



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS
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Lieutenant Governor

JACQUELYN A. SUÁREZ
Acting Commissioner

FINAL DECISION

January 30, 2024 Government Records Council Meeting

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

Complaint No. 2021-300

v.

Borough of Cape May Point Police
Department (Cape May)
Custodian of Record

At the January 30, 2024 public meeting, the Government Records Council (“Council”) considered the January 23, 2024 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’s November 10, 2021 response was insufficient because she failed to address each request item. N.J.S.A. 47:1A-5(g); see Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). However, the GRC declines to order disclosure since the evidence of record demonstrates that the Custodian provided the Complainant with responsive records on November 9, 2021, in response to the June request.
2. Notwithstanding the Custodian’s insufficient response, she did not unlawfully deny access to Complainant’s November 1, 2021 OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that the Borough of Cape May Point provided all responsive records containing the requested information, inclusive of agreements between the Borough and police officers. See Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010).
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 Custodian certified that she provided the Complainant with all responsive records in the Borough of Cape May Point’s possession. 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 30th Day of January 2024

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 5, 2024

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 30, 2024 Council Meeting**

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

GRC Complaint No. 2021-300

v.

**Borough of Cape May Point Police Department (Cape May)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, payroll record, amount and type of pension of individuals who either resigned or retired or terminated or otherwise separated from 2014 to the present. N.J.S.A. 47:1A-10.

- a. This request includes any agreement entered with each one of the separated police officer(s).
- b. 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.
- c. Some police officers separate due to internal affairs investigations within the police departments.

Custodian of Record: Elaine L. Wallace

Request Received by Custodian: November 1, 2021

Response Made by Custodian: November 10, 2021

GRC Complaint Received: November 17, 2021

Background³

Request and Response:

On November 1, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. That same day, the Custodian sought clarification from the Complainant, asking whether the Complainant sought records pertaining to all employees with the Borough of Cape May Point (“Borough”) or just from police

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

² Represented by John P. Amenhauser, Esq. of The DeWeese Law Firm, P.C. (Wildwood, NJ).

³ 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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officers. On November 9, 2021, the Custodian e-mailed the Complainant, stating that the request appeared to be a duplicate of a portion of a request sent by the Complainant in June 2021 (“June Request”), and asked whether he received her response at the time. On November 10, 2021, the Complainant responded to the Custodian stating she should resend the records responsive to the previous OPRA request that are also responsive to the instant request. On November 10, 2021, the Custodian responded to the Complainant in writing via e-mail, attaching a PDF containing records responsive to the June Request, stating the documents were clearly marked and the Complainant should be able to locate the records responsive to the current request.

Denial of Access Complaint:

On November 17, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the records 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.

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

Statement of Information:

On December 17, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that the Borough received the Complainant’s OPRA request on November 1, 2021. The Custodian certified that the Cape May City Police Department (“CMCPD”) searched its records and databases for responsive records. The Custodian also certified that the Cape May City Clerk provided all resolutions and settlement agreements. The Custodian certified that the Borough did not have a police department and the CMCPD provided all police services. The Custodian certified that she responded to the Complainant in writing on November 10, 2021, attaching the responsive records.

The Custodian asserted that no portion of N.J.S.A. 47:1A-10 requires a custodian to provide a narrative explanation on the reasons why a public employee separated from an agency. The Custodian also asserted that the Appellate Division previously found that a custodian was not required to “describe the circumstances surround a resignation or the reasons they decided to resign.” Libertarians for Transparent Gov’t v. Ocean Cnty. Prosecutor’s Office, 2018 N.J. Super. Unpub. LEXIS 25 (App. Div. 2018). The court noted that OPRA did “not require the provision of the circumstances that may have caused an employee to choose to resign, the employee’s motivation for resigning, or anything beyond the reason for the employee’s ‘date of separation.’” Libertarians, slip op. at *11-12.

The Custodian therefore argued that the instant matter was without merit and should be dismissed by the GRC.

Additional Submissions

On January 12, 2022, 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 the Borough 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 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 the GRC declare the Complainant a prevailing party and award counsel fees.⁴

On October 18, 2023, the GRC e-mailed the parties, requesting copies of the request at issue, as well as the responsive records provided on November 10, 2023. The GRC noted that the only request in the file was the June Request.

⁴ 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 October 24, 2023, the Custodian responded to the GRC, providing copies of the November 1, 2021 OPRA request, as well as the responsive records provided on November 10, 2021. The Custodian also provided the records provided on November 9, 2021 in response to the June Request.

On December 21, 2023, the GRC requested additional information from the Custodian. Specifically, the GRC inquired:

1. Did the records provided on November 9, 2021 encompass the gap between the [June Request] and the November 1, 2021 OPRA request?
2. If no, the GRC requests a search be conducted for responsive records which may have been created during that period, and to certify if any such records exist.

On December 27, 2023, the Custodian responded to the GRC's request for additional information. The Custodian certified that the records provided on November 9, 2021 encompassed the gap between the June Request and the November 1, 2021 OPRA request and confirmed with the CMCPD that no responsive records came into existence during that period.

Analysis

Sufficiency of Response

OPRA provides that if a “custodian is unable to comply with a request for access, the custodian *shall indicate the specific basis therefor . . . on the request form and promptly return it to the requestor.*” N.J.S.A. 47:1A-5(g) (emphasis added). In Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the Council held that “. . . [t]he Custodian’s response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g).” See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013).

Upon review, the GRC is satisfied that the Custodian provided an insufficient response. Here, the Custodian responded to the Complainant’s OPRA request on November 10, 2021, by providing responsive records attached to an e-mail, stating the records were previously provided on November 9, 2021 in response to the June Request. However, the November 9, 2021 e-mail contained two (2) attachments; one containing records responsive to the request for personnel information, and the other containing records that would have been responsive to the portion seeking “agreements” between the Borough and the officers. However, the Custodian only provided the attachment containing the personnel information, and did not include the other attachment. The facts here are on point with those in Paff; thus, it follows there was an insufficient response in the instant complaint.

Therefore, the Custodian’s November 10, 2021 response was insufficient because she failed to address each request item. N.J.S.A. 47:1A-5(g); see Paff, GRC 2007-272. However, the GRC declines to order disclosure since the evidence of record demonstrates that the Custodian provided the Complainant with responsive records on November 9, 2021, in response to the June request.

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 Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010), the Council found that the custodian did not unlawfully deny access to the requested records based on the custodian’s certification that all such records were provided to the complainant. The Council held that the custodian’s certification, in addition to the lack of refuting evidence from the complainant, was sufficient to meet the custodian’s burden of proof. See also Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015).

In the instant matter, the Complainant requested the “[n]ames, date of hire, date of separation and reason for separation, salary, payroll record, amount and type of pension of individuals who either resigned or retired or terminated or otherwise separated from 2014 to the present” on November 1, 2021.

Subsequently thereafter, the Custodian responded to the June Request on November 9, 2021, providing records that the Custodian certified would have also been responsive to the November 1, 2021 request. On November 10, 2021, the Custodian responded in writing to the November 1, 2021 request providing the records containing the requested personnel information, but did not include the attachment containing the agreements.

In the SOI the Custodian certified that she provided fully responsive records and was not obligated to search for records containing the “reasons for separation.” Although the Complainant identified instances where other municipalities possessed records elaborating on the “reason for separation,” he failed to present any evidence that the Borough possessed same at the time of the request. Further, the Custodian certified to the GRC that no additional responsive records were created during the period between the June Request and the November 1, 2021 request.

Accordingly, notwithstanding the Custodian’s insufficient response, she did not unlawfully deny access to Complainant’s November 1, 2021 OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that the Borough provided all responsive records containing the requested information, inclusive of agreements between the Borough and police officers. See Danis, GRC 2009-156, *et seq.*

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 “[n]ames, date of hire, date of separation and reason for separation, salary, payroll record, amount and type of pension of individuals who either resigned or retired or terminated or otherwise separated from 2014 to the present,” as well as any “agreement” providing the “reason for separation.” On November 9, 2021, the Custodian provided records containing the requested personnel information and agreements, but in response to the June Request. The Custodian then provided the records containing the personnel information on November 10, 2021. The Complainant then filed the instant complaint on November 17, 2021, asserting the Custodian failed to provide the “real reason” for the officers’ separations. However, the Custodian certified in the SOI that the Borough did not possess any additional records, and that the records provided on November 9, 2021, encompassed the period between the June Request and the November 1, 2021 request. Thus, 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 Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 76. Specifically, the Custodian certified that she provided the Complainant with all responsive records in the Borough’s possession. 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’s November 10, 2021 response was insufficient because she failed to address each request item. N.J.S.A. 47:1A-5(g); see Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). However, the GRC declines to order disclosure since the evidence of record demonstrates that the Custodian provided the Complainant with responsive records on November 9, 2021, in response

to the June request.

2. Notwithstanding the Custodian's insufficient response, she did not unlawfully deny access to Complainant's November 1, 2021 OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that the Borough of Cape May Point provided all responsive records containing the requested information, inclusive of agreements between the Borough and police officers. See Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010).
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 Custodian certified that she provided the Complainant with all responsive records in the Borough of Cape May Point's possession. 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

January 23, 2024