



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

August 25, 2020 Government Records Council Meeting

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

Complaint No. 2019-17

v.

Logan Township Police Department (Gloucester)
Custodian of Record

At the August 25, 2020 public meeting, the Government Records Council (“Council”) considered the August 18, 2020 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds the:

1. The original Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the original Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). However, the Council declines to order disclosure since the evidence of record indicates that the Custodian provided the responsive records on April 2, 2019.
2. The original Custodian’s failure to timely respond in writing resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the current Custodian provided the Complainant with all responsive records that existed on April 2, 2019. Additionally, the evidence of record does not indicate that the original Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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 (2008). Specifically, the Custodian had no knowledge of the subject OPRA request until after the filing of this complaint. Further, the Custodian’s inability to address the request prior to Denial of Access Complaint nullifies the causal nexus



between his subsequent response and the complaint. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 25th Day of August 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: August 27, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 25, 2020 Council Meeting**

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

GRC Complaint No. 2019-17

v.

**Logan Township Police Department (Gloucester)²
Custodial Agency**

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

1. “Record Retention and Disposition Schedules” used by the Logan Township Police Department (“LTPD”) from January through December 2016; January through December 2017; and January through present 2018.
2. Records Retention and Disposition policies and directives used by the LTPD for the time frames in item No. 1.
3. Standard Operating Procedures (“SOP”) for retention and disposition used by the LTPD for the time frames in item No. 1.
4. Agreement between the Logan Township (“Township”) and the applicable storage facility or any record showing the address where the City stored summonses and complaints for fifteen (15) years.
5. SOP, manual or directives relating to use of eCDR by LTPD.
6. Name, title, position, and date of hire of each individual within LTPD who has access to the eCDR.
7. “Arrest Card File” from January 2017 through November 2018.
8. “Summonses Log Book” from January 2017 through November 2018.

Custodian of Record: Chief Joseph Lombardo³

Request Received by Custodian: April 2, 2019

Response Made by Custodian: April 2, 2019

GRC Complaint Received: January 29, 2019

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

² Represented by Brian J. Duffield, Esq., of Law Office of Brian J. Duffield (Mullica Hill, NJ).

³ The original “Custodian of Record” was Chief Robert Lease, who retired effective December 31, 2018.

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Background⁴

Request:

On December 9, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On January 29, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to respond to the subject OPRA request. The Complainant requested that the Council determine that the Custodian violated OPRA, order disclosure of the requested records, and hold that he is a prevailing party entitled to an award of attorney’s fees.

Response:

On April 2, 2019, the Custodian responded in writing stating that the Complainant stating that the Complainant sent the subject OPRA request to original Custodian’s e-mail account, who retired. The Custodian stated that because of this, he was not aware of this OPRA request under conducting research to locate it on April 1, 2019. The Custodian further stated that because he was unaware of the subject OPRA request, he believed that this Denial of Access Complaint related to a prior OPRA request.⁵ The Custodian suggested that going forward, the Complainant may want to follow up an electronic OPRA request with a hardcopy via U.S. mail.

The Custodian further stated that regarding the subject OPRA request, he was disclosing records responsive to item Nos. 1, 6, and 7. The Custodian further stated that no records responsive to item Nos. 2, 3, 5, and 8 existed. The Custodian finally stated that in response to item No. 4, all records were maintained at the municipal building.

Statement of Information:

On April 2, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on April 2, 2019. The Custodian certified that he responded the same day disclosing those records that existed and denying access to those request items to which no records existed.

The Custodian contended that, unaware of the subject OPRA request, he conducted “research” to locate it on April 1, 2019 because it was sent to the original Custodian’s e-mail account, who retired. The Custodian asserted that his initial belief was that 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.

⁵ That OPRA request was the subject of Owoh, Esq. (O.B.O. AADARI & Baffi Simmons) v. Twp. of Logan Police Dep’t (Gloucester), GRC Complaint No. 2018-264 (July 2020).

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related to a prior OPRA request submitted in October 2018. The Custodian averred that upon locating the subject OPRA request, he endeavored to respond to it.

Additional Submissions:

On October 19, 2018, the Complainant submitted a letter brief responding to the SOI. Therein, the Complainant stated that he received the responsive records after filing the instant complaint. The Complainant thus asserted that the only outstanding issue here is whether he is a prevailing party entitled to an award of attorney's fees. The Complainant stated that OPRA's fee shifting provision is decided based on the catalyst theory. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). The Complainant stated that attached was "evidence of [his] hourly rate."

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁶ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Here, the Complainant argued that the Custodian failed to respond to his OPRA request within the statutory time frame. In the SOI, the Custodian certified that he was unaware of the subject OPRA request because the Complainant sent it to the original Custodian, who retired. That retirement occurred on December 31, 2018, according to the Township's January 15, 2019 meeting minutes.⁷ However, there is no evidence in the record to suggest that the original Custodian was either not available for an extended period of time prior to his retirement or that a transition between the original and current Custodians' occurred at any point during the pendency of the subject OPRA request. In the absence of this evidence, the facts support that the original Custodian had sufficient time prior to his retirement to respond to the subject OPRA request and failed to do so.

Therefore, the original Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the original Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to

⁶ A custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

⁷ <https://www.logan-twp.org/minutes-agendas/> (accessed August 7, 2020).

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N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. However, the Council declines to order disclosure since the evidence of record indicates that the Custodian provided the responsive records on April 2, 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 original Custodian’s failure to timely respond in writing resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the current Custodian provided the Complainant with all responsive records that existed on April 2, 2019. Additionally, the evidence of record does not indicate that the original Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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 Court held that a complainant is a “prevailing party” if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. Id. at 432. Additionally, the Court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason, 196 N.J. 51, the Supreme Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . .” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, citing Teeters, 387 N.J. Super. at 429; see, e.g., Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), certif. denied, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a **prevailing party**; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

[Mason at 73-76 (2008).]

The Court in Mason, further held that:

[R]equestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) “a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved”; and (2) “that the relief ultimately secured by plaintiffs had a basis in law.” Singer v. State, 95 N.J. 487, 495, [certif. denied](1984).

[Id. at 76.]

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 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.

In determining whether the Complainant is a prevailing party, the GRC acknowledges that the original Custodian’s failure to respond in writing in a timely manner resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). Thus, the burden of proving that this complaint was not the catalyst for providing the responsive records to the Complainant shifts to the Custodian pursuant to Mason, 196 N.J. at 79.

In the matter before the Council, the Complainant alleged that the Custodian failed to respond to his OPRA request. Following the Denial of Access Complaint, the Custodian responded to the Complainant on April 2, 2019 advising that he did not receive the original OPRA request, which was sent to the retiring original Custodian. In the SOI, the Custodian reiterated that he never received the subject request, noting that he believed this Denial of Access Complaint was related to an earlier OPRA request. Thereafter, the Complainant acknowledged that he received a satisfactory response and believed he was a prevailing party entitled to an award of attorney’s fees.

In determining whether the Complainant is a prevailing party, the evidence of record must establish a causal nexus existed between the filing of this complaint and disclosure of the responsive records. However, in accordance with Mason 196 N.J. 79, the burden shifts to the Custodian to prove that the instant Denial of Access Complaint was not the catalyst for her disclosure. Having reviewed the evidence of record, the GRC does not find that a causal nexus exists between this complaint and the Custodian’s actions. Specifically, the evidence of record shows that the original Custodian failed to respond to the subject OPRA request prior to his retirement. Further, the Custodian was unaware of the subject OPRA request until a few months after the filing of the complaint. It was not until the Custodian realized that this complaint was not related to an earlier OPRA request that he was able to locate and respond to the subject OPRA

request on April 2, 2019. While the Denial of Access Complaint ultimately alerted the Custodian to subject OPRA request, he had no ability to attempt to address it in advance of the complaint filing. It is within these unique set of circumstances that the GRC cannot conclude that this complaint changed the Custodian's conduct. That is, the Custodian exhibited no prior conduct because he was unaware of the subject OPRA request before this complaint filing.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters, 387 N.J. Super. 432. Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Custodian had no knowledge of the subject OPRA request until after the filing of this complaint. Further, the Custodian's inability to address the request prior to Denial of Access Complaint nullifies the causal nexus between his subsequent response and the 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 original Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the original Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). However, the Council declines to order disclosure since the evidence of record indicates that the Custodian provided the responsive records on April 2, 2019.
2. The original Custodian's failure to timely respond in writing resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the current Custodian provided the Complainant with all responsive records that existed on April 2, 2019. Additionally, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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 (2008). Specifically, the Custodian had no knowledge of the subject OPRA request until after the filing of this complaint. Further, the Custodian's inability to

address the request prior to Denial of Access Complaint nullifies the causal nexus between his subsequent response and the complaint. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Prepared By: Frank F. Caruso
Executive Director

August 18, 2020