



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 23, 2021 Government Records Council Meeting

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

Complaint No. 2018-281

v.
Borough of Washington (Warren)
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 unlawfully denied access to the requested records on the basis that the Township, with which the Borough had a shared services agreement, possessed the records. N.J.S.A. 47:1A-6; Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010); and Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). The Custodian had an obligation to obtain the responsive records from the Township and provide same to the Complainant. See Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005). However, the GRC declines to order disclosure of the responsive records since the Complainant acknowledged receipt of same on March 20, 2019.
2. The Custodian unlawfully denied access to the requested records. N.J.S.A. 47:1A-6. However, the Custodian ultimately cured the response issue on March 20, 2019. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
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, 71 (2008). Specifically, the evidence of record supports that the responsive records provided to the Complainant were disclosed via separate litigation with the Township and not the Borough. See Nuckel v. N.J. Econ. Dev. Auth., 2020 N.J. Super. Unpub. LEXIS 948, at *6-7 (App. Div. 2020). 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 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 of¹
African American Data and Research Institute
And Baffi Simmons)
Complainant**

GRC Complaint No. 2018-281

v.

**Borough of Washington (Warren)²
Custodial Agency**

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

1. Driving While Intoxicated/Driving Under the Influence (“DWI/DUI”) complaints and summonses prepared by the Police Department from January 2017 through present.
2. Drug possession complaints and summonses prepared 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: Laurie Barton
Request Received by Custodian: October 15, 2018
Response Made by Custodian: October 15, 2018
GRC Complaint Received: November 21, 2018

Background³

Request and Response:

On October 14, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 15, 2018, the Custodian responded in writing stating that the Complainant’s request was forwarded to the Washington Township Police Department (“WTPD”) since the Borough of Washington (“Borough”) did not have a police force, and contracted with the Township of Washington (“Township”) to provide those services.

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

² Represented by Tara Ann St. Angelo, Esq., of Gebhardt & Kiefer, P.C. (Clinton, 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 African American Data and Research Institute and Baffi Simmons) v. Borough of Washington (Warren), 2018-281 – Findings and Recommendations of the Executive Director

Denial of Access Complaint:

On November 21, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian has not provided any records or requested an extension of time to respond within the allotted period. The Custodian also argued that under Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004), summonses were subject to disclosure under OPRA, and that other police departments have provided access to same via OPRA requests submitted by the Complainant.

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); and 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 December 20, 2018, the Custodian filed a Statement of Information (“SOF”). The Custodian certified that she received the Complainant’s OPRA request on October 15, 2018. The Custodian certified that she responded in writing that same day, stating that the request was forwarded to the WTPD, since they had a contract with the Borough to provide police services.⁴

The Custodian asserted that she was not the appropriate custodian, and therefore the Borough was not the proper party to the current matter. The Custodian asserted that the WTPD and potentially the Mansfield Township Municipal Court (“Court”) were the proper custodians of the requested records. The Custodian maintained that she forwarded the request to the proper custodian in compliance with N.J.S.A. 47:1A-5(h) and prior GRC caselaw. See Dixson v. Twp. of Hamilton (Mercer), GRC Complaint No. 2009-63 (June 2009).

The Custodian also asserted that the Complainant failed to advise the GRC that he filed an action in Superior Court against WTPD and the Township for an alleged unlawful denial of access to an OPRA request identical to the instant matter. See AADARI v. Washington Twp., Docket No. WRN-L-3422-18. The Custodian asserted that because WTPD served as the police department for both the Township and Borough, the request in AADARI encompassed the records sought by the Complainant in the instant matter. Therefore, the Custodian argued that the matter should be dismissed since the Complainant filed two (2) separate actions stemming from the same OPRA request.

The Custodian also asserted that WTPD provided the Complainant with the “Arrest Listings” requested under Item No. 3 on October 28, 2018. Because the WTPD provided services to both the Borough and Township, the provided Arrest Listings included arrests occurring within the Borough. The Custodian therefore argued that the Complainant was not entitled to receive records already in his possession. See Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008).

⁴ The Custodian included a copy of an “Interlocal Service Agreement” between the Borough and Township marked as “Exhibit A.”

Rotimi Owoh, Esq. (On Behalf of African American Data and Research Institute and Baffi Simmons) v. Borough of Washington (Warren), 2018-281 – Findings and Recommendations of the Executive Director

The Custodian also contended that to the extent that the Complainant sought municipal court records, the GRC did not have jurisdiction over requests for records maintained by a municipal court under N.J.S.A. 47:1A-7(g). The Custodian maintained that municipal courts were considered part of the New Jersey Judiciary, and access to its records were governed by N.J. Court Rules, R. 1:38. The Custodian argued that records generated during a municipal court proceeding were not accessible under OPRA. Dixson, GRC 2009-63.

The Custodian also contended that records of the municipal prosecutor were court records and not subject to OPRA. See Tompkins v. Newark Municipal Court, GRC Complaint No. 2010-332 (January 2011). The Custodian asserted that while municipal prosecutors were appointed by the governing body pursuant to N.J.S.A. 2B:25-4, their powers were derived from the State and were under the direct supervision of “the attorney general or county prosecutor” regarding prosecutorial functions. N.J.S.A. 2B:12-27. The Custodian argued that municipalities could not exercise control over the prosecutors in the carrying out of their official duties. See Kershenblatt v. Kozmor, 264 N.J. Super. 432, 430 (Law Div. 1993); Wright v. State, 169 N.J. 422, 461-62 (2001); State v. Clark, 162 N.J. 201, 206 (2000). Thus, the Custodian argued that the GRC did not have jurisdiction over any claims that the requested records were not provided by the Court or its municipal prosecutor.

The Custodian argued that the matter should be dismissed as frivolous under N.J.S.A. 47:1A-7(e) and N.J.S.A. 2A:15-59.1(b)(2). Additionally, the Custodian asserted that the Complainant was not entitled to fees since she properly denied the request.

Additional Submissions:

On December 26, 2018, the Complainant filed a letter brief in opposition to the Custodian’s SOI. Therein, the Complainant first argued that the Borough could not pass its responsibilities and obligations to OPRA onto to a third-party agent. The Complainant asserted that the Borough was trying to avoid liability by forwarding the request to the Township.

The Complainant also asserted that AADARI was a matter filed against the Township, while the instant matter was filed against the Borough regarding a separate OPRA request. Therefore, the Complainant argued that AADARI and the instant matter were unrelated. The Complainant also noted that AADARI made no reference to the Borough.

The Complainant next contended that the State’s Uniform Crime Reporting (“UCR”) program required law enforcement agencies or their agents to submit crime reports to the program on a monthly and annual basis. The Complainant therefore argued that WTPD was the reporting “agent” for the Borough. The Complainant argued that the number of drug and DUI incidents occurring within the Borough was separate from those incidents occurring within the Township.

The Complainant asserted that based on the forgoing, the Council should order the Borough to comply with the OPRA request and to award counsel fees pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006).

On January 4, 2019, the Custodian, through Counsel, submitted a reply to the Complainant's opposition brief. The Custodian maintained that she was not the proper custodian of record and forwarded the request to the Township in accordance with N.J.S.A. 47:1A-5(h). The Custodian maintained that WTPD did not separate its Arrest Listings between events occurring in the Township and the Borough. Thus, the Custodian asserted that the Arrest Listings the Township provided to the Complainant through AADARI were responsive to Item No. 3 of the request at issue. The Custodian also noted that the Complainant's reference to the UCR program neglected to mention that the program identified twenty (20) municipalities which contracted with other police departments. The Custodian argued that the Borough was one of those municipalities, and therefore maintained that the WTPD was the proper party to an action pertaining to the Complainant's OPRA request.

On January 5, 2019, the Complainant submitted a response to the Custodian. Therein, the Complainant asserted that AADARI pertained to an OPRA request separate from the instant matter. The Complainant therefore argued that it was not improper to file separate actions against the Borough and Township. The Complainant also asserted that the Township's December 27, 2018 e-mail containing the responsive records did not mention the Borough. The Complainant included a copy of said e-mail with his response.

On March 20, 2019, the Custodian's Counsel submitted correspondence to the GRC. Therein, Counsel asserted that the Township's counsel informed her that the Township provided the Complainant with all requested records resulting from AADARI, and that the matter was dismissed on January 17, 2019. Counsel added that the Township's counsel provided her with a copy of the December 27, 2018 e-mail sent to the Complainant, including the responsive records attached. Counsel argued that the Complainant failed to advise the GRC that the records provided on December 27, 2018 encompassed all requested records pertaining to the Borough. Thus, Counsel argued that the Complainant has in his possession all responsive records at issue, including the Arrest Listings obtained from the Township on October 28, 2018.

On April 6, 2019, the Complainant submitted correspondence to the GRC. Therein, the Complainant confirmed that he received the requested records that were attached to Counsel's letter dated March 20, 2019. The Complainant added that the only outstanding issue is the award of counsel fees as a prevailing party under the catalyst theory in Teeters, 387 N.J. Super. 423. The Complainant included a copy of a settlement agreement between AADARI and the Township, stating that the agreement did not reference the Borough. The Complainant also included a copy of his January 5, 2019 correspondence and accompanying attachments.

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 v. Stafford Police Dep't, 381 N.J. Super. 30, 38-39 (App. Div. 2005) 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 516-17.]

The Council subsequently expanded the court's holding in Burnett to agencies entered into a shared services agreement. See Michalak, GRC 2010-220. In that case, the complainant sought police dispatch logs from the Borough of Helmetta ("Helmetta"). The custodian asserted that Helmetta did not maintain the records as dispatch calls were routed through the Spotswood Police Department ("SPD"). The Council held that since Helmetta entered into a shared services agreement with the Borough of Spotswood to operate Helmetta's dispatch log, the custodian was obligated to obtain the requested records from SPD. The Council found that SPD "made, maintained, or kept on file" the dispatch logs on behalf of Helmetta pursuant to the shared services agreement. See Burnett, 415 N.J. Super. at 517.

Moreover, in Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005), the complainant requested e-mails sent to various individuals regarding official business but located on the mayor's home computer. The custodian alleged that due to the records' location, they were not government records. The Council found that the definition of a government record was not restricted its physical location. The Council further found that the requested records should be released in accordance with OPRA, to the extent they fell within the definition of a government record. Thus, the Council held that the location of a document was immaterial to its status as a government record.

Both Burnett and Michalak are directly applicable in the instant matter. In response to the Complainant's request, the Custodian explicitly stated that the Borough contracted with the Township to provide law enforcement services. Moreover, the Custodian's SOI included a copy of the "Interlocal Service Agreement" between the Borough and the Township to provide law enforcement services. Thus, the requested records were created and maintained in the Township on behalf of the Borough. Additionally, the Custodian was obligated to retrieve the records from the Township, as their physical location was immaterial. See Meyers, GRC 2005-127.

Accordingly, the Custodian unlawfully denied access to the requested records on the basis that the Township, with which the Borough had a shared services agreement, possessed the records. N.J.S.A. 47:1A-6; Burnett, 415 N.J. Super. 506; and Michalak, GRC 2010-220. The Custodian had an obligation to obtain the responsive records from the Township and provide same to the Complainant. See Meyers, GRC 2005-127. However, the GRC declines to order disclosure of the responsive records since the Complainant acknowledged receipt of same on March 20, 2019.

Knowing & Willful

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . ." N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access

under the totality of the circumstances. Specifically OPRA states “. . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . .” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the matter before the Council, the Custodian unlawfully denied access to the requested records. N.J.S.A. 47:1A-6. However, the Custodian ultimately cured the response issue on March 20, 2019. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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, 387 N.J. Super. 423, 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.]

In Mason, the plaintiff submitted an OPRA request on February 9, 2004. The defendant responded on February 20, eight (8) business days later, or one day beyond the statutory limit. Id. at 79. As a result, the Court shifted the burden to the defendant to prove that the plaintiff's lawsuit, filed on March 4, was not the catalyst behind defendant's voluntary disclosure. Id. Because defendant's February 20 response included a copy of a memo dated February 19 -- the seventh (7th) business day -- which advised that one of the requested records should be available on February 27 and the other one week later, the Court determined that the plaintiff's lawsuit was not the catalyst for the release of the records and found that she was not entitled to an award of prevailing party attorney fees. Id. at 80.

Additionally, although unpublished and decided during the pendency of this complaint, Nuckel v. N.J. Econ. Dev. Auth., 2020 N.J. Super. Unpub. LEXIS 948 (App. Div. 2020) is instructive. In Nuckel, the Plaintiff filed an action when he was denied access under OPRA to records pertaining to a third-party vendor ("Vendor"). Slip op. at 3. While the matter was pending, the Plaintiff issued a subpoena against the Vendor in a related tax litigation, seeking the same records withheld under OPRA. Slip op. at 4. The Vendor provided the records in response to the subpoena. Slip op. at 4. The Plaintiff acknowledged he received the records at issue in response to the subpoena and moved for an award of counsel fees under OPRA. Slip op. at 4. The trial court denied the Plaintiff's motion, stating that the elements of the catalyst theory were not met:

[T]he documents are ultimately provided by [the Vendor] in the context of WREIT versus Farmland Dairies, New Jersey Tax Docket Number 590-2017. [Vendor] was subpoenaed to provide information in that case. We have representations and there have been certification[s] filed by [Vendor's] counsel and documents attached to show what the subpoena requested and what they provided. But the documents that [Plaintiff] got through that litigation with Farmland Dairies in the tax court were documents that were also requested here, but the catalyst for his getting those documents was the subpoena in the tax case and not any ruling from this Court, not any settlement that was achieved by the parties in this court, and not any voluntary action from the [NJ]EDA that is connected to this litigation.

[Slip op. at 6-7.]

The Appellate Division affirmed the trial court's ruling since the catalyst resulting in the Plaintiff's receipt of the requested records was the subpoena in the tax litigation, and not from any ruling in the OPRA action.

In determining whether the Complainant is a prevailing party, the GRC acknowledges that the Custodian unlawfully denied access to the records pursuant to Burnett, 415 N.J. Super. 506, Michalak, GRC 2010-220, and Meyers, GRC 2005-127. N.J.S.A. 47:1A-6. Thus, the burden of proving this complaint was not the catalyst for providing the responsive records to the Complainant on March 20, 2019 shifts to the Custodian pursuant to Mason, 196 N.J. 51.

In the matter before the Council, the Complainant alleged that the Borough failed to provide responsive records in response to his OPRA request, resulting in the filing of the instant matter. The Custodian asserted that the records were held with the Township since they provided

law enforcement services for the Borough. While this matter was pending, the Complainant filed an action in Superior Court against the Township, asserting they failed to provide responsive records to an OPRA request seeking the same records as those sought from the Borough, albeit as a separate request. See AADARI v. Washington Twp., Docket No. WRN-L-3422-18.

In his January 5, 2019 correspondence, the Complainant asserted that he received responsive records from the Township on December 27, 2018 as a result from a settlement agreement in AADARI. In her March 20, 2019 correspondence, Counsel asserted that the records the Complainant received on December 27, 2018 included records responsive to the OPRA request at issue, since the Township provided law enforcement services on their behalf. Counsel attached the December 27, 2018 e-mail and accompanying records with her correspondence. On April 6, 2019, the Complainant acknowledged receipt of responsive records via Counsel's March 20, 2019 e-mail and asserted that he was a prevailing party.

A review of the attachment included with Counsel's March 20, 2019 reveals that the December 27, 2018 e-mail (and accompanying records) was forwarded from the Township's clerk to the Township's counsel on January 7, 2019. At no point was Counsel or the Custodian included in or copied on the December 27, 2018 or January 7, 2019 e-mails until the Township's counsel forwarded same to Counsel on March 12, 2019. Thus, the attached records were not separate from or in addition to the records provided by the Township, but a duplicate received by Counsel. Therefore, Counsel's intent behind the attachment was not to voluntarily provide records in response to the complaint filing, but to notice the GRC that the Complainant had already received responsive records from the Township.

Additionally, the records were not provided pursuant to a settlement agreement between the Complainant and the Borough, as the Complainant stated that the agreement between AADARI and the Township made no mention of the Borough. Moreover, the records were not provided in response to a ruling from the GRC. Accordingly, just as the records in Nuckel were provided in response to a subpoena in a separate matter, the records at issue here were provided in response to litigation with the Township, and not through any action connected with the instant matter. Slip op. at 7. Thus, the GRC finds that the evidence supports that the complaint was not the catalyst for the Custodian's disclosure and that no casual nexus exists. Thus, the Complainant is not a prevailing party and is not entitled to an award of reasonable attorney's fees. Nuckel, slip op. at 7.

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 evidence of record supports that the responsive records provided to the Complainant were disclosed via separate litigation with the Township and not the Borough. See Nuckel, slip op. at 6-7. 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 unlawfully denied access to the requested records on the basis that the Township, with which the Borough had a shared services agreement, possessed the records. N.J.S.A. 47:1A-6; Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010); and Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). The Custodian had an obligation to obtain the responsive records from the Township and provide same to the Complainant. See Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005). However, the GRC declines to order disclosure of the responsive records since the Complainant acknowledged receipt of same on March 20, 2019.

2. The Custodian unlawfully denied access to the requested records. N.J.S.A. 47:1A-6. However, the Custodian ultimately cured the response issue on March 20, 2019. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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, 71 (2008). Specifically, the evidence of record supports that the responsive records provided to the Complainant were disclosed via separate litigation with the Township and not the Borough. See Nuckel v. N.J. Econ. Dev. Auth., 2020 N.J. Super. Unpub. LEXIS 948, at *6-7 (App. Div. 2020). 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

February 16, 2021