



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 28, 2023 Government Records Council Meeting

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

Complaint No. 2021-188

v.
Elk Township (Gloucester)
Custodian of Record

At the February 28, 2023 public meeting, the Government Records Council (“Council”) considered the February 21, 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 requested CDR-1s responsive to the Complainant’s July 20, 2021 OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian had an obligation to locate and retrieve responsive records created by the Elk Township Police Department. See Simmons v. Mercado, 247 N.J. 24, 42 (2021). However, the Council declines to order disclosure since the evidence of record demonstrates that the Custodian provided the Complainant with responsive records on September 9, 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. 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 28th Day of February 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: March 6, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 28, 2023 Council Meeting**

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

GRC Complaint No. 2021-188

v.

**Elk Township (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of complaints (CDR-1) 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 2021 to present.³

Custodian of Record: Debbie Pine

Request Received by Custodian: July 20, 2021

Response Made by Custodian: August 2, 2021

GRC Complaint Received: August 10, 2021

Background⁴

Request and Response:

On July 20, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 2, 2021, the Custodian responded to the Complainant in writing, stating that the Elk Township (“Township”) Police Department (“EPD”) did not maintain the requested CDR-1 records. The Custodian stated the Complainant would need to contact the municipal court for the records.

Denial of Access Complaint:

On August 10, 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 in the wake of the New Jersey Supreme Court’s decision in Simmons

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

² Represented by Brian J. Duffield, Esq. (Mullica Hill, 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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v. Mercado, 247 N.J. 24 (2021), rev'g 464 N.J. Super. 77 (App. Div. 2020). The Complainant requested the GRC compel the Township to fully comply with the OPRA request and to award counsel fees.

Supplemental Response:

On September 9, 2021, the Custodian e-mailed the Complainant providing twelve (12) pages of responsive records. The Custodian stated that in the wake of the Simmons decision she provided the records she believed were responsive to the Complainant's request.

Statement of Information:⁵

On May 2, 2022, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on July 20, 2021. The Custodian certified that she responded in writing on August 2, 2021, stating that CDR-1 records had to be sought from the municipal court.

The Custodian asserted that at the time of the request she was unaware of the Court's Simmons decision issued on June 17, 2021. The Custodian then stated that once discovered, EPD completed a search for the requested CDR-1s and provided same to the Complainant on September 9, 2021.

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.

Additionally, the Council has previously held that criminal complaints and summonses are subject to disclosure. Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004); see also Mawhinney v. Egg Harbor City Police Dep't (Atlantic), GRC Complaint No. 2015-85 (January 2016).

In Simmons, the Complainant requested the same or similar 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. Id. at 32. The Court reversed the Appellate Division and found that the requested records were government records subject to disclosure under OPRA. Id. at 29. The Court found that notwithstanding which government branch created the CDR-1 and -2 forms, it is the information

⁵ On September 9, 2021, this complaint was referred to mediation. On January 28, 2022, this complaint was referred back to the GRC for adjudication.

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contained within those forms by MPD officers that is sought by AADARI. Id. at 40-41. Thus, the Court held 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. Thus, 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.

In the instant matter, the Custodian responded to the Complainant on August 2, 2021, stating that the request items sought court records not maintained by EPD. The Complainant filed the instant matter on August 10, 2021, stating that the Custodian's response was contrary to the Simmons decision. In the SOI, the Custodian asserted they were unaware of the Simmons decision at the time and provided the Complainant with the requested records via e-mail on September 9, 2021.

When considering the Court's decision in Simmons, the Custodian maintained the obligation to provide the Complainant with responsive records created by EPD. Notwithstanding whether EPD maintained physical copies of same, the Court held that since police departments created the CDR-1s and CDR-2s when inputting information, they were government records even if the records were maintained by the Judiciary's electronic databases. Simmons, 247 N.J. at 42.

Accordingly, the Custodian unlawfully denied access to the requested CDR-1s responsive to the Complainant's July 20, 2021 OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian had an obligation to locate and retrieve responsive records created by EPD. See Simmons, 247 N.J. at 42. However, the Council declines to order disclosure since the evidence of record demonstrates that the Custodian provided the Complainant with responsive records on September 9, 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 complaints and summonses prepared by EPD pertaining to drug possession or drug paraphernalia. The Custodian responded on August 2, 2021, 2021, asserting that the records were maintained by the municipal court. The Complainant then filed the instant complaint on August 10, 2021, asserting that the Custodian should have obtained the records via EPD in accordance with Simmons, 247 N.J. 24. While the matter remained pending, the Custodian provided the Complainant with access to the requested records on September 9, 2021.

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 by directing him to the municipal court. It was only until after the complaint was filed that the Custodian reversed course and provided the Complainant with responsive records. 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. 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).**

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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Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian unlawfully denied access to the requested CDR-1s responsive to the Complainant's July 20, 2021 OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian had an obligation to locate and retrieve responsive records created by the Elk Township Police Department. See Simmons v. Mercado, 247 N.J. 24, 42 (2021). However, the Council declines to order disclosure since the evidence of record demonstrates that the Custodian provided the Complainant with responsive records on September 9, 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. 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

February 21, 2023