



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

TAHESHA L. WAY
Lieutenant Governor

JACQUELYN A. SUÁREZ
Acting Commissioner

FINAL DECISION

October 3, 2023 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o African American
Data & Research Institute, Baffi Simmons &
Delores Simmons)
Complainant

Complaint No. 2021-250

v.

Dover Police Department (Morris)
Custodian of Record

At the October 3, 2023 public meeting, the Government Records Council (“Council”) considered the September 26, 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 performed an insufficient search for the portion of the Complainant’s OPRA request seeking “agreements” between the Town and former police officers. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008). Specifically, the Custodian failed to locate responsive records until after conducting an additional search following receipt of the Denial of Access Complaint.
2. Notwithstanding the Custodian’s insufficient search, and recognizing that the Custodian’s September 15, 2021 response and November 16, 2021 correspondence to the Complainant’s July 27, 2021 OPRA request seeking agreements is no longer a lawful denial pursuant to Libertarians for Transparent Gov’t v. Cumberland Cnty., 250 N.J. 46, 56-57 (2022); his response was nonetheless lawful at that time because it was consistent with the prevailing case law prior to the Court’s ruling. N.J.S.A. 47:1A-6; Libertarians for Transparent Gov’t v. Cumberland Cnty., 465 N.J. Super. 11 (App. Div. 2020); 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.
3. 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 denial was lawful at the time. 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 3rd Day of October 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: October 10, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 3, 2023 Council Meeting**

**Rotimi Owoh, Esq. (on behalf of African American
Data & Research Institute, Baffi Simmons & Delores
Simmons)¹
Complainant**

GRC Complaint No. 2021-250

v.

**Dover Police Department (Morris)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of: Names, date of hire, date of separation and reason for separation, salary at the time of separation who either resigned or retired or terminated or otherwise separated from 2008 to the present. N.J.S.A. 47:1A-10. This request includes any agreement entered with each one of the separated police officer(s).

- a. When stating the reason for separation, please note that some police officers separate due to plea deal, criminal convictions, criminal charges, sentences, and or other court agreement or court proceedings that require officers to be separated from your police department and or law enforcement jobs.
- b. Some police officers separate due to internal affairs investigations within the police departments.³

Custodian of Record: John Schmidt

Request Received by Custodian: July 27, 2021

Response Made by Custodian: August 5, 2021; September 15, 2021

GRC Complaint Received: October 13, 2021

Background⁴

Request and Response:

On July 27, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 5, 2021, the Custodian responded in writing extending the time to respond to the Complainant’s request.⁵ On September

¹ The Complainant represents the African American Data & Research Institute, Baffi Simmons, and Delores Simmons.

² Represented by Walter E. Luers, Esq., of Cohn, Lifland, Pearlman, Herrman, & Knopf, LLP (Saddle Brook, 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 Complainant nor the Custodian provided a copy of this correspondence or state the length of the extension.

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15, 2021, the Custodian responded in writing providing a record containing the requested officer information for the years 2016 to the present. The Custodian stated that payroll records from 2008 to 2015 would need to be obtained manually and therefore imposed an estimated special service charge to fulfill that portion of the request.

The Custodian also stated that for the request portion seeking separation agreements, no responsive records were located for the identified officers.

Denial of Access Complaint:

On October 13, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the provided record did not provide the reasons for separation. The Complainant contended that simply stating “terminated”, “resigned”, or “retired,” was insufficient under N.J.S.A. 47:1A-10 (“Section 10”). The Complainant noted that his objection pertained to the officer information provided by the Custodian, and not the portion requiring a special service charge.

The Complainant requested the GRC compel the Custodian to comply fully with the OPRA request and award counsel fees.

Statement of Information:

On October 22, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on July 27, 2021. The Custodian certified that his search included contacting the Town of Dover (“Town”) Finance Department who in turn reached out to their database vendor to provide the requested information. The Custodian certified that the vendor provided a sheet containing the information.

The Custodian also certified that he searched the Town’s personnel files to determine whether separation agreements existed which contained the requested information. The Custodian certified that his office was unable to locate information that was different from or more comprehensive than what was contained in the sheet received from the Finance Department.

The Custodian further certified that he searched eCourts for lawsuits involving the Town to help identify settlements or other similar records that would contain the reasons for separation. The Custodian certified that he was unable to locate any additional documents or information responsive to the Complainant’s request. The Custodian further certified that he requested one of the Town’s attorneys to search for similar information on the federal government’s PACER database, but no records were located either. The Custodian certified that he responded in writing on September 15, 2021, providing a spreadsheet containing the requested information, and stating that no other records existed, including agreements.

The Custodian first asserted that three (3) months prior to the instant request, the Complainant submitted an OPRA request seeking the same records, and at the time did not object to the provided records. The Custodian maintained that the spreadsheet provided contained all the requested information, including the reasons for separation.

The Custodian argued that OPRA expressly excluded personnel and pension records from disclosure. See N.J.S.A. 47:1A-10. The Custodian asserted that among those records included settlement agreements between a public agency and public employee that resolved a disciplinary matter. See Libertarians for Transparent Gov't v. Cumberland Cnty., 465 N.J. Super. 11 (App. Div. 2020). The Custodian asserted that in that case, the court rejected the Complainant's current argument that Section 10 requires a custodian to disclose personnel and/or pension records which provide the reasons for separation of a law enforcement officer. The Custodian noted that the court found that disciplinary agreements and agreements resolving internal disciplinary charges remain exempt from disclosure as personnel records even if they contain information subject to disclosure under Section 10.

The Custodian further asserted that OPRA did not require a public body to disclose information about the circumstances surrounding an employee's termination. See Libertarians for Transparent Gov't v. Ocean Cnty. Prosecutor's Office, 2018 N.J. Super. Unpub. LEXIS 25 (App. Div.) cert. denied, 235 N.J. 407 (2018). The Custodian asserted that Libertarians was directly on point, in that the Town was not obligated to conduct research to obtain the "real" reason for retirement.

The Custodian next contended that notwithstanding the arguments above, the Town did not possess any records containing the "reasons" for separation. The Custodian asserted that an extensive search was conducted to locate any records that may contain the reasons for separation, including reviewing eCourts and the federal judiciary's PACER database. The Custodian asserted that no other records were located. The Custodian thus maintained that the provided record was the most comprehensive document containing the information requested by the Complainant. The Custodian noted that the facts in this matter were like those in Owoh, Esq. (O.B.O. O.R.) v. West Windsor-Plainsboro Sch. Dist. (Morris), GRC Complaint Nos. 2014-15, *et al.* (September 2014), where the Complainant sought similar personnel information. The GRC held that the custodian provided the Complainant with the requested information and was not obligated to provide a redacted record.

The Custodian therefore argued that the GRC should dismiss the matter and find that the Complainant was not a prevailing party.

Additional Submissions:

On October 30, 2021, the Complainant submitted a brief in response to the Complainant's SOI. The Complainant asserted that the Custodian failed to provide the "real reasons" for separation in response to his OPRA request.

The Complainant initially argued that the terms "terminated", "retired", or "resigned," did not sufficiently provide the "reason for separation" because they were merely types of employment separations and did not adequately describe the underlying basis thereof. The Complainant argued that the "reason" for separation was likely located within a separate document constituting a government record, and the Custodian was obligated to retrieve that record, rather than create a spreadsheet or list containing the words "terminated", "retired", or "resigned."

The Complainant next asserted that in many instances where a police officer is charged for crimes, they may enter a plea agreement which may require them to leave the police department or be removed from employment because of a conviction. The Complainant argued that it was insufficient for the Custodian to merely state the terms “retired”, “resigned”, or “terminated” as the reason for separation if the “real reason” was that the officer was compelled to separate as part of a plea agreement or sentence. The Complainant thus argued that the Custodian violated OPRA by not providing the “real reasons” for any of the separations listed.

The Complainant asserted that a guilty plea agreement between an officer and prosecutor is akin to a settlement agreement normally entered into in civil proceedings. Libertarians, 465 N.J. Super. 11. The Complainant argued that civil settlement agreements are subject to OPRA, and therefore guilty plea agreements should also be subject to OPRA in accordance with Libertarians.

The Complainant contended that the Town did not want to provide the “real reasons” for separation due to the pervasive culture and predisposition to protect officers convicted of misconduct. The Complainant argued that providing single word descriptions was only partially truthful and did not promote OPRA’s goal of transparency.

The Complainant asserted that as an example of police departments’ culture, he noted that in response to a similar OPRA request, Millville Police Department stated that two (2) officers “resigned” from the department. The Complainant asserted that in fact the two (2) officers pleaded guilty to criminal charges and as part of the agreement and sentencing they were required to be separated from the department.

The Complainant requested that the GRC compel the Custodian to comply fully and truthfully with the OPRA request. The Complainant also requested that the GRC declare the Complainant a prevailing party and award counsel fees.⁶

On November 5, 2021, the Custodian submitted a sur-reply. The Custodian contended that the Complainant failed to distinguish the instant matter from Libertarians, slip op. The Custodian further argued that the Town was not required to research through all its records to attempt to locate a record containing the “real” reason for separation. The Custodian maintained that the provided record contains all the requested information, and the Town fulfilled its obligations under OPRA.

On November 13, 2021, the Complainant submitted an additional response. The Complainant provided three (3) news articles to contrast the Custodian’s sur-reply. Two (2) of the news articles allegedly pertain to a police officer who was fired for misconduct and later charged for a crime. The last news article pertains to the Town settling with a former police officer who filed a “whistle-blower” lawsuit against same.

⁶ The Complainant further noted that access to the records should have been granted under the “common law ‘right to access public records’.” However, the GRC does not have the authority to address a requestor’s common law right to access records. N.J.S.A. 47:1A-7(b); Rowan, Jr. v. Warren Hills Reg’l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013); Kelly v. N.J. Dep’t of Transp., GRC Complaint No. 2010-215 (November 2011). Thus, the GRC cannot address any common law right of access to the requested records.

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On November 16, 2021, the Custodian submitted an additional reply. The Custodian asserted that the first two (2) news articles pertain to Dover, New Hampshire, and not Dover, New Jersey. The Custodian next asserted that the third news article made no reference to any criminal charges against an officer. The Custodian also stated the settlement referenced in the news article had previously been provided to the Complainant as part of an earlier OPRA request. The Custodian included a copy of the e-mail correspondence sent to the Complainant as well as a copy the settlement agreement itself. However, the Custodian contended that the settlement agreement was not a “separation agreement” and therefore was not responsive to the Complainant’s request.

Analysis

Sufficiency of Search

It is the custodian’s responsibility to perform a complete search for the requested records before responding to an OPRA request, as doing so will help ensure that the custodian’s response is accurate and has an appropriate basis in law. In Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008), the custodian initially stated that no records responsive to the complainant’s OPRA request existed. The custodian certified that after receipt of the complainant’s denial of access complaint, which contained e-mails responsive to the complainant’s request, the custodian conducted a second search and found records responsive to the complainant’s request. The GRC held that the custodian had performed an inadequate search and thus unlawfully denied access to the responsive records. See also Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (January 2011).

In the instant matter, the Custodian asserted that at the time of the response, no responsive records were located for the requested agreements between the Town and former police officers. Furthermore, the Custodian certified in the SOI that his office conducted a search for “separation agreements” within the officers’ personnel files, as well the Judiciary’s eCourts database for any agreements stemming from litigation. However, in his November 16, 2023 correspondence the Custodian located a settlement agreement between a separated officer and the Town, but asserted that the record had already been provided in response to a prior OPRA request.⁷ The facts here, however, are on point with those in Schneble, 2007-220, and follows that an insufficient search occurred.

Accordingly, the Custodian performed an insufficient search for the portion of the Complainant’s OPRA request seeking “agreements” between the Town and former police officers. N.J.S.A. 47:1A-6; Schneble, GRC 2007-220. Specifically, the Custodian failed to locate responsive records until after conducting an additional search following receipt of the Denial of Access Complaint.

⁷ The GRC notes that the Custodian’s distinction between a “separation agreement” and “settlement agreement” is unpersuasive. Particularly, the Complainant’s OPRA request does not specify the type of agreement desired between a separated officer and the Town but sought “any” agreement between the parties. Thus, the settlement agreement identified by the Custodian would be responsive to this portion of the request.
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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).

Here, in addition to the requested personnel information, the Complainant sought any “agreement” between the Town and any separated officer containing the “reason for separation,” and included examples of such agreements within subparts (a) and (b) of the request. On September 15, 2021, the Custodian responded to the Complainant stating that no separation agreements were located for the listed officers. In the SOI, the Custodian certified that an extensive search was conducted within the officers’ personnel files along with the state and federal judiciary’s electronic databases. On November 13, 2021, the Complainant identified a news article reporting an incident between the Town and a former officer which led to a written agreement between the parties. On November 16, 2021, the Custodian responded to the Complainant stating that the incident resulted in a settlement agreement rather than a separation agreement and was therefore not responsive. Further, the Custodian contended that the settlement agreement had already been provided to the Complainant on April 23, 2021 in response to an earlier OPRA request, and included a copy of the settlement.

At the time of the Complainant’s OPRA request and the Town’s September 15, 2021 response, Libertarians, 465 N.J. Super. 11 was the precedential decision on an agency’s obligation to disclose personnel records containing information subject to disclosure under N.J.S.A. 47:1A-10. In that case, the plaintiffs discovered through meeting minutes that a corrections officer was involved in a misconduct investigation along with several other officers. Id. at 13-14. The officer was to be terminated originally but was allowed to “retire in good standing” after cooperating with the investigation in accordance with a settlement agreement. Id. The plaintiffs then submitted an OPRA request seeking the settlement agreement referenced in the minutes, and the officer’s “name, title, position, salary, length of service, date of separation and the reason therefore” in accordance with Section 10. Id. The defendants declined to provide the settlement agreement,

claiming it was a personnel record exempt from access. Id.

The plaintiffs challenged the denial of access to the settlement agreement, asserting that the defendants “misrepresent[ed] the ‘reason’ for Ellis’s separation from public employment” and improperly withheld a government record. Id. at 15. The trial court ordered disclosure of the settlement agreement with redactions, and the Appellate Division reversed, finding that the record was exempt as a personnel record under Section 10.

During the pendency of this complaint, the New Jersey Supreme Court reversed the Appellate Division and ordered disclosure of the settlement agreement with redactions. Libertarians for Transparent Gov’t v. Cumberland Cnty., 250 N.J. 46, 56-57 (2022). The Court found that under OPRA, custodians were required to disclose the actual records containing the information required to be disclosed under Section 10. Id. at 56. The Court thus held that because the requested settlement agreement contained Section 10 information, the defendants were obligated to disclose the record with appropriate redactions. Id. at 57.

Since this Denial of Access Complaint was filed before the Court’s Libertarians decision, the GRC must determine the applicable law at the time of the response. See Moore, GRC 2009-144. Here, the Custodian argued in the SOI that the Town did not possess any “separation agreements” and asserted that the located settlement agreement was nevertheless not responsive to the OPRA request. Since the Custodian responded prior to the Supreme Court’s decision, the Town was not obligated to provide the Complainant with personnel and disciplinary records which contained the “reasons” for separation. See Libertarians, 465 N.J. Super. 11; Moore, GRC 2009-144.

Therefore, notwithstanding the Custodian’s insufficient search, and recognizing that the Custodian’s September 15, 2021 response and November 16, 2021 correspondence to the Complainant’s July 27, 2021 OPRA request seeking agreements is no longer a lawful denial pursuant to Libertarians, 250 N.J. at 56-57; his response was nonetheless lawful at that time because it was consistent with the prevailing case law prior to the Court’s ruling. N.J.S.A. 47:1A-6; Libertarians, 465 N.J. Super. 11; 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.]

Here, the Complainant sought the “[n]ames, date of hire, date of separation and reason for separation, salary at the time of separation who either resigned or retired or terminated or otherwise separated from 2008 to the present,” as well as any “agreement” providing the “reason for separation.” The Custodian provided a list which stated the “reason for separation” as “normal retirement”, “early retirement” “relocation” or “resignation” for all identified officers. The Custodian also stated that no “agreement” exists between the Town and any of the separated officers. The Complainant then filed the instant complaint on October 13, 2021, asserting that the Custodian failed to provide the “real reason” for the officers’ separations. Thereafter, on November 16, 2021 the Custodian conducted an additional search and located a settlement agreement, but contended the record was not responsive to the OPRA request. On March 7, 2022, the Court overturned the Appellate Division in Libertarians, 250 N.J. 46. However, because the Custodian’s denial of access was valid at the time of the response, the Complainant has not achieved the desired result and is not a prevailing party in this complaint.

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 Complainants’ filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 71. Specifically, the evidence of record supports that the Custodian’s denial was lawful at the time. 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 71.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian performed an insufficient search for the portion of the Complainant’s OPRA request seeking “agreements” between the Town and former police officers. N.J.S.A. 47:1A-6; Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008). Specifically, the Custodian failed to locate responsive records until after conducting an additional search following receipt of the Denial of Access Complaint.
2. Notwithstanding the Custodian’s insufficient search, and recognizing that the Custodian’s September 15, 2021 response and November 16, 2021 correspondence to the Complainant’s July 27, 2021 OPRA request seeking agreements is no longer a lawful denial pursuant to Libertarians for Transparent Gov’t v. Cumberland Cnty., 250 N.J. 46, 56-57 (2022); his response was nonetheless lawful at that time because it was

consistent with the prevailing case law prior to the Court's ruling. N.J.S.A. 47:1A-6; Libertarians for Transparent Gov't v. Cumberland Cnty., 465 N.J. Super. 11 (App. Div. 2020); 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.

3. 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 denial was lawful at the time. 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

September 26, 2023