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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

April 27, 2021 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o African American Data & Research Institute)
Complainant
v.
Township of Bloomfield (Essex)
Custodian of Record

Complaint No. 2020-48

At the April 27, 2021 public meeting, the Government Records Council ("Council") considered the April 20, 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 December 30, 2019 OPRA request. N.J.S.A. 46:1A-6. Specifically, the Custodian certified, and the record reflects, that the Township of Bloomfield does not possess or maintain the requested complaints and summonses. See Simmons v. Mercado, 464 N.J. Super. 77 (App. Div. 2020), certif. granted, 244 N.J. 342 (Oct. 26, 2020); Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

2. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Complainant failed to achieve the relief sought in his Denial of Access Complaint. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 71.

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

Final Decision Rendered by the
Government Records Council
On The 27th Day of April 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: April 29, 2021

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
April 27, 2021 Council Meeting

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

GRC Complaint No. 2020-48

v.

Township of Bloomfield (Essex)[2]
Custodial Agency

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

1. Drug possession complaints and summonses prepared and filed by the Police Department from January 2019 through present.
2. Drug paraphernalia complaints and summonses prepared and filed by the Police Department from January 2019 through present.

Custodian of Record: Louise Palagano
Request Received by Custodian: December 30, 2019
Response Made by Custodian: January 21, 2020
GRC Complaint Received: February 24, 2020

Background[4]

Request and Response:

On December 30, 2019, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On January 9, 2020, the Custodian requested an extension of time until January 21, 2020 to process the request. On January 21, 2020, Catherine Finkler responded on the Custodian's behalf in writing stating that the requested records were not maintained by the Bloomfield Police Department ("BPD") and should be requested from the Bloomfield Municipal Court ("Court") or the Superior Court of Essex County.

[1] The Complainant represents the African American Research & Data Institute.
[2] Represented by Steven J. Martino, Esq., Assistant Director of Law (Bloomfield, 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.

Denial of Access Complaint:

On February 24, 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 any court to access the database containing the responsive records.

The Complainant also asserted that the Records Retention Schedule for both Municipal Police Departments and Municipal Prosecutors required retention of the requested records. The Complainant also contended that several other police departments have retrieved, printed, and furnished the Complainant with the requested records. The Complainant therefore requested the GRC compel compliance with the OPRA request and to award counsel fees.

Statement of Information:

On March 6, 2020, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on December 30, 2019 and forwarded same to BPD to conduct a search for records. The Custodian certified that on January 21, 2020, Ms. Finkler responded to the Complainant on her behalf, stating that the requested records were not maintained by the Township of Bloomfield ("Township"). The Custodian maintained that the requested records were not kept on file by the Township.

Additional Submissions:

On March 12, 2020, the Complainant filed a letter brief in opposition to the Custodian's SOI. Therein, the Complainant first argued that the because BPD 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 transmitted to the municipal court for filing.

The Complainant next argued that police departments in the State were required to retain summonses and complaints until thirty (30) days after disposition of same.[5] The Complainant further asserted that municipalities were required to retain these records for at least fifteen (15) years after disposition. The Complainant argued that because BPD officers and municipal prosecutors were City employees, their records were subject to access under OPRA and should have been disclosed accordingly. The Complainant noted that if the responsive records were in storage or otherwise unavailable, the Custodian had an obligation to extend the response time frame but failed to do so.

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

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

Complainant asserted that eCDR was set up by the New Jersey State Police ("NJSP") in cooperation with the Administrative Office of the Courts ("AOC"), and that eCDR was a separate system from eCourts. Notwithstanding, the Complainant contended that since BPD officers had direct access to the database maintaining the records and could retrieve and print the records without any assistance, help, or permission from the Court, they were obligated to retrieve same.

The Complainant further argued that he specifically requested records that were prepared by the police department, and not the Judiciary. Additionally, the Complainant asserted that R. 1:38 was inapplicable since the request was made directly to an executive branch agency. The Complainant asserted that they had the right to decide where to send their request to the Judiciary or Executive branch.

The Complainant further noted that BPD's obligation to disclose responsive records was not diminished simply because the Judiciary also made them available to the public. See Keddie v. Rutgers Univ., 144 N.J. 377 (1996). The Complainant also noted that it was far cheaper to obtain the responsive records via OPRA than through R. 1:38. The Complainant argued that OPRA should not be used as "a money generating scheme (another form of taxation) for government." The Complainant thus argued that BPD should be required to disclose the responsive records.

The Complainant also argued that BPD 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 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).

The Complainant also noted that several other judges have ruled that summons and complaints prepared by police officers were subject to disclosure and ordered counsel fees as a result. The Complainant asked the GRC to take notice of the decisions in favor of AADARI in AADARI v. Town of West New York, Docket No. HUD-L-31-20, and AADARI v. City of Millville, Docket No. CUM-L-712-18.[6]

On April 1, 2021, the GRC requested additional information from the Custodian. Specifically, the GRC asked:

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

[6] This matter was reversed on appeal, Simmons v. Mercado, 464 N.J. Super. 77 (App. Div.), certif. granted, 244 N.J. 342 (Oct. 26, 2020).

4. Please describe the search undertaken to look for the requested complaints and summonses.

On April 7, 2021, the Custodian submitted a certification in response to the GRC's request for additional information. The Custodian certified that BPD officers' complete summonses and complaints electronically and do not keep or maintain copies upon submission to the Court. The Custodian certified that the Township municipal prosecutor did not maintain copies of the requested summonses and complaints. The Custodian certified that the municipal prosecutor uses summonses and complaints from the Court's file and return them to the Court once the case has been completed.

The Custodian also certified that the Township did not keep or maintain copies in archives or storage. The Custodian certified that representatives from her office spoke with BPD and the assistant township attorney spoke to the municipal officer regarding the summonses and complaints. The Custodian certified that neither her office, the BPD, nor the municipal prosecutor maintain copies of the requested records and were instead maintained by the Court.

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

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

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

Additionally, although decided during the pendency of this complaint, the GRC finds the Appellate Division's holding in Simmons v. Mercado, 464 N.J. Super. 77 (App. Div.), certif.

granted, 2020 LEXIS 1218 (Oct. 26, 2020) relevant and binding. In Simmons, the Complainant 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, Ms. Finkler responded on the Custodian's behalf stating that the Township did not possess or maintain copies of the requested summonses and complaints and directed the Complainant to request them from the Court or the Essex County Superior Court. The Custodian maintained this position in her SOI. Additionally, in response to the GRC's request for additional information, the Custodian certified that the Township's municipal prosecutor did not maintain the requested records, nor did the Township 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 BPD had access to the complaints and/or summonses through eCDR.

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

Additionally, while the Complainant noted that the Custodian had the capability of printing out the requested summonses and complaints through eCDR, the court in Simmons 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 BPD 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 December 30, 2019 OPRA request. N.J.S.A. 46:1A-6. Specifically, the Custodian certified, and the record reflects, that the Township does not possess or maintain the requested complaints and summonses. See Simmons, 464 N.J. Super. at 86; Pusterhofer, GRC 2005-49.

Prevailing Party Attorney's Fees

OPRA provides that:

> A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.
>
> [N.J.S.A. 47:1A-6.]

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

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

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

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

> OPRA itself contains broader language on attorney's fees than the former RTKL

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

The Court in Mason, further held that:

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

[Id. at 76.]

The Complainant filed the instant complaint requesting that the GRC require the Custodian to obtain and disclose the requested records to him. However, the evidence of record indicates that the Custodian did not possess or maintain the requested records, and properly directed the Complainant to obtain the records from the Court or the Essex County Superior Court. Thus, the Complainant has not achieved the desired result and is 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 December 30, 2019 OPRA request. N.J.S.A. 46:1A-6. Specifically, the Custodian certified, and the record reflects, that the Township of Bloomfield does not possess or maintain the requested complaints and summonses. See Simmons v. Mercado, 464 N.J. Super. 77 (App. Div. 2020), certif. granted, 244 N.J. 342 (Oct. 26, 2020); Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

2. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Complainant failed to achieve the relief sought in his Denial of Access Complaint. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 71.

Prepared By: Samuel A. Rosado
Staff Attorney

April 20, 2021