been destroyed in accordance with the retention schedule.

Additionally, the New Jersey Supreme Court has held that retention schedules created in accordance with the Destruction of Public Records Law, N.J.S.A. 47:3-15 to -32, did not satisfy the "required by law" standard under OPRA. See N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 568 (2017), aff'g in relevant part and rev'g in part, 441 N.J. Super. 70, 106-07 (App. Div. 2015). The Court found that if the retention schedules carried the force of law, parts of OPRA would be rendered meaningless due to the retention schedules' comprehensive list of records. Id.

The Court therefore held that “the retention schedules adopted by the State Records Committee [do not] meet the ‘required by law’ standard for purposes of OPRA.” Id.

Additionally, although decided during the pendency of this complaint, the GRC finds the Appellate Division’s holding in Simmons v. Mercado, 464 N.J. Super. 77 (App. Div.), certif. granted, 2020 LEXIS 1218 (Oct. 26, 2020) relevant and binding. In Simmons, the Complainant’s request for summons and complaints from the Millville Police Department (“MPD”) was denied because the records, upon their creation in the eCDR by police officers, were records of the Judiciary that are not required to be disclosed under OPRA. 464 N.J. Super. at 80. The court found that notwithstanding MPD’s access to eCDR, “it does not alter the fact that the [requested complaints and summonses are] maintained by the Judiciary.” Id. at 86. The court noted that although an MPD officer initiates the creation of the responsive records, “the document is completed by eCDR and the finished product is maintained by the municipal court, or, in a larger sense, the Judiciary.” Id. at 85-86.

In the current matter, the Custodian responded and later certified that the Township did not possess or maintain copies of the requested summonses and complaints, and directed the Complainant to request them from the Court. Additionally, the current Custodian certified that the Township’s municipal prosecutor did not keep or maintain the requested records, nor did the Township keep or maintain the records in archives or storage. The current Custodian also certified that LTPD did not utilize an electronic ticketing system to access complaints and summonses.

The Complainant asserted that the retention schedules required police departments and municipal prosecutors to possess copies of the requested records for the stated period. Furthermore, the Complainant asserted that LTPD had access to the complaints and/or summonses through eCDR.

Initially, the GRC addresses the Complainant’s arguments pertaining to retention schedules. Upon review, the Complainant’s reliance on Merino, GRC 2003-110 to contend that LTPD and the Township’s municipal prosecutor are required by law to maintain the requested records based upon the retention schedules ignores the prevailing caselaw. Instead, the retention schedules determine how records that may be in an agency’s possession are to be maintained, and are not a legal requirement to make, maintain, or keep on file every identified record. See N. Jersey Media Grp. Inc., 229 N.J. at 568. Therefore, the retention schedules alone do not counter the Custodian’s certification that the Township does not possess or maintain the requested records.

Additionally, while the Complainant noted that the Custodian had the capability of printing out the requested summonses and complaints through eCDR, the court in Simmons concluded that the records were maintained by the Judiciary and thus were not “government records” in the police department’s possession.. Simmons, 464 N.J. Super. at 86. The court determined that the burden of searching for responsive records should not be placed on local authorities when such records were maintained by others. Id. Thus, notwithstanding whether LTPD has electronic access to the records via eCDR, the Custodian is not obligated to conduct a search for records maintained by the Judiciary. Id.

Accordingly, the Custodian lawfully denied access to the Complainant's August 26, 2018 OPRA request. N.J.S.A. 46:1A-6. Specifically, the Custodian certified, and the record reflects, that LTPD does not possess or maintain the requested complaints and summonses. See Simmons, 464 N.J. at 86; 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, 432 (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. 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 did not possess or maintain the requested records, and properly directed the Complainant to obtain the records from the Court. Schlosser, GRC 2009-45. 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. 423. 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 lawfully denied access to the Complainant’s August 26, 2018 OPRA request. N.J.S.A. 46:1A-6. Specifically, the Custodian certified, and the record reflects, that Lower Township Police Department does not possess or maintain the requested complaints and summonses. See Simmons v. Mercado, 464 N.J. Super. 77 (App. Div.

2020), certif. granted, 2020 LEXIS 1218 (Oct. 26, 2020); Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

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, 432 (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, 71 (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. at 432, and Mason, 196 N.J. at 71.

Prepared By: Samuel A. Rosado
Staff Attorney

February 16, 2021