



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

March 29, 2022 Government Records Council Meeting

Michael P. Rubas, Esq. (o/b/o Anonymous)
Complainant

Complaint No. 2020-78 and
2020-91

v.

Hudson County Prosecutor's Office
Custodian of Record

At the March 29, 2022 public meeting, the Government Records Council ("Council") considered the March 22, 2022 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 has lawfully denied access to all request items for GRC Complaint No. 2020-78 and GRC Complaint No. 2020-91 request items number 1 through 3, because these request items seek personnel record information with respect to an individual's title within the agency and such information does not constitute a government record subject to disclosure. N.J.S.A. 47:1A-6.
2. The Custodian did not unlawfully deny access to GRC Complaint No. 2020-91 request item number 4 because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Complainant has not achieved "the desired result because the complaints 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 the Denial of Access Complaints 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 lawfully denied access to the subject OPRA requests because they do not exist or are not government records subject to disclosure. Thus, 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 v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008).

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 29th Day of March 2022

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 31, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 29, 2022 Council Meeting**

**Michael P. Rubas, Esq. (on behalf of Anonymous)¹
Complainant**

**GRC Complaint Nos. 2020-78
and 2020-91²**

v.

**Hudson County Prosecutor's Office ³
Custodial Agency**

December 23, 2019 OPRA Request:⁴ For Gene Rubino, who held the title and position of Chief of Investigations, please provide the following copies via e-mail:

1. Length of service in the Hudson County Prosecutor's Office ("HCPO") with the title and in the position of the Chief of Investigations (start date and end date).
2. Date of separation from the title and position as the Chief of Investigations.
3. The reason for separation from the title and position as the Chief of Investigations.

February 6, 2020 OPRA Request:⁵ For Gene Rubino, who held the title and position of Director of Investigations, please provide the following copies via e-mail:

1. Length of service in the HCPO with the title and in the position of the Director of Investigations (start date and end date).
2. Date of separation from the title and position as the Director of Investigations.
3. The reason for separation from the title and position of Director of Investigations.
4. All documents regarding Gene Rubino's appointment as Director of Investigations.

Custodian of Record: John P. Libretti, Esq.

Request Received by Custodian: December 23, 2019; February 6, 2020

Response Made by Custodian: January 2, 2020; February 12, 2020

GRC Complaint Received: April 22, 2020; May 1, 2020

¹ Represented by Michael P. Rubas, Esq., of Rubas Law Offices (Manasquan, NJ).

² The Government Records Council has consolidated these complaints for adjudication due to the commonality of the issues and parties.

³ Represented by Kirstin Bohn, Esq., of Chasan Lamparello Mallon & Cappuzzo, PC (Secaucus, NJ).

⁴ This OPRA request is the subject of GRC Complaint No. 2020-78.

⁵ This OPRA request is the subject of GRC Complaint No. 2020-91.

Michael Rubas, Esq. (on behalf of Anonymous) v. Hudson County Prosecutor's Office, 2020-78 – Findings and Recommendations of the Executive Director

Background⁶

Request and Response for GRC Complaint No. 2020-78:

On December 23, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 2, 2020, the sixth (6th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that, with respect to request item number 1, he attached a memorandum from Acting Prosecutor Gaetano T. Gregory, dated June 17, 2015, designating Executive Assistant Prosecutor Gennaro Rubino as Acting Chief of Investigations effective July 1, 2015. The Custodian stated that with respect to request items number 2 and 3, there are no responsive records.

On January 6, 2020, the Complainant e-mailed a letter to the Custodian informing the Custodian that the response to the request was unresponsive and wholly deficient. The Complainant stated that he was not seeking documents; however, the Custodian responded by producing one (1) irrelevant document and representing that no other responsive records exist. The Complainant stated that the information he requested is required to be disclosed under N.J.S.A. 47:1A-10. The Complainant also cited Libertarians for Transparent Gov't v. Ocean Cnty. Prosecutor's Office, No. A-1608-16T1, 2018 N.J. Super. Unpub. LEXIS 25, at *7 (App. Div. January 5, 2018) as holding that the information itself is a government record and must be disclosed. The Complainant stated that nothing in his request sought records regarding Mr. Rubino’s appointment as Acting Chief. The Complainant informed the Custodian that he had until the end of business on January 7, 2020, to produce the requested information.

On January 7, 2020, the Custodian e-mailed a letter replying to the Complainant’s January 7, 2020 letter. The Custodian stated that the HCPO disagrees with the Complainant’s “accusatory assertions.” The Custodian stated that he disclosed the June 17, 2015 memorandum to respond to the Complainant’s request for Executive Assistant Prosecutor Rubino’s start date under the internal title of Acting Chief of Investigations. The Custodian stated that the HCPO has no record of when the “Acting” qualifier was removed or when Mr. Rubino stopped using it. The Custodian then largely reiterated the statements contained within the SOI.

Request and Response for GRC Complaint No. 2020-91:

On February 6, 2020, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On February 12, 2020, the fourth (4th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that there are no records responsive to the request.

Denial of Access Complaint Number 2020-78:

On April 22, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that October 17, 2018,

⁶ 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.

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Raymond Worrall, Director of Communications for the HCPO, issued a press release stating that Gene Rubino held the internal title of “Chief of Investigations.” The Complainant stated that, pursuant to N.J.S.A. 47:1A-10, he sought the records relevant to the complaint.

The Complainant stated that on January 2, 2020, in response to his OPRA request item number 1, the Custodian disclosed to him an appointment memorandum naming Mr. Rubino as the Acting Chief of Investigations. The Complainant stated that the record was not responsive to his request because he did not seek information regarding Mr. Rubino’s appointment as Acting Chief of Investigations, but rather his appointment as Chief of Investigations. With respect to request items number 2 and number 3, the Complainant stated that the Custodian informed him that it had no responsive records; however, the Complainant stated that the Custodian’s response was false because the HCPO had in its possession a letter dated February 8, 2019 from the Director of the Division of Criminal Justice regarding request items number 2 and number 3.

The Complainant stated that he sent a letter to the Custodian dated January 6, 2020, informing the Custodian that he was not seeking records, but rather information mandated by N.J.S.A. 47:1A-10. The Complainant stated that he further informed the Custodian that the information itself is a government record that must be disclosed. The Complainant cited Libertarians for Transparent Gov't v. Ocean Cnty. Prosecutor's Office, No. A-1608-16T1, 2018 N.J. Super. Unpub. LEXIS 25, at *7 (App. Div. January 5, 2018).

The Complainant stated that on January 7, 2020, the Custodian replied to his January 6, 2020 letter, informing him that the HCPO has no record as to when Mr. Rubino became the Chief of Investigations. The Complainant stated that the Custodian also informed him that the HCPO has no record of when Mr. Rubino ceased being the Chief of Investigations and that they did not have to provide a reason for Mr. Rubino’s separation from the position of Chief of Investigations because he was still employed as an assistant prosecutor. The Complainant stated that the Custodian’s “representations . . . are simply implausible and constitute a purposeful denial.”

Denial of Access Complaint Number 2020-91:

On May 1, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that on August 30, 2019 he came into possession of a February 2019 press release from the HCPO stating that “Gene Rubino has held and will continue to hold the title of Executive Assistant Prosecutor with the Office of the Hudson County Prosecutor. **He will now also have an internal title of Director of Investigations in this office,**” . . . “

The Complainant stated that on February 6, 2020, he submitted an OPRA request for the records relevant to the complaint. The Complainant stated that his request followed the statutory language set forth in N.J.S.A. 47:1A-10, and that the information itself is a government record that must be disclosed. The Complainant cited Libertarians for Transparent Gov't v. Ocean Cnty. Prosecutor's Office, No. A-1608-16T1, 2018 N.J. Super. Unpub. LEXIS 25, at *7 (App. Div. January 5, 2018).

The Complainant stated that the Custodian represented that the HCPO has no information and records establishing when Mr. Rubino became the Director of Investigations or ceased acting as the Director of Investigations as announced in a publicly disseminated press release. The Complainant stated that the Custodian's actions constitute a purposeful denial.

Statement of Information:

On June 4, 2020, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request which formed the basis of GRC Complaint No. 2020-78 on December 23, 2019, and responded in writing on January 2, 2020.

The Custodian certified that to search for any responsive information and documentation he asked HCPO personnel to speak with Mr. Rubino, review Mr. Rubino's personnel file, request the agency's HR specialist and the County's Payroll Department to review their files, and direct the HCPO's Computer/Technical Services Section to also review their files. The Custodian certified that one (1) record, a June 17, 2015 memorandum from Acting Prosecutor Gaetano T. Gregory designating Mr. Rubino as Acting Chief of Investigations effective July 1, 2015, was determined to be responsive to request item number 1. The Custodian certified that the record was redacted to remove content that was not relevant to the request and disclosed to the Complainant on January 2, 2020. The Custodian certified that there were no records responsive to request items number 2 and 3.

The Custodian certified that he received the Complainant's OPRA request which formed the basis of GRC Complaint No. 2020-91 on February 6, 2020 and responded in writing on February 12, 2020. The Custodian certified that there were no records responsive to the Complainant's request.

The Custodian certified that the Complainant misunderstands Mr. Rubino's titles with the HCPO and has misinterpreted N.J.S.A. 47:1A-10. The Custodian certified that the Complainant relied upon N.J.S.A. 47:1A-10 to argue that he was entitled to more information than was provided by the HCPO. The Custodian certified that he knows that N.J.S.A. 47:1A-10 provides for the disclosure of information; however, the requestor did not request the information that is subject to disclosure under this provision of OPRA. The Custodian certified that the Complainant requested Mr. Rubino's length of service, date of separation and reason for separation as Chief of Investigations and as Director of Investigations. The Custodian certified that Mr. Rubino was hired by the HCPO in 1996 in the civil service title of "Legal Assistant" and subsequently promoted to "Assistant Prosecutor." The Custodian certified that at some point while serving as an assistant prosecutor, he was designated as Acting Chief of Investigations and then Chief of Investigations. The Custodian certified that those designations are for organizational and administrative purposes only. The Custodian further certified that the title "Chief of Investigations" is not a classified title and is not recognized by the Civil Service Commission. The Custodian certified that the HCPO does not maintain records based upon internal designations.

The Custodian certified that N.J.S.A. 47:1A-10 requires disclosure of only specifically prescribed categories of information from an individual's personnel records. The Custodian certified that if the Legislature wanted the public to have access to a public employee's job title

history or dates of promotions and demotions they would have expressly provided for such disclosure. The Custodian certified that because the Legislature did not provide for such disclosure, the HCPO is not obligated to provide such information. For the reasons set forth in the SOI, the Custodian asked the GRC to dismiss the complaints.⁷

Additional Submissions:

On July 2, 2020, the Complainant submitted an unsolicited submission in response to the Custodian's SOI. The Complainant stated that he was compelled to provide the submission because the Custodian purposefully submitted false statements to the GRC. The Complainant's submission makes three main points: (1) that, contrary to the Custodian's assertion, the position of Chief of Investigations is recognized by the Civil Service Commission; (2) that the Custodian falsely represented that the title "Chief of Investigations" is only an internal designation; and (3) that the Custodian unlawfully withheld a letter removing Mr. Rubino from the position of Chief of Investigations.

The Complainant asserted that the New Jersey Civil Service Commission's Job Description and Title Code Search lists title code 07105 as "Chief of County Investigators." The Complainant further stated that both Mr. Rubino's predecessor and his successor held the 07105 Civil Service job title code. The Complainant also asserted that the Custodian's assertion that the title "Chief of Investigations" is false. The Complainant stated that as the Chief of Investigations, Mr. Rubino was at the top of the Table of Organization for HCPO officers. Therefore, the Complainant stated that it "strains the bounds of credulity" for the Custodian to represent to the GRC that the HCPO does not know when Mr. Rubino became Chief, when he ceased acting as Chief and why he ceased being Chief. Finally, the Complainant stated that the Custodian's representation that the HCPO does not possess responsive documents regarding the date of, and reason for, Mr. Rubino's separation from the Chief position is false. The Complainant states that the HCPO is in possession of a letter dated February 8, 2019 from the Director of the Division of Criminal Justice to the Hudson County Prosecutor that appears to set forth the date of, and reason for, Mr. Rubino's separation from the position of Chief of Investigators. The Complainant asserts that the Custodian purposely withheld the letter. The Complainant concluded by stating that the Custodian knowingly and willfully violated OPRA by purposefully withholding governmental records.

On July 17, 2020, the Custodian's Counsel replied to the Complainant's July 2, 2020 submission to the GRC. Counsel first asserts that the Complainant conflates the Civil Service position of "Chief of County Investigators" with the non-Civil Service designation of "Chief of Investigations." As such, Counsel argued that the Custodian did not falsely represent that the title of "Chief of Investigations" is not recognized by the Civil Service Commission. The Custodian's Counsel also argued that the Custodian did not unlawfully withhold from disclosure the February 8, 2019 letter from the Director of the Division of Criminal Justice because the letter is not a record that was responsive to the request.

⁷ The Custodian did not provide background information with respect to the "Director of Investigations" designation. Michael Rubas, Esq. (on behalf of Anonymous) v. Hudson County Prosecutor's Office, 2020-78 – Findings and Recommendations of the Executive Director

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.

GRC Complaint No. 2020-78 request items and GRC Complaint No. 2020-91 request items number 1 through 3

OPRA also provides that:

[T]he personnel or pension records of any individual in the possession of a public agency . . . shall not be considered a government record and shall not be made available for public access, except that an individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record[.]

[N.J.S.A. 47:1A-10.]

Here, in the submissions received for GRC Complaint No. 2020-78, there was much argument over the issue of whether the title designated as “Chief of Investigations” is synonymous with the title “Chief of County Investigators,” which is a job title recognized by the Civil Service Commission. But this argument clouds the actual issue in this complaint, which is whether N.J.S.A. 47:1A-10 provides that an individual’s length of service in a title, date of separation from a title, and reason for separation from a title are government records subject to disclosure.

Although personnel and pension records are not government records, an individual’s length of service, date of separation and the reason therefor are government records by operation of N.J.S.A. 47:1A-10. However, the Complainant did not seek the records with respect to the agency but rather with respect to *titles held within the agency*; to wit, “Chief of Investigations” and “Director of Investigations” for GRC 2020-78 and 2020-91, respectively.

There is no definition in OPRA for type of “service.” However, in November 1974, Executive Order 11 (Gov. Byrne, 1974) addressed the accessibility of personnel and pension records. Section 2(a) of that Executive Order, which was later modified and codified in OPRA, prohibits disclosure of personnel or pension records of an individual except for:

An individual's name, title, position, salary, payroll record, length of service *in the instrumentality of government and in the government*, date of separation *from government service* and the reason therefor; and the amount and type of pension he is receiving[.] (Emphasis added.)

[Id.]

It is also instructive that the Federal Government views separation from service as ending employment from the employer, not changing jobs or positions within the organization. For example, Title 26 of the U.S. Code, defines “separation from service” as follows: “An employee separates from service with the employer if the employee dies, retires, or otherwise has a termination of employment with the employer.” 26 CFR § 1.409A-1.

The GRC therefore concludes that OPRA’s provision that certain personnel records are government records does not apply to an individual’s length of service in a title, date of separation from a title, and reason for separation from a title. Rather, the N.J.S.A. 47:1A-10 exceptions to the exemption of personnel records applies to the individual’s government service within the agency and date of separation and the reason for separation therefrom.

Accordingly, the Custodian has lawfully denied access to all request items for GRC Complaint No. 2020-78 and GRC Complaint No. 2020-91 request items number 1 through 3, because these request items seek personnel record information with respect to an individual’s title within the agency and such information does not constitute a government record subject to disclosure. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6.

GRC Complaint No. 2020-91 request item number 4

In Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant’s request for billing records existed and the complainant submitted no evidence to refute the custodian’s certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian’s certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified that there are no records responsive to GRC Complaint No. 2020-91 request item number 4, all documents regarding Gene Rubino’s appointment as Director of Investigations.

As such, the Custodian did not unlawfully deny access to GRC Complaint No. 2020-91 request item number 4 because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. See 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 (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. Id. at 432. Additionally, the court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), 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, *cert denied* (1984).

[Id. at 76.]

The Complainant submitted these complaints contending that the Custodian unlawfully denied access to records responsive to the subject OPRA requests. In the SOI, the Custodian argued that he lawfully denied access to the OPRA requests because, with the exception of one record that was disclosed, no such records exist. Ultimately, the Council found that no unlawful denial of access occurred because the information requested (except for the records responsive to GRC Complaint No. 2020-91 request item number 4, which is nonexistent) does not constitute a government record. As such, these complaints did not bring about the desired relief.

Therefore, the Complainant has not achieved “the desired result because the complaints 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 the Denial of Access Complaints and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Custodian lawfully denied access to the subject OPRA requests because they do not exist or are not government records subject to disclosure. Thus, 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. 423, and Mason, 196 N.J. 51.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has lawfully denied access to all request items for GRC Complaint No. 2020-78 and GRC Complaint No. 2020-91 request items number 1 through 3, because these request items seek personnel record information with respect to an individual’s title within the agency and such information does not constitute a government record subject to disclosure. N.J.S.A. 47:1A-6.
2. The Custodian did not unlawfully deny access to GRC Complaint No. 2020-91 request item number 4 because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

3. The Complainant has not achieved “the desired result because the complaints 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 the Denial of Access Complaints 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 lawfully denied access to the subject OPRA requests because they do not exist or are not government records subject to disclosure. Thus, 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 v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008).

Prepared By: John E. Stewart
Staff Attorney

March 22, 2022