



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

June 30, 2020 Government Records Council Meeting

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

Complaint No. 2018-64

Complainant

v.

Township of Edison (Middlesex)
Custodian of Record

At the June 30, 2020 public meeting, the Government Records Council (“Council”) considered the June 23, 2020 Supplemental 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 the Council dismiss this matter since the Complainant withdrew his request for reconsideration of the Council’s February 26, 2020 Final Decision on June 11, 2020. Therefore, no further adjudication is required.

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**

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

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

GRC Complaint No. 2018-64

v.

**Township of Edison (Middlesex)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:³

1. Drug Recognition Expert (“DRE”) Rolling Log from January of 2016 to the present.
2. Copies of complaints that were prepared by the Township of Edison Police Department (“EPD”) relating to the DRE Rolling Logs mentioned in item #1 above.
3. Copies of DRE Reports prepared by the EPD’s DRE Officer(s) from January of 2016 to the present.
4. Copies of Driving While Intoxicated/Driving Under the Influence (“DWI/DUI”) complaints that were prepared and filed by the EPD from January of 2016 to the present.
5. Copies of drug possession complaints that were prepared and filed by the EPD from January of 2016 to the present.

Custodian of Record: Cheryl Russomanno
Request Received by Custodian: March 14, 2018
Response Made by Custodian: March 26, 2018
GRC Complaint Received: April 10, 2018

Background

February 26, 2020 Council Meeting:

At its February 26, 2020 public meeting, the Council considered the February 19, 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, found that:

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

² Represented by Ted Del Guercio, III, Esq., of McManimon, Scotland & Baumann, LLC (Roseland, NJ).

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

1. The Custodian has borne her burden of proof that she lawfully denied access to the Complainant's March 14, 2018 OPRA request Item Nos. 1-3, because the Custodian certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
2. The Custodian lawfully denied access to the Complainant's March 14, 2018 OPRA request Item Nos. 4 and 5. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the records reflects, that the Township of Edison Police Department does not electronically maintain or physically possess the responsive records; rather, the records are maintained solely by the Judiciary, over which the GRC has no jurisdiction. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005); N.J.S.A. 47:1A-7(g).
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, 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 (2008). Specifically, the evidence of record demonstrates that no responsive records exist for the Complainant's OPRA request Item Nos. 1-3, and that the Township of Edison Police Department did not maintain responsive records for Item Nos. 4 and 5. 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.

Procedural History:

On March 3, 2020, the Council distributed its Final Decision to all parties. On March 4, 2020, the Complainant filed a request for reconsideration of the Council's February 26, 2020 Final Decision based on a mistake and new evidence. Therein, the Complainant asserted that the decision was based on the mistaken premise that the "eCDR" system used by law enforcement to electronically generate Court Disposition Reporting forms CD-1, CD-2, and Warrants ("CDR forms") was maintained solely by the New Jersey Judiciary. The Complainant asserted before New Jersey enacted its bail reform legislation, law enforcement requested CDR forms from the New Jersey State Police ("NJSP"). The Complainant asserted that once completed, law enforcement would physically deliver or mail a completed CDR form to the appropriate court. The Complainant included excerpts from the "New Jersey Municipal Court Procedures Manual (April 1985)" ("NJMCPM"), indicating which parties received copies of the CDR forms once completed.

The Complainant asserted that eCDR was set up by NJSP in cooperation with the Administrative Office of the Courts ("AOC") to efficiently implement the bail reform law. The Complainant therefore asserted that eCDR was never under the sole control of the judiciary, but instead was a production of the executive branch via NJSP. The Complainant also asserted that while CDR forms were stored in eCDR, other court-related records such as orders, motions, pre-trial assessment reports, and pre-sentencing reports were stored in the "eCourts" system controlled

by the Judiciary. The Complainant argued that it was therefore a mistake to treat eCDR as equivalent to eCourts.

The Complainant asserted that once an officer completed a CDR form within eCDR, the officer would transmit the form to eCourts for filing. The Complainant asserted that once transmitted a PDF copy of the CDR form was stored and maintained within eCDR. The Complainant therefore argued that EPD had direct access to retrieve and print the CDR form without the assistance or authorization of any court, since eCDR was a form generation system created by NJSP. The Complainant asserted that police departments did not need to have physical copies of the CDR forms to have “constructive possession” under OPRA.

The Complainant also asserted that the GRC was mistaken to not consider the court rulings between the Complainant and the City of Bridgeton, City of Millville, and the East Greenwich Township, where the municipalities were ordered to print the CDR forms via eCDR and deliver same in response to the Complainant’s OPRA request.

Later on March 4, 2020, the Complainant provided an additional submission in support of his request for reconsideration. The Complainant attached an excerpted order and opinion dated February 28, 2020 from AADARI v. Town of West New York, Docket No. HUD-L-31-20, where the court ruled that the Town of West New York’s Police Department (“WNYPD”) unlawfully denied access to the requested complaints and summonses. The Complainant stated that the court held that because WNYPD officers created the records via eCDR and could access and print them via same, they were obligated to retrieve them under OPRA. The Complainant noted that the court also held that the custodian’s restrictive interpretation of eCDR’s dissemination guidelines was unreasonable.

On March 8, 2020, the Complainant provided an additional submission in support of his request for reconsideration. The Complainant attached a hearing transcript dated December 18, 2018 from AADARI v. City of Millville, Docket No. CUM-L-712-18, where the court held that the Millville Police Department had access to the requested records via eCDR and ordered their production.

On March 16, 2020, the Custodian submitted objections to the request for reconsideration. The Custodian asserted that apart from the opinion provided on March 4, 2020, the arguments and submissions raised were already presented or could have been presented prior to the Council’s decision, and thus there was no basis for reconsideration. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990).

The Custodian asserted that the Complainant’s claim that EPD had “constructive possession” of the CDR forms supported the position that EPD’s officers must affirmatively enter eCDR to retrieve records stored by the Judiciary. The Custodian asserted that the Complainant’s NJMCPM excerpts affirmed the argument that the records were of the Judiciary and not law enforcement, since they indicated that copies of CDR forms were given to entities other than the arresting law enforcement agency.

The Custodian next asserted that notwithstanding the Complainant's reliance on West New York and other Law Division decisions, none were published, Millville was under appeal⁴, and the law remained unsettled regarding this issue. The Custodian attached briefs submitted by the agencies in Millville and AADARI v. Clifton, Docket No. PAS-L-3920-19, asserting they relied in part on the Council's previous rulings in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-74 (August 2011) and Schlosser v. City of Union City (Hudson), GRC Complaint No. 2009-45 (May 2009). The Custodian asserted that the Council held there was no unlawful denial of access because the municipalities certified that the requested summonses and complaints were not in their possession but rather with their respective municipal courts.

The Custodian also noted that in Clifton, the agency asserted that its police department did not have the ability to search eCDR to obtain the requested records, as there was no search engine to utilize. The Custodian also highlighted the argument that an officer could not access a complaint or summons via the Judiciary's ATS/ACS system since the records were not stored therein.

The Custodian finally argued that even if the Complainant met the requirements for reconsideration, he should not be entitled to an attorney fee award as a prevailing party. The Custodian asserted that the complaint was not the catalyst that prompted the production of records because the Township provided a timely response on March 26, 2018. See Mason v. City of Hoboken, 196 N.J. 51, 74 (2008). The Custodian asserted that the Township's good faith dispute over the disclosure of the requested summonses and complaints could not serve as the catalyst due to the current state of the law on this issue.

On June 11, 2020, the Complainant sent an e-mail to the GRC stating he was withdrawing his request for reconsideration.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council dismiss this matter since the Complainant withdrew his request for reconsideration of the Council's February 26, 2020 Final Decision on June 11, 2020. Therefore, no further adjudication is required.

Prepared By: Samuel A. Rosado
Staff Attorney

June 23, 2020

⁴ The Appellate Division reversed the trial court's decision in Simmons v. Mercado, ___ N.J. Super. ___ (App. Div. 2020).



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FINAL DECISION

February 26, 2020 Government Records Council Meeting

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

Complaint No. 2018-64

v.

Township of Edison (Middlesex)
Custodian of Record

At the February 26, 2020 public meeting, the Government Records Council (“Council”) considered the February 19, 2020 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has borne her burden of proof that she lawfully denied access to the Complainant’s March 14, 2018 OPRA request Item Nos. 1-3, because the Custodian certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
2. The Custodian lawfully denied access to the Complainant’s March 14, 2018 OPRA request Item Nos. 4 and 5. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the records reflects, that the Township of Edison Police Department does not electronically maintain or physically possess the responsive records; rather, the records are maintained solely by the Judiciary, over which the GRC has no jurisdiction. Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005); N.J.S.A. 47:1A-7(g).
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, 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 (2008). Specifically, the evidence of record demonstrates that no responsive records exist for the Complainant’s OPRA request Item Nos. 1-3, and that the Township of Edison Police Department did not maintain responsive records for Item Nos. 4 and 5. 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 26th Day of February 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: March 3, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 26, 2020 Council Meeting**

**Rotimi Owoh, Esq. (on behalf of¹
African American Data and Research Institute)
Complainant**

GRC Complaint No. 2018-64

v.

**Township of Edison (Middlesex)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:³

1. Drug Recognition Expert (“DRE”) Rolling Log from January of 2016 to the present.
2. Copies of complaints that were prepared by the Township of Edison Police Department (“EPD”) relating to the DRE Rolling Logs mentioned in item #1 above.
3. Copies of DRE Reports prepared by the EPD’s DRE Officer(s) from January of 2016 to the present.
4. Copies of Driving While Intoxicated/Driving Under the Influence (“DWI/DUI”) complaints that were prepared and filed by the EPD from January of 2016 to the present.
5. Copies of drug possession complaints that were prepared and filed by the EPD from January of 2016 to the present.

Custodian of Record: Cheryl Russomanno
Request Received by Custodian: March 14, 2018
Response Made by Custodian: March 26, 2018
GRC Complaint Received: April 10, 2018

Background⁴

Request and Response:

On March 14, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 26, 2018, Maureen Connell, on behalf of the Custodian, responded in writing that for Item Nos. 1-3, no responsive records exist because the EPD did not employ a DRE. Regarding Item Nos. 4 and 5, Ms. Connell

¹ No legal representation listed on record.

² Represented by Ted Del Guercio, III, Esq., of McManimon, Scotland & Baumann, LLC (Roseland, NJ).

³ The Complainant sought other records that are not at issue in the instant complaint.

⁴ 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) v. Township of Edison (Middlesex), 2018-64 – Findings and Recommendations of the Executive Director

stated that the EPD did not possess responsive records because same were maintained with the Township of Edison Municipal Court (“Court”).

Denial of Access Complaint:

On April 10, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that the Custodian violated OPRA by denying access to his request. The Complainant asserted that in Obafemi v. Plainsboro Twp., Docket No. MID-L-5752-16 (Law Div. June 30, 2017), the court addressed a similar case pertaining to the Plainsboro Township Police Department (“PPD”). The Complainant contended that the court ruled in his favor and ordered an award of attorney’s fees. The Complainant also noted that the South Brunswick Township Police Department (“SBPD”) recently provided responsive records to Item Nos. 2, 4, and 5 in response to a similar OPRA request.

Therefore, the Complainant requested that the GRC order immediate disclosure of records, award counsel fees and costs pursuant to OPRA, and other such relief as may be fair, equitable, and necessary.

Statement of Information:

On April 25, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on March 14, 2018. The Custodian certified that the Township of Edison (“Township”) confirmed the absence of a DRE, and therefore would not possess responsive records for Item Nos. 1-3. The Custodian also certified that she confirmed with the EPD twice that they did not maintain responsive records for Item Nos. 4 and 5. The Custodian certified that Ms. Connell responded on her behalf in writing on March 26, 2018, stating that no responsive records exist for Item Nos. 1-3, and that neither the Township nor EPD maintained responsive records for Item Nos. 4 and 5.

The Custodian asserted that the Complainant’s reference to Obafemi was inapposite to the current matter. The Custodian contended that unlike the PPD in Obafemi, any complaints responsive to Item Nos. 4 and 5 were held exclusively by the Court. Additionally, the Custodian maintained that unlike the PPD, the Township did not have a DRE, and therefore it was impossible to provide responsive records for Item Nos. 1-3.

The Custodian concluded that the Township complied with all requirements under OPRA and demanded that the GRC dismiss the matter.

Additional Submissions:

On April 30, 2018, the Complainant filed a letter brief in opposition to the Custodian’s SOI. Therein, the Complainant attached a copy of a response from Woodbridge Police Department (“WPD”), wherein they also claimed that that request Item Nos. 2, 4, and 5 were only available through their municipal court. The Complainant then attached a letter from the Clerk of the Superior Court for the New Jersey Judiciary (“Judiciary”) dated April 11, 2018 (“Clerk’s Letter”), stating that records responsive for Item Nos. 1-3 and 5 should be produced by the WPD. The

Complainant contended that the Clerk's Letter was consistent with the Obafemi decision, where the court awarded the Complainant counsel fees under OPRA. The Complainant also included eight (8) responses from other municipal police departments that provided responsive records for Item Nos. 4 and 5.

On May 12, 2018, the Complainant filed a supplemental brief. The Complainant noted that the State's "Records Retention and Disposal Schedule for Municipal Prosecutors" indicated that complaints were required to be retained and stored by the agency for fifteen (15) years. The Complainant also noted that the State's "Records Retention and Disposal Schedule for Municipal Police Departments" indicated that police departments were required to retain a "copy" of the requested records for at least thirty (30) days after disposition of the relevant case. The Complainant contended that since the Township's prosecutor and police officers were Township employees, the requested records for Item Nos. 4 and 5 should have been provided just as other police departments have when requested via OPRA.

On May 30, 2018, Custodian's Counsel filed a reply in response to the Complainant. Counsel contended that the Complainant's request focused on "police copies" of judiciary records, and such records are not subject to OPRA. Counsel further argued that any copy of those records that may be available to a police department would not fall within the purview of OPRA. Counsel also argued that the Clerk's Letter contradicted the Complainant's position. Counsel asserted that the letter demonstrated that R. 1:38 was established as a method to obtain access to judicial records. Counsel thus argued that municipal court records such as complaints should be sought directly from the Court under R. 1:38, and not through police departments under OPRA.

On June 2, 2018, the Complainant filed a reply in response to Counsel. The Complainant attached a court order wherein the judge ordered the Complainant to file his OPRA request seeking the same records with Woodbridge Township's ("Woodbridge") prosecutor rather than the municipal court. The Complainant also attached an e-mail from opposing counsel five (5) days after the date of the order declaring Woodbridge's intent to make the requested records available to the Complainant. The Complainant asserted that these attachments supported his position that the Township violated OPRA by not providing responsive records for Item Nos. 4 and 5.

On January 30, 2020, the GRC requested additional information from the Custodian. Specifically, the GRC asked the Custodian:

1. Upon entering and/or filing complaints responsive to Item No. 4 with the municipal court, does the EPD maintain any duplicates or "police copies" of those complaints?
2. Upon entering and/or filing complaints responsive to Item No. 5 with the municipal court, does the EPD maintain any duplicates or "police copies" of those complaints?

On February 3, 2020, the Custodian responded to the GRC. The Custodian certified that the EPD informed her they did not maintain copies of complaints responsive to the Complainant's OPRA request Item Nos. 4 and 5. The Complainant certified that physical copies were not maintained by the EPD but were instead electronically maintained in databases controlled by the Judiciary. The Custodian certified that the appropriate method of obtaining copies of such complaints should be through a request directed to the Court rather than the Township.

On February 4, 2020, the Complainant filed a reply to the Custodian's certification. Therein the Complainant first argued that because EPD officers "made" the complaints upon issuing them, they qualified as government records under OPRA. Further, the Complainant contended that according to an Attorney General Directive, if the complaints were unable to be entered electronically, police officers were required to prepare the complaints manually and then sent to the municipal court for filing.

The Complainant also argued 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 EPD officers had direct access to the database maintaining the complaints and could retrieve and print the complaints without any assistance, help, or permission from the Court. The Complainant noted that several Law Division courts have ruled that these complaints were subject to access under OPRA.

The Complainant also argued that EPD should not be allowed to erect technological barriers as means to deny access to government records. The Complainant contended that the complaints should remain subject to access under OPRA regardless of whether they were prepared manually in the past but now entered electronically. The Complainant next asserted that the standard under OPRA was not "actual possession" but rather "access" to the requested records, citing Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), and Verry v. Franklin Fire Dist. No. 1, 230 N.J. 285 (2017).

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.

Item Nos. 1-3

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). Here, the Complainant's OPRA request Item Nos. 1-3 sought logs, complaints, and reports created by the EPD's DRE between 2016-2018. The Custodian responded and certified in her SOI that the EPD does not have a DRE, and therefore would not have responsive records.

The Complainant argued because the PPD and SBPD provided responsive records for Item Nos. 1-3 via a similar OPRA request, the Custodian should have provided responsive records as well. The Complainant further contended that in Obafemi, the court awarded the Complainant prevailing party attorney's fees where the PPD initially denied access. However, Obafemi is an unpublished case, and thus has authoritative value in very limited circumstances. See R. 1:36-3.

Moreover, the Complainant provided only an excerpt of the court's decision where the court recited the Complainant's claim that the PPD provided DRE records during litigation. Obafemi, slip op. at 7. Unlike the current matter, the court's mention of DRE records did not speak to whether the PPD originally asserted that they did not have a DRE. Id. Next, the Complainant's April 30, 2018 brief included responses from the Borough of Palmyra, Borough of Helmetta, and the Township of Maple Shade, wherein they asserted that their police departments did not have a DRE and therefore had no responsive records for Item Nos. 1-3. This further supports the Custodian's argument that the PPD and SBPD's production of responsive records for Item Nos. 1-3 does not indicate that EPD should also have a DRE, and in turn responsive records.

Accordingly, the Custodian has borne her burden of proof that she lawfully denied access to the Complainant's March 14, 2018 OPRA request Item Nos. 1-3, because the Custodian certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49.

Item Nos. 4 and 5

OPRA also provides that the GRC "shall not have jurisdiction over the Judicial or Legislative Branches of State Government or any agency, officer, or employee of those branches. N.J.S.A. 47:1A-7(g). In Pitts v. N.J. Dep't of Corr., GRC Complaint No. 2013-299 (September 2014), the custodian argued in part that because the requested presentence report was a court record created by the Judiciary, it was not a government record under N.J.S.A. 47:1A-1.1, and not within the GRC's jurisdiction under N.J.S.A. 47:1A-7(g). The Council disagreed, holding that because the agency received and kept on file a copy of the record, it still met the definition of a government record. N.J.S.A. 47:1A-1.1. The Council further held that OPRA's jurisdictional prohibition applies when the Judiciary is the records custodian.

The facts in the current matter are distinguished from those in Pitts, GRC 2013-299. Here, unlike the agency in Pitts, the Custodian certified that the EPD did not maintain any physical copies of the complaints. Furthermore, the Custodian certified that the Judiciary maintained the electronic database used by police officers to file the requested records. In a letter to the Complainant, counsel for the City of Elizabeth stated that the responsive records were "entered and stored electronically" via the Judiciary's main website, and that "to retrieve said records, an individual with proper access to the njcourts.gov site would input identifying information for each case in order to locate the summons and complaint[.]" See Complainant's Reply dated February 4, 2020, Ex. 19.

Additionally, while the Complainant relies on Paff, 229 N.J. 343 and Burnett, 415 N.J. Super. 506 to demonstrate an agency's responsibilities when they have access to records, the facts in those cases are distinguishable as well. In Paff, the agency maintained the e-mail server containing the requested information. See 229 N.J. at 352. In Burnett, the requested settlements were created by, entered on behalf of, and retained by a private, third-party insurer under contract with the public agency. See 415 N.J. Super. at 513. Here, the Judiciary, not the EPD, maintains the server containing the requested records, and the GRC has no jurisdiction over records maintained solely by the Judiciary. N.J.S.A. 47:1A-7(g).

Therefore, the Custodian lawfully denied access to the Complainant's March 14, 2018 OPRA request Item Nos. 4 and 5. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the records reflects, that the EPD does not electronically maintain or physically possess the responsive records; rather, the records are maintained solely by the Judiciary, over which the GRC has no jurisdiction. Pusterhofer, GRC 2005-49; N.J.S.A. 47:1A-7(g).

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 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. 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 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 also 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 filed this complaint asserting that the Township failed to provide responsive records to his OPRA request. The Complainant requested that the GRC order the Custodian to disclose to the Complainant the responsive records and determine that the Complainant was a prevailing party entitled to reasonable attorney’s fees pursuant to N.J.S.A. 47:1A-6.

In determining whether the Complainant is a prevailing party, the evidence of record must establish a casual nexus existed between the filing of this complaint and disclosure of records. Having reviewed the evidence, the GRC does not find that such a casual nexus exists. Based the evidence of record, the GRC determined that no responsive records exist for Item Nos. 1-3, and that the EPD did not maintain responsive records for Item Nos. 4 and 5 as they are entered into a database maintained by the Judiciary. Thus, at the time of the subject OPRA request, no unlawful denial of access occurred.

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. at 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. at 71. Specifically,

the evidence of record demonstrates that no responsive records exist for the Complainant's OPRA request Item Nos. 1-3, and that the EPD did not maintain responsive records for Item Nos. 4 and 5. 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has borne her burden of proof that she lawfully denied access to the Complainant's March 14, 2018 OPRA request Item Nos. 1-3, because the Custodian certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
2. The Custodian lawfully denied access to the Complainant's March 14, 2018 OPRA request Item Nos. 4 and 5. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the records reflects, that the Township of Edison Police Department does not electronically maintain or physically possess the responsive records; rather, the records are maintained solely by the Judiciary, over which the GRC has no jurisdiction. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005); N.J.S.A. 47:1A-7(g).
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, 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 (2008). Specifically, the evidence of record demonstrates that no responsive records exist for the Complainant's OPRA request Item Nos. 1-3, and that the Township of Edison Police Department did not maintain responsive records for Item Nos. 4 and 5. 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.

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