



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 28, 2023 Government Records Council Meeting

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

Complaint No. 2021-196

v.

Clementon Borough Police Department (Camden)
Custodian of Record

At the March 28, 2023 public meeting, the Government Records Council (“Council”) considered the March 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 did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the extended period results in a “deemed” denial of the said request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). However, the Council declines to order disclosure of the requested records since the evidence of record demonstrates the Custodian provided same to the Complainant on August 31, 2021.
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, 436 (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 demonstrates the Custodian intended to respond to the Complainant’s OPRA request notwithstanding the “deemed” denial, and Ms. Carns’s July 27, 2021 e-mail was not an official response on the Custodian’s behalf. 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 28th Day of March 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: April 3, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

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

GRC Complaint No. 2021-196

v.

**Clementon Borough Police Department (Camden)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 jaywalking by your police department from January 2020 to present.

Custodian of Record: Jenai Johnson

Request Received by Custodian: April 26, 2021

Response Made by Custodian: May 3, 2021; May 4, 2021; July 26, 2021

GRC Complaint Received: August 11, 2021

Background⁴

Request and Response:

On April 26, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 3, 2021, the Custodian requested an extension of time to respond, stating that a response would be ready on or about June 1, 2021. On May 4, 2021, the Complainant acquiesced to the extension.

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

² Represented by George J. Botcheos, Esq., (Voorhees, 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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On July 26, 2021, the Custodian responded to the Complainant in writing, providing records not at issue in the matter. That same day, the Complainant replied to the Custodian stating he did not see any CDR-1 complaints relating to drug offenses included in the response. The Custodian responded stating she would reach out to the Clementon Police Department (“CPD”) and Clementon Municipal Court (“Municipal Court”). The Custodian thereafter forwarded the Complainant’s reply to then-Acting Police Chief Bill Boyle and Donna Carns of the Municipal Court, seeking clarification as to which entity possessed the CDR-1s

On July 27, 2021, Ms. Carns e-mailed the Complainant stating he needed to visit the New Jersey Judiciary’s website to access public records pertaining to court matters. Ms. Carns also stated that a Judiciary request form was also available on the website.

On July 28, 2021, Ms. Carns responded to the Custodian stating the request for complaints and summonses pertained to the court and the Complainant would need to look up those records on the Judiciary’s website. Ms. Carns further stated she would forward the request to the Administrative Office of the Courts to obtain advice.

On August 2, 2021, Ms. Carns e-mailed the Custodian stating her division manager advised her that the request sought police records, not court records. Ms. Carns stated she therefore had nothing to provide. That same day, the Custodian e-mailed Acting Chief Boyle stating she was referred to him for the requested records, citing Ms. Carns’s e-mail.

Denial of Access Complaint:

On August 11, 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 requested 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 Clementon Borough (“Borough”) to fully comply with the OPRA request and to award counsel fees.

Supplemental Response:

On August 30, 2021, the Custodian e-mailed the Complainant stating the Borough had not denied the OPRA request and was actively attempting to the acquire the requested CDR-1s. The Custodian stated that Ms. Carns’s July 27, 2021 e-mail was not the official response from her as the Custodian. The Custodian stated that she did not have personal access or knowledge of where the records were stored and was working with the Municipal Court and CPD to acquire same. The Custodian stated she would have additional clarification within the next few days from the Chief of Police.

On August 31, 2021, sixty-one (61) days after the June 1, 2021 deadline, the Custodian e-mailed the Complainant providing copies of responsive records. The Custodian stated her apologies for the delay in response and any misunderstanding that the request was denied. The Custodian further stated CPD was in the middle of a transition period of its Police Chief and clerk at the time of the request resulting in new employees being tasked with providing a response.

Statement of Information:⁵

On May 3, 2022, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on April 26, 2021. The Custodian certified she requested an extension until June 1, 2021 to provide a response. The Custodian certified that she responded on August 31, 2021, providing responsive records.

The Custodian maintained that the July 27, 2021 e-mail from Ms. Carns was not the official response from the Borough, and there was no intent to deny access to responsive records. The Custodian asserted that the original request sought eighteen (18) bulleted items and required numerous hours to process. The Custodian argued that unforeseen staffing changes at CPD hindered the initial response but that the requested CDR-1s were ultimately provided on August 31, 2021.

Additional Submissions:

On May 3, 2022, the Complainant e-mailed the GRC stating there was no need to respond to the SOI as the Custodian admitted the CDR-1s were provided after the complaint was filed. The Complainant asserted the Custodian violated the law considering the Simmons decision, and thus the only outstanding issue was counsel fees.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁶ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).

Additionally, in Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant’s March 19, 2007 OPRA request seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records would be provided later in the week. Id. The evidence of record showed that no records were provided until May 31, 2007. Id. The GRC held that:

⁵ On August 31, 2021, this complaint was referred to mediation. On January 28, 2022, this complaint was referred back to the GRC for adjudication.

⁶ A custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

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The Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5(i) resulting in a “deemed” denial of access to the records.

[Id.]

In the instant matter, the Custodian extended the deadline to the end of business on June 1, 2021. However, the Custodian did not respond again until August 31, 2021, or sixty-one (61) business days after the extended deadline. Thus, the facts here are like those discussed in Kohn, GRC 2007-124 and support a “deemed” denial of access.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the extended period results in a “deemed” denial of the said request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. See also Kohn, GRC 2007-124. However, the Council declines to order disclosure of the requested records since the evidence of record demonstrates the Custodian provided same to the Complainant on August 31, 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.]

Additionally, in Mason the plaintiff submitted an OPRA request on February 9, 2004. The defendant responded on February 20, eight (8) business days later, or one day beyond the statutory limit. Id. at 79. As a result, the Court shifted the burden to the defendant to prove that the plaintiff's lawsuit, filed on March 4, was not the catalyst behind defendant's voluntary disclosure. Id. Because defendant's February 20 response included a copy of a memo dated February 19 -- the seventh (7th) business day -- which advised that one of the requested records should be available on February 27 and the other one week later, the Court determined that the plaintiff's lawsuit was not the catalyst for the release of the records and found that she was not entitled to an award of prevailing party attorney fees. Id. at 80.

In determining whether the Complainant is a prevailing party, the GRC acknowledges that the Custodian's failure to respond in writing within the extended period resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). Thus, the burden of proving that this complaint was not the catalyst for providing the responsive records to the Complainant shifts to the Custodian pursuant to Mason, 196 N.J. 51.

In the matter before the Council, the Complainant alleged the Custodian denied access to the requested CDR-1 records, in violation of the Simmons decision. In the Denial of Access Complaint, the Complainant referenced the July 27, 2021 e-mail from Ms. Carns as evidence of the Custodian's denial. In the SOI, the Custodian asserted that Ms. Carns's e-mail was not an official response from the Borough and informed the Complainant as much on August 31, 2021. In the May 3, 2022 e-mail, the Complainant maintained that the Custodian violated the law via Simmons and noted the CDR-1 records were not provided until after the complaint was filed.

A review of the facts indicates the Custodian intended to provide responsive records to the Complainant, regardless of the filing of the complaint. A review of the correspondence between the Custodian, Acting Chief Boyle, and Ms. Carns shows the Custodian sought clarification on which entity maintained the records, and received conflicting information before and after Ms. Carns's July 27, 2021 e-mail to the Complainant. Further, there is no evidence in the record demonstrating that Ms. Carns, a member of the Judiciary, responded on the Custodian's behalf on July 27, 2021. Thereafter, the Custodian demonstrated her desire to fulfill the request, notwithstanding the extended deadline's expiration and the complaint filing. Thus, the GRC finds that the complaint was not the catalyst for the Custodian's intended disclosure and that no causal nexus exists.

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 demonstrates the Custodian intended to respond to the Complainant's OPRA request notwithstanding the "deemed" denial, and Ms. Carns's July 27, 2021 e-mail was not an official response on the Custodian's behalf. 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. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the extended period results in a "deemed" denial of the said request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007). See also Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). However, the Council declines to order disclosure of the requested records since the evidence of record demonstrates the Custodian provided same to the Complainant on August 31, 2021.

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, 436 (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 demonstrates the Custodian intended to respond to the Complainant's OPRA request notwithstanding the "deemed" denial, and Ms. Carns's July 27, 2021 e-mail was not an official response on the Custodian's behalf. 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

March 21, 2023