



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 31, 2023 Government Records Council Meeting

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

Complaint No. 2021-164

v.

Mountainside Police Department (Union)
Custodian of Record

At the January 31, 2023 public meeting, the Government Records Council (“Council”) considered the January 24, 2023 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 unlawfully denied access to the Complainant’s OPRA request seeking cancelled checks used to settle sexual harassment allegations from 2014 through present. N.J.S.A. 47:1A-6; Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 517 (App. Div. 2010); Libertarians for Transparent Gov’t v. Borough of Westwood (Bergen), GRC Complaint No. 2016-214 (Interim Order dated October 30, 2018). However, the GRC declines to order disclosure since the evidence of record demonstrates that the Custodian provided the records to the Complainant on July 23, 2021.
2. The Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a 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 Custodian did not provide the Complainant with the requested records until after the instant complaint was filed, and unlawfully denied access. Therefore, the Complainant is 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. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney’s fees, Complainant’s Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13(c).**

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 31st Day of January 2023

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: February 6, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 31, 2022 Council Meeting**

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

GRC Complaint No. 2021-164

v.

**Mountainside Police Department (Union)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “cancelled checks . . . used to settle sexual harassment allegations from 2014 to present.”³

Custodian of Record: Susan DiFrancesco

Request Received by Custodian: April 28, 2021

Response Made by Custodian: May 7, 2021; May 24, 2021; July 19, 2021

GRC Complaint Received: July 20, 2021

Background⁴

Request and Response:

On April 28, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 7, 2021, the Custodian e-mailed the Complainant stating that an extension until May 30, 2021 was needed to process the request. The Custodian also requested clarification, asking whether the Complainant sought evidence of any cash settlement payout by the Borough of Mountainside (“Borough”) via settlement agreement or jury verdict. On May 22, 2021, the Complainant responded to the Custodian, stating that the request was self-explanatory. The Complainant stated that if the Borough and its insurance carrier did not settle any case since 2014, then no records would exist. The Complainant also stated that if the Borough and its insurance carrier did not make any payments due to a complaint filed from 2014 to present, then no records would exist.

On May 24, 2021, the Custodian responded to the Complainant in writing, stating that no responsive records exist. On July 19, 2021, the Complainant e-mailed the Custodian stating that

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

² Represented by Siobhan Beere, Esq., of Post Polak, PA (Roseland, 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.

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he did not see any cancelled checks in their response. The Custodian responded that same day, stating that the Borough did not have any cancelled checks, and payments were issued by the Borough's insurance carrier.

Denial of Access Complaint:

On July 20, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant contended that the Custodian failed to disclose the records responsive to the subject OPRA request. The Complainant argued that the Custodian had an obligation to obtain the records from the Borough's insurance carrier. See Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010); Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). The Complainant asserted that the Custodian did not request additional time to get the records from the insurance carrier.

The Complainant requested that the GRC compel the Borough to provide the cancelled checks, and to award counsel fees.

Additional Response:

On July 23, 2021, Custodian's Counsel e-mailed the Complainant providing copies of the settlement checks responsive to the Complainant's request. Counsel stated that the checks were redacted to protect bank account information and requested the Complainant to withdraw the matter.

Statement of Information:

On September 3, 2021, the Custodian filed a Statement of Information ("SOF"). The Custodian certified that she received the Complainant's OPRA request on April 28, 2021. The Custodian certified that she requested an extension of time on May 7, 2021, as well as clarification of the request. The Custodian then certified that she initially responded in writing on May 24, 2021, stating that no responsive records exist. The Custodian certified that she later told the Complainant that the insurance company made the settlement checks on July 19, 2021. The Custodian certified that after receiving the instant complaint, the responsive checks were located and disclosed on July 23, 2021.

The Custodian asserted that the Borough was a member of the Suburban Municipal Joint Insurance Fund ("JIF"). The Custodian asserted that the settlement checks were drawn by the third-party administrators of the JIF's insurance policies, and that the Borough had no direct contract with those administrators. The Custodian further argued that the Complainant received copies of the settlement agreements themselves which contained the amounts issued by those checks. The Custodian argued that the Complainant therefore already possessed the requested information notwithstanding the production of the checks themselves.

The Custodian next asserted that the Complainant was not a prevailing party because the Custodian was not obligated to obtain the checks from the third-party administrators under OPRA.

The Custodian also argued that the Complainant’s Counsel was the requestor, and therefore could not obtain counsel fees.

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.

In Burnett, the court determined that the defendant was required to obtain settlement agreements from its insurance broker. 415 N.J. Super. at 517. The court’s decision largely fell on the fact that there was no question that the broker was working on behalf of the defendants to execute settlement agreements. Id. at 513. The court noted that it previously held that while insurance brokers or outside counsel are third parties, “they nonetheless bind the county as principle, and the agreements are made on its behalf.” Id. In determining that defendants had an obligation to obtain responsive records from the insurance broker, the court noted that the facts there differed from those in Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 38-39 (App. Div. 2005)⁵ (holding that plaintiff made no showing that the defendant was required to obtain records located outside its agency).

In Libertarians for Transparent Gov’t v. Borough of Westwood (Bergen), GRC Complaint No. 2016-214 (Interim Order dated October 30, 2018), the complainant requested records pertaining to a civil suit. The custodian denied access, stating that the suit was handled by the joint insurance fund (“fund”) on the municipality’s behalf, and directed the complainant to submit an OPRA request directly. The Council found that while the fund was a public agency, the municipality’s relationship with the fund was the same as with private insurers or outside counsel. The Council held that the Custodian therefore had an obligation to obtain the records from the fund in accordance with Burnett.

In the instant matter, the Custodian argued that while the Borough was a member of the JIF, the checks were drawn from the administrators of the insurance policies provided by the JIF. The Custodian asserted that the Borough had no contract with these administrators and therefore was not obligated to retrieve the checks.

However, the relationship between the between the Borough and JIF remains the same as those in Burnett and Libertarians. Specifically, the administrators issued the checks on behalf of the Borough in accordance with the policy offered by JIF, of which the Borough is a member. Similarly, the court in Burnett held that records created by counsel were on behalf of the custodian, notwithstanding that counsel was retained and provided by the custodian’s insurer, rather than the

⁵ Affirming Bent v. Stafford Police Dep’t, GRC Complaint No. 2004-78 (October 2004).
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custodian directly. 415 N.J. Super. at 513. Thus, the Custodian was obligated to retrieve the checks, even if held by the third-party administrators.

Therefore, the Custodian unlawfully denied access to the Complainant's OPRA request seeking cancelled checks used to settle sexual harassment allegations from 2014 through present. N.J.S.A. 47:1A-6; Burnett, 415 N.J. Super. at 517; Libertarians, GRC 2016-214. However, the GRC declines to order disclosure since the evidence of record demonstrates that the Custodian provided the records to the Complainant on July 23, 2021.

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 copies of cancelled checks used to settle sexual harassment allegations from 2014 to present. The Custodian initially responded on May 24, 2021, asserting that no responsive records exist. On July 19, 2021, the Custodian added that the Borough did not possess the checks since they were issued by their insurance carrier. The Complainant then filed the instant complaint that same day, asserting that the Custodian should have obtained the records from the JIF in accordance with Burnett. While the matter remained pending, the Custodian provided the Complainant with access to the requested records on July 23, 2021.

Initially, the GRC addresses the Custodian’s contention that the Complainant could not be a prevailing party because the Complainant, an attorney, is a *pro se* requestor. Here, the Complainant asserted that he represented Delores Simmons, Baafi Simmons, and Grace Woko in the Denial of Access Complaint. Additionally, the OPRA request itself states it is from Delores Simmons, Obafemi Simmons, and Grace Woko. Further, the request sought a response via an e-mail address separate from the Complainant’s. Therefore, there is sufficient evidence

demonstrating that the Complainant submitted the OPRA request on the other parties' behalf at the time of the complaint and was not the requestor.

Next, in determining whether the Complainant is a prevailing party entitled to attorney's fees, the GRC is satisfied that the evidence of record supports a conclusion in the affirmative. The Custodian initially denied access to the Complainant's request. However, it was only until after the complaint was filed that the Custodian reversed course and provided the Complainant with responsive records. Furthermore, in accordance with the above, the Custodian's initial denial was unlawful. Thus, a causal nexus exists between this complaint and the change in the Custodian's conduct. Mason 196 N.J. at 76. Accordingly, the Complainant is a prevailing party entitled to attorney's fees.⁶

Therefore, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. at 432. Additionally, a 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 Custodian did not provide the Complainant with the requested records until after the instant complaint was filed, and unlawfully denied access. Therefore, the Complainant is 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. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13(c).**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian unlawfully denied access to the Complainant's OPRA request seeking cancelled checks used to settle sexual harassment allegations from 2014 through present. N.J.S.A. 47:1A-6; Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 517 (App. Div. 2010); Libertarians for Transparent Gov't v. Borough of Westwood (Bergen), GRC Complaint No. 2016-214 (Interim Order dated October 30, 2018). However, the GRC declines to order disclosure since the evidence of record demonstrates that the Custodian provided the records to the Complainant on July 23, 2021.

⁶ The Council makes this determination with the understanding that the Complainant acted on behalf of a bona fide client at the time of the request. Although the Complainant's status as representing an actual client has been previously challenged, the available evidence on the record is insufficient to address that issue herein. See Owoh, Esq. (O.B.O. AADARI) v. Neptune City Police Dep't (Monmouth), GRC Complaint No. 2018-153 (April 2020) and Owoh, Esq. (O.B.O. AADARI) v. Freehold Twp. Police Dep't (Monmouth), GRC Complaint No. 2018-155 (Interim Order dated September 29, 2020).

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2. The Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a 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 Custodian did not provide the Complainant with the requested records until after the instant complaint was filed, and unlawfully denied access. Therefore, the Complainant is 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. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney’s fees, Complainant’s Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13(c).**

Prepared By: Samuel A. Rosado
Staff Attorney

January 24, 2023