



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

May 18, 2021 Government Records Council Meeting

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

Complaint No. 2020-111

v.
City of New Brunswick (Middlesex)
Custodian of Record

At the May 18, 2021 public meeting, the Government Records Council (“Council”) considered the May 11, 2021 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian lawfully denied access to the Complainant’s April 28, 2020 OPRA request item Nos. 1-3. N.J.S.A. 47:1A-6. Specifically, Deputy Director J. T. Miller and the Custodian certified, and the record reflects, that the City does not possess or maintain the requested complaints and summonses. See Simmons v. Mercado, 464 N.J. Super. 77 (App. Div.), certif. granted, 2020 LEXIS 1218 (Oct. 26, 2020); Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
2. The Custodian lawfully denied access to the Complainant’s OPRA request item No. 4 seeking records, reports, and notifications generated from New Brunswick Police Department’s Early Warning System, as same are exempt from disclosure pursuant to the Attorney General Law Enforcement Directive No. 2018-3. N.J.S.A. 47:1A-6; O’Shea v. Twp. of West Milford, 410 N.J. Super. 371, 382 (App. Div. 2009). Additionally, to the extent the Complainant seeks disciplinary records, same are exempt under OPRA’s personnel records exemption. N.J.S.A. 47:1A-10; Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 2004).
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, 71 (2008). Specifically, the Complainant failed to achieve the relief sought in his Denial of Access Complaint. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 71.

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

Final Decision Rendered by the
Government Records Council
On The 18th Day of May 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: May 20, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 18, 2021 Council Meeting**

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

GRC Complaint No. 2020-111

v.

**City of New Brunswick (Middlesex)²
Custodial Agency**

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

1. Driving Under the Influence (“DUI”) and Driving While Intoxicated (“DWI”) summonses and complaints that were prepared by the Police Department from January 2020 through present.
2. Drug possession complaints and summonses prepared and filed by the Police Department from January 2020 through present.
3. Drug paraphernalia complaints and summonses prepared and filed by the Police Department from January 2020 through present.
4. Records, reports, and notifications showing and tracking the number of police officers who triggered the [Early Warning System (“EW System”)] performance indicators, the conduct that triggered the EW System, and the remedial actions and disciplinary actions that were taken by the police department against police officers from 2019 to the present. Please feel free to redact the names and personal identifying information about specific police officers.

Custodian of Record: Leslie Zeledón
Request Received by Custodian: April 28, 2020
Response Made by Custodian: May 15, 2020
GRC Complaint Received: June 4, 2020

Background⁴

Request and Response:

On April 16, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 15, 2020, Deputy Director

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

² Represented by Joseph Catanese, Esq., Assistant City Attorney (New Brunswick, NJ).

³ The Complainant sought additional records that are not at issue in this 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 & Research Institute) v. City of New Brunswick (Middlesex), 2020-111 – Findings and Recommendations of the Executive Director

J.T. Miller⁵ of the City of New Brunswick Police Department (“NBPD”) responded in writing on the Custodian’s behalf stating that for item Nos. 1-3, the requested records were court records and not maintained by NBPD. D. Director Miller also provided the main telephone number for the New Brunswick Municipal Court (“Court”). Regarding item No. 4, D. Director Miller asserted that the requested information was not maintained in a specific record or report. D. Director Miller stated that compiling the information would require research and the creation of records not already maintained.

Denial of Access Complaint:

On June 4, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that New Jersey police departments have direct access to eCDR as well as the ATS/ACS database. The Complainant argued that police departments did not need the assistance or permission of the Court to access the database which contain the responsive records. The Complainant included excerpts of relevant court opinions in support of his position. The Complainant therefore requested the GRC compel compliance with the OPRA request and to award counsel fees.

Statement of Information:

On December 28, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on April 28, 2020. The Custodian certified that the search for records included a computer search of NBPD arrest records and department policies. The Custodian certified that on May 15, 2020, D. Director Miller responded on her behalf stating that NBPD did not maintain the requested complaints and summonses and did not maintain a record containing information responsive to item No. 4.

Regarding item No. 4, the Custodian maintained that the NBPD did not maintain a list of officers who have triggered the EW System. The Custodian contended that fulfilling this portion of the request would require research and create records, which she is not required to do under OPRA. See Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007).

Regarding item Nos. 1-3, the Custodian asserted that the City of New Brunswick (“City”) relied on the on the Appellate Divisions opinion in Simmons v. Mercado, 464 N.J. Super. 77 (App. Div.), certif. granted, 2020 LEXIS 1218 (Oct. 26, 2020), which superseded the superior court decisions referenced by the Complainant.

Additional Submissions:

On December 28, 2020, the Complainant filed a letter brief in opposition to the Custodian’s SOI. Therein, the Complainant argued that even in the Simmons decision, the municipality provided summonses responsive to item No. 1. The Complainant argued that DUI/DWI summonses were stored separately from CDR-1 complaints for drug related offenses and should be available for production.

⁵ D. Director Miller held the rank of “Captain” at the time of his response, but subsequently received a change in title. Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute) v. City of New Brunswick (Middlesex), 2020-111 – Findings and Recommendations of the Executive Director

The Complainant also stated that the Simmons decision was being actively reviewed by the New Jersey Supreme Court. The Complainant also argued that the Custodian did not deny that hard copies of the records may be available in case files and held as required pursuant to the Records Retention Schedule for both Municipal Police Departments and Municipal Prosecutors.

Regarding item No. 4, the Complainant argued that redacted copies of responsive records were subject to disclosure under Attorney General Directive 2018-3 (“Directive”). The Complainant maintained that the GRC should require the Custodian to make the records available to the Complainant and award counsel fees.

On April 21, 2021, the GRC submitted a request for additional information from the Custodian. Specifically, the GRC asked the Custodian:

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

On April 28, 2021, the Custodian responded to the GRC’s request. The Custodian asserted that she did not have access or personal knowledge to certify to the information requested by the GRC, but instead provided a certification from D. Director Miller.

D. Director Miller certified that for question No. 1, the NBPD did not have a policy or procedure in place regarding the maintenance of summons or complaints once completed and forwarded to the Court. D. Director Miller added that officers were not prohibited from maintaining a copy for their personal reference, but the Custodian would need to ask every officer and would require research since there was no mechanism to search for the requested records.

Regarding question No. 2, D. Director Miller certified that the Municipal Prosecutor did not maintain a physical file for summonses and complaints. D. Director Miller certified that the Municipal Prosecutor obtains copies of summonses and complaints from the Court when preparing for an individual case. Regarding question No. 3, D. Director Miller certified that NBPD did not maintain a file of summonses and complaints or keep them in archives and storage.

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). In Merino, GRC 2003-110, the custodian argued that the requested complaints and summonses were not subject to access since they were dated beyond the required retention period via the State's retention schedule. The Council held that if the agency in fact possessed the responsive records, they were subject to access under OPRA even if they were supposed to have been destroyed in accordance with the retention schedule.

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

Furthermore, although decided during the pendency of this complaint, the GRC finds the Appellate Division's holding in Simmons v. Mercado, 464 N.J. Super. 77 (App. Div.), certif. granted, 2020 LEXIS 1218 (Oct. 26, 2020) relevant and binding. In Simmons, the Complainant requested the same records as those at issue in the instant matter, with the custodian asserting that the records were not maintained by the Millville Police Department ("MPD") once its officers created and submitted the records through eCDR. 464 N.J. Super. at 80. The court found that notwithstanding MPD's access to eCDR, "it does not alter the fact that the [requested complaints and summonses are] maintained by the judiciary." Id. at 86. The court noted that although an MPD officer initiates the creation of the responsive records, "the document is completed by eCDR and the finished product is maintained by the municipal court, or, in a larger sense, the judiciary." Id. at 85-86.

In the current matter, D. Director Miller responded on the Custodian's behalf stating that the City did not possess or maintain copies of the requested summonses and complaints and directed the Complainant to request them from the Court. The Custodian maintained this position in her SOI. Additionally, in response to the GRC's request for additional information, D. Director Miller certified that the City's Municipal Prosecutor did not maintain the requested records, nor did the City keep or maintain the records in archives or storage.

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

Initially, the GRC addresses the Complainant's arguments pertaining to retention schedules. Upon review, the Complainant's reliance on Merino, GRC 2003-110 to contend that

NBPD and the City's Municipal Prosecutor are required by law to maintain the requested records based upon the retention schedules ignores the prevailing caselaw. Instead, the retention schedules determine how records that may be in an agency's possession are to be maintained, and are not a legal requirement to make, maintain, or keep on file every identified record. See N. Jersey Media Grp. Inc., 229 N.J. at 568. Therefore, the retention schedules alone do not counter the Custodian's certification that the City does not possess or maintain the requested records.

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

Accordingly, the Custodian lawfully denied access to the Complainant's April 28, 2020 OPRA request item Nos. 1-3. N.J.S.A. 47:1A-6. Specifically, D. Director Miller and the Custodian certified, and the record reflects, that the City does not possess or maintain the requested complaints and summonses. See Simmons, 464 N.J. at 86; Pusterhofer, GRC 2005-49.

Item No. 4

The Council is permitted to raise additional defenses regarding the disclosure of records pursuant to Paff v. Twp. of Plainsboro, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div. 2007) (certif. denied, 193 N.J. 292 (2007)).⁶ In Paff, the complainant challenged the GRC's authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the custodian's denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian's cited basis for denial was lawful. The court held that:

The GRC has an independent obligation to "render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to' OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian's initial determination; it is charged with determining if the initial decision was correct."

The court further stated that:

Aside from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-

⁶ On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).
Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute) v. City of New Brunswick (Middlesex), 2020-111 – Findings and Recommendations of the Executive Director

30 (App. Div. 1998) (citing Isko v. Planning Bd. of Livingston, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action) (aff'd, 24 N.J. 139 (1957)).

OPRA provides that “[n]otwithstanding the provisions [OPRA] or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency . . . shall not be considered a government record . . .” N.J.S.A. 47:1A-10. OPRA begins with a presumption against disclosure and “proceeds with a few narrow exceptions that . . . need to be considered.” Kovalcik v. Somerset Cty. Prosecutor’s Office, 206 N.J. 581 (2011). In Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 2004), the Council held that:

The Complainant’s request to review the records of complaints filed against Officer Tuttle were properly denied by the Custodian. N.J.S.A. 47:1A-10 provides in pertinent [part] that “the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a public record and shall not be made available for public access” [emphasis omitted]. As a result, records of complaints filed against Officer Tuttle and/or reprimands he has received are not subject to public access.

[Id.]

In Rodriguez v. Kean Univ., GRC Complaint No. 2013-296 (June 2014), the Council held that “disciplinary actions are not specifically identified as personnel information subject to disclosure under OPRA.” Id. at 5. Furthermore, the Appellate Division has held that the personnel records exemption may apply to records that “. . . bear many of the indicia of personnel files.” North Jersey Media Grp. v. Bergen Cnty. Prosecutor’s Office, 405 N.J. Super. 386, 390 (App. Div. 2009). See also McGee, 416 N.J. Super. at 616 (noting that OPRA’s personnel records exemption “is not limited to the items included in a personnel file”).

In O’Shea, the Appellate Division held that Attorney General directives, like guidelines, “cannot be ignored” and are “binding and enforceable on local law enforcement agencies. . . .” 410 N.J. Super. at 382. Like the Internal Affairs Policy & Procedures (“IAPP”), the Directive derives its authority from Attorney General’s status as the chief law enforcement officer of the State and tasked with the general supervision of criminal justice. See N.J.S.A. 52:17B-97 to -117. Thus, the Directive has the force of law for police entities.

The purpose of the Directive was to require implementation of the EW System to all law enforcement agencies in New Jersey.⁷ The EW System is a management tool intended to detect

⁷ Directive at 1.

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute) v. City of New Brunswick (Middlesex), 2020-111 – Findings and Recommendations of the Executive Director

trends in police conduct and help identify and remediate a potentially problematic officer before conduct escalates to becoming a substantial risk to public safety.⁸ The Directive provides a minimal set of “performance indicators” monitored by the EW System.⁹ The Directive also provides guidelines on a tracking system, how an incident may trigger one of the performance indicators, and the types of remedial action taken when an officer triggers the EW System review process.¹⁰ Notably, the Directive states that the EW System “should be administered by the agency’s internal affairs unit.”¹¹

Furthermore, the Directive provides in part:

All EW System policies adopted by law enforcement agencies shall be made available to the public upon request and shall be posted on the agency’s website. Annual reports from the County Prosecutors to the Attorney General (as required by Section II.I above) also shall be made available to the public upon request and shall be posted on the agency’s website.

All written reports created or submitted pursuant to this Directive that identify specific officers are confidential and not subject to public disclosure.¹²

In the instant matter, the Complainant asserted that the Directive permits the disclosure of “records, reports, and notifications showing and tracking the number of police officers who triggered the [EW System] performance indicators, the conduct that triggered the EW System, and the remedial actions . . . that were taken by [NBPD],” so long as the names of specific officers are redacted. The Custodian asserted that the NBPD did not have the requested information contained in a specific file or report.

Upon review, any underlying records produced under the Directive are integrally related to the internal personnel management of police officers. The Directive’s confidentiality section should therefore be read through the lens of personnel records, which favor a presumption against disclosure. See Kolvalcik, 206 N.J. 581. Thus, the Directive’s plain language indicates that the requested records and reports are deemed confidential and not subject to public disclosure other than the expressly identified “EW System polices” and the “annual report” provided to the Attorney General from the County Prosecutor. Just as internal affairs records are deemed confidential in their entirety under the IAPP, so too are the underlying records generated from the EW System pursuant to the Directive. Furthermore, to the extent that the Complainant seeks reports and records detailing any disciplinary actions taken against police officers flagged via the EW System, such records are exempt from disclosure via Merino, GRC 2003-110.

Accordingly, the Custodian lawfully denied access to the Complainant’s OPRA request item No. 4 seeking records, reports, and notifications generated from NBPD’s EW System, as same are exempt from disclosure pursuant to the Directive. N.J.S.A. 47:1A-6; O’Shea, 410 N.J.

⁸ Id.

⁹ Id. at 2.

¹⁰ Id. at 3-4.

¹¹ Id. at 3.

¹² Id. at 4-5.

Super. at 382. Additionally, to the extent the Complainant seeks disciplinary records, same are exempt under OPRA's personnel records exemption. N.J.S.A. 47:1A-10; Merino, GRC 2003-110.

Prevailing Party Attorney's Fees

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

[N.J.S.A. 47:1A-6.]

In Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006), the Appellate Division held that a complainant is a "prevailing party" if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. Additionally, the court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008), the Court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct" (quoting Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court held that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." Id. at 603 (quoting Black's Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . ." Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

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

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA. [196 N.J. at 73-76.]

The Court in Mason, further held that:

[R]equestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) “a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved”; and (2) “that the relief ultimately secured by plaintiffs had a basis in law.” Singer v. State, 95 N.J. 487, 495, cert. denied, New Jersey v. Singer, 469 U.S. 832 (1984).

[Id. at 76.]

The Complainant filed the instant complaint requesting that the GRC require the Custodian to obtain and disclose the requested summonses and complaints. However, the evidence of record indicates that the Custodian did not possess or maintain the requested records, and properly directed the Complainant to obtain the records from the Court.

The Complainant also desired records pertaining to the EW System with redactions to personal and confidential information. However, the evidence of record demonstrates that the requested records are exempt in their entirety pursuant to the Directive. Thus, the Complainant has not achieved the desired result and it not a prevailing party in this complaint.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters, 387 N.J. Super. 423. Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Complainant failed to achieve the relief sought in his Denial of Access Complaint. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian lawfully denied access to the Complainant's April 28, 2020 OPRA request item Nos. 1-3. N.J.S.A. 47:1A-6. Specifically, Deputy Director J. T. Miller and the Custodian certified, and the record reflects, that the City does not possess or maintain the requested complaints and summonses. See Simmons v. Mercado, 464 N.J. Super. 77 (App. Div.), certif. granted, 2020 LEXIS 1218 (Oct. 26, 2020); Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
2. The Custodian lawfully denied access to the Complainant's OPRA request item No. 4 seeking records, reports, and notifications generated from New Brunswick Police Department's Early Warning System, as same are exempt from disclosure pursuant to the Attorney General Law Enforcement Directive No. 2018-3. N.J.S.A. 47:1A-6; O'Shea v. Twp. of West Milford, 410 N.J. Super. 371, 382 (App. Div. 2009). Additionally, to the extent the Complainant seeks disciplinary records, same are exempt under OPRA's personnel records exemption. N.J.S.A. 47:1A-10; Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 2004).
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, 71 (2008). Specifically, the Complainant failed to achieve the relief sought in his Denial of Access Complaint. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 71.

Prepared By: Samuel A. Rosado
Staff Attorney

May 11, 2021