



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

December 13, 2022 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o Delores Simmons,
Baffi Simmons, and Grace Woko)
Complainant

Complaint No. 2021-145

v.

Long Branch Police Department (Monmouth)
Custodian of Record

At the December 13, 2022 public meeting, the Government Records Council (“Council”) considered the December 6, 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. Recognizing that the Custodian’s June 10, 2021 response to the Complainant’s April 28, 2021 OPRA request is no longer a lawful denial pursuant to Simmons v. Mercado, 247 N.J. 24, 42 (2021); her response was nonetheless lawful at that time because it was consistent with the prevailing case law and Council decisions prior to the Court’s ruling. N.J.S.A. 47:1A-6; Simmons v. Mercado, 464 N.J. Super. 77 (App. Div. 2020); Owoh, Esq. (O.B.O. AADARI) v. Borough of East Newark (Hudson), GRC Complaint No. 2019-256 (April 27, 2021); Moore v. N.J. Dep’t of Corr., GRC Complaint No. 2009-144 (Interim Order dated October 26, 2010). Thus, the Council declines to order disclosure here.
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, 76 (2008). Specifically, the evidence of record supports that the Custodian’s response was lawful at the time and her subsequent actions were in response to Simmons, 247 N.J. 24 rather than 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. at 432, and Mason, 196 N.J. at 76.

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 13th Day of December 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: December 15, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 13, 2022 Council Meeting**

**Rotimi Owoh, Esq. (on Behalf of Delores Simmons,
Baffi Simmons, and Grace Woko)¹
Complainant**

GRC Complaint No. 2021-145

v.

**Long Branch Police Department (Monmouth)²
Custodial Agency**

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

1. Complaints and summonses prepared by your police department relating to individuals who were charged with drug possession and or drug paraphernalia by your police department from January 2020 to present.
2. Driving While Intoxicated/Driving under the Influence (“DWI/DUI”) complaints and summonses prepared and or issued by your police department from January 2020 to present.
3. Complaints and summonses prepared by your police department relating to individuals who were charged with jay walking by your police department from January 2016 to present.

Custodian of Record: Heather Capone

Request Received by Custodian: March 3, 2021

Response Made by Custodian: June 10, 2021

GRC Complaint Received: July 7, 2021

Background⁴

Request and Response:

On or about March 3, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. The Custodian extended the time to respond to the Complainant’s OPRA request several times thereafter.⁵

¹ The Complainant represents Delores Simmons, Baafi Simmons, and Grace Woko.

² Represented by Brian P. Trelease, Esq., of Rainone, Coughlin, Minchello, Attorneys at Law (Iselin, 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.

⁵ Neither the Custodian nor the Complainant provided the dates for the extensions.

Rotimi Owoh, Esq. (on Behalf of Delores Simmons, Baffi Simmons, and Grace Woko) v. Long Branch Police Department (Monmouth), 2021-145 – Findings and Recommendations of the Executive Director

On June 10, 2021, Amanda Caldwell responded on the Custodian's behalf in writing via e-mail, providing the Complainant a copy of the Complainant's OPRA request with the word "court" handwritten next to the request items.

Denial of Access Complaint:

On July 7, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the Custodian improperly denied access to the request items in the wake of the New Jersey Supreme Court's decision in Simmons v. Mercado, 247 N.J. 24 (2021), rev'g 464 N.J. Super. 77 (App. Div. 2020). The Complainant requested the GRC compel the Long Branch Police Department ("LBPD") to fully comply with the OPRA request and to award counsel fees.

Additional Correspondence:

On February 15, 2022, Custodian's Counsel e-mailed the Complainant providing responsive records.

Statement of Information:⁶

On March 31, 2022, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on or about March 3, 2021. The Custodian certified that Ms. Caldwell responded on her behalf in writing on June 10, 2021.

Through Counsel, the Custodian argued that the Complainant failed to demonstrate that he was unlawfully denied access to the requested records. The Custodian asserted that in the June 10, 2021 response, the body of the e-mail stated, "please see attached records." The Custodian argued that the Denial of Access Complaint failed to show by a preponderance of the evidence that the City of Long Branch ("City") denied the Complainant's OPRA request.

The Custodian next contended that the Complainant was not a prevailing party. The Custodian first argued that the Complainant failed to show that the City unlawfully denied access to government records. The Custodian next asserted that the Court's Simmons decision was not decided until June 17, 2021, or seven (7) days after the City's response to the Complainant. The Custodian therefore argued there was no unlawful denial of access to warrant an award of attorney's fees, as the caselaw the Complainant relied upon was not in effect at the time the City allegedly denied access.

⁶ On July 30, 2021, the matter was referred to mediation. On January 28, 2022, the matter was referred back to the GRC for adjudication. Additionally, as part of the SOI the Custodian included additional information regarding correspondence between the parties while this complaint was in mediation. Pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq., communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications which occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4.

Additional Submissions:

On March 31, 2022, the Complainant submitted a brief in response to the Custodian's SOI. The Complainant contended that the only outstanding issue in the matter was counsel fees as the records were ultimately disclosed to him. The Complainant asserted that but for the complaint filing, the Custodian would not have made the records available to the Complainant, and the GRC should therefore award counsel fees pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006).

Analysis

Sufficiency of Response

In Morris v. Trenton Police Dep't, GRC Complaint No. 2007-160 (May 2008), the complainant requested several records. The custodian, without further elaboration, stated that access to the requested records was denied. The Council, in finding that the custodian violated OPRA, stated “. . . the Custodian's failure to supply the requester with a detailed lawful basis for denial violates N.J.S.A. 47:1A-5(g).” Subsequently, in Rader v. Twp. of Willingboro (Burlington), GRC Complaint No. 2007-239 (June 2008), the Council, upon finding that the custodian's written response was insufficient, noted that, “. . . N.J.S.A. 47:1A-5(g) provides that if a custodian is ‘unable to comply with a request for access, then the custodian shall indicate the specific basis’ for noncompliance.”

Here, the Custodian responded to the Complainant's OPRA request by providing a copy of the Complainant's OPRA request and handwriting “court” next to the request items, without any further elaboration. Just as in the case of Morris, GRC 2007-160, the Custodian's single word response failed to supply the Complainant with a detailed lawful basis for denial.

Therefore, the Custodian's June 10, 2021 response is insufficient because the Custodian failed to provide a specific legal basis for denying access to the requested records. N.J.S.A. 47:1A-5(g). See also Morris, GRC 2007-160 and Rader, GRC 2007-239.

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.

Generally, the GRC does not retroactively apply court decisions to complaints pursuant to Gibbons v. Gibbons, 86 N.J. 515 (1981). There the Court held that “it is a fundamental principle of jurisprudence that retroactive application of new laws involves a high risk of being unfair.” Id. at 522. In Moore v. N.J. Dep't of Corr., GRC Complaint No. 2009-144 (Interim Order dated October 26, 2010), the custodian denied access to responsive records in 2009 based upon a then existing Executive Order, the custodial agency's proposed regulations, and prior Council decisions

relying on same. During the pendency of the complaint, the Appellate Division in 2010 reversed a separate Council decision relying on the Executive Order and proposed regulations. The Council held that while the custodian's basis for denial was no longer valid, the denial was not unlawful since at the time the request was consistent with prior GRC case law. See also Biss v. Borough of New Providence Police Dep't (Union), GRC Complaint No. 2009-21 (February 2010); Sallie v. N.J. Dep't of Law & Public Safety, Div. of Criminal Justice, GRC Complaint No. 2008-21 (Interim Order dated June 23, 2009).

In the instant matter, the Complainant submitted his OPRA request on March 3, 2021. After requesting several extensions, the Custodian responded to the Complainant on June 10, 2021, providing a copy of the Complainant's request with the word "court" handwritten next to the request items. The Complainant thereafter filed the instant matter on July 7, 2021, stating that the Custodian's June 10, 2021 response was contrary to the Simmons decision. In the SOI, the Custodian argued that the Complainant did failed to demonstrate that there was an unlawful denial of access. The Custodian further argued that the Simmons decision was not issued until seven (7) days after the Custodian allegedly denied access.

At the time of the Complainant's OPRA request and LBPD's June 10, 2021 response, Simmons, 464 N.J. Super. 77 was the precedential decision on an agency's obligation to disclose eCDR records. There, the Complainant requested the same category of 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 same 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 Council would thereafter rely on Simmons in subsequent decisions. See e.g., Owoh, GRC 2020-83; Owoh, Esq. (O.B.O. AADARI) v. Borough of East Newark (Hudson), GRC Complaint No. 2019-256 (April 27, 2021).

However, the Court reversed the Appellate Division on June 17, 2021. Simmons, 247 N.J. 24. The Court held that notwithstanding which government branch created the CDR-1 and -2 forms, it is the information contained within those forms that is sought by the Complainant. Id. at 40-41. Thus, the Court found that:

Because MPD officers create the completed CDR-1s by populating the forms with the information necessary to generate a summons and submit it to the court, there is no question that the CDR-1s are government records subject to disclosure pursuant to OPRA.

[Id.]

Additionally, the Court rejected MPD's argument that they did not maintain the records, holding that OPRA's definition of a "government record" is not restricted to records maintained by the agency, but rather includes records it creates, even if not maintained. Id. at 41. Therefore, the Court found, "that the Judiciary might maintain on its servers the information that MPD made does not absolve MPD of its obligation to produce that information pursuant to a proper OPRA request made to MPD." Id. at 42.

Since this Denial of Access Complaint was filed after the Simmons decision, the GRC must determine the applicable law at the time of the response. See Moore, GRC 2009-144. Here, the Custodian responded on June 10, 2021, handwriting “court” next to the request items, which was seven (7) days prior to the Court’s Simmons decision. The Custodian’s response was therefore in accordance with the Appellate Division and prior GRC case law, as LBPD was not obligated to access an electronic database maintained by the Judiciary to retrieve responsive records. See Simmons, 464 N.J. Super. at 86; Owoh, GRC 2019-256.

Therefore, recognizing that the Custodian’s June 10, 2021 response to the Complainant’s April 28, 2021 OPRA request is no longer a lawful denial pursuant to Simmons, 247 N.J. at 42; her response was nonetheless lawful at that time because it was consistent with the prevailing case law and Council decisions prior to the Court’s ruling. N.J.S.A. 47:1A-6; Simmons, 464 N.J. Super. 77; Owoh, GRC 2019-256; Moore, GRC 2009-144. Thus, the Council declines to order disclosure here.

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, 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.]

In the instant matter, the Complainant sought complaints and summonses prepared by LBPDP pertaining to drug possession, drug paraphernalia, DUI/DWI, and jaywalking offenses. The Custodian responded on June 10, 2021, directing the Complainant to the “court”. On June 17, 2021, the Court overturned the Appellate Division in Simmons, 247 N.J. 24. The Complainant then filed the instant complaint on July 7, 2021, asserting that the Custodian should have obtained the records via LBPDP in accordance with the Court's ruling. While the matter remained pending, the Custodian provided the Complainant with access to the requested records on February 15, 2022.

The Complainant sought attorney's fees relying on the Court's reversal as a basis for the unlawful denial in his complaint, which he argued created the causal nexus with the Custodian's realization that the previously relied upon authority had been overturned. However, while Simmons, 247 N.J. 24 was the prevailing authority at the time of the complaint filing, it was not the prevailing authority at the time of the response. The Custodian's June 10, 2021 response was made after the Appellate Division's published ruling in Simmons, 464 N.J. Super. 77, but before the Court's June 17, 2021 reversal. The Custodian's production of records after the complaint filing can therefore only be attributed to the Court's Simmons reversal, as the Custodian's response denying access was pursuant to proper legal foundation. Accordingly, the complaint was not the causal nexus exists, and the Complainant is not a prevailing party.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters, 387 N.J. Super. at 432. Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 76. Specifically, the evidence of record supports that the Custodian's response was lawful at the time and her subsequent actions were in response to Simmons, 247 N.J. 24 rather than 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. at 432, and Mason, 196 N.J. at 76.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Recognizing that the Custodian's June 10, 2021 response to the Complainant's April 28, 2021 OPRA request is no longer a lawful denial pursuant to Simmons v. Mercado, 247 N.J. 24, 42 (2021); her response was nonetheless lawful at that time because it was consistent with the prevailing case law and Council decisions prior to the Court's ruling. N.J.S.A. 47:1A-6; Simmons v. Mercado, 464 N.J. Super. 77 (App. Div. 2020); Owoh, Esq. (O.B.O. AADARI) v. Borough of East Newark (Hudson), GRC Complaint No. 2019-256 (April 27, 2021); Moore v. N.J. Dep't of Corr., GRC Complaint No. 2009-144 (Interim Order dated October 26, 2010). Thus, the Council declines to order disclosure here.
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, 76 (2008). Specifically, the evidence of record supports that the Custodian's response was lawful at the time and her subsequent actions were in response to Simmons, 247 N.J. 24 rather than 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. at 432, and Mason, 196 N.J. at 76.

Prepared By: Samuel A. Rosado
Staff Attorney

December 6, 2022