



## State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS  
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PHILIP D. MURPHY  
Governor

TAHESHA L. WAY  
Lieutenant Governor

JACQUELYN A. SUÁREZ  
Acting Commissioner

### FINAL DECISION

#### February 29, 2024 Government Records Council Meeting

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

Complaint No. 2022-11

v.

Borough of Franklin Police Department (Sussex)  
Custodian of Record

At the February 29, 2024 public meeting, the Government Records Council (“Council”) considered the February 20, 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 did not unlawfully deny access to the portion of the Complainant’s December 1, 2021 OPRA request seeking disclosable personnel information and separation agreements pertaining to two (2) of the three (2) identified officers. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that the Borough of Franklin provided all responsive records in its possession. See Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010).
2. The Custodian has borne her burden of proof that she lawfully denied access to the Complainant’s OPRA request seeking any “agreement[s]” between the Borough of Franklin and one (1) of the separated police officers. Specifically, the Custodian certified, and the record reflects, that no such records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
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 Franklin’s possession and that no agreements between the Borough and one (1) of the officers existed.

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 29<sup>th</sup> Day of February 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: March 4, 2024**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 27, 2024 Council Meeting**

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

**GRC Complaint No. 2022-11**

v.

**Borough of Franklin Police Department (Sussex)<sup>2</sup>  
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:** Darlene J. Tremont

**Request Received by Custodian:** December 1, 2021

**Response Made by Custodian:** December 10, 2021

**GRC Complaint Received:** January 20, 2022

**Background<sup>3</sup>**

**Request and Response:**

On December 1, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 10, 2021, the Custodian responded to the Complainant in writing, providing responsive records. The Custodian stated that three (3) officers left the Borough of Franklin (“Borough”) within the requested period

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<sup>1</sup> The Complainant represents the African American Data & Research Institute.

<sup>2</sup> Represented by Robert B. McBriar, Esq., of Schenck, Price, Smith & King, LLP (Sparta, NJ).

<sup>3</sup> 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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– Findings and Recommendations of the Executive Director

and provided redacted payroll records as well as the separation agreements and pension information for each. The Custodian stated that the redactions were made to protect confidential and personal identifying information in accordance with N.J.S.A. 47:1A-1. The Custodian also provided a list of the officers which identified “retired”, “simple misconduct”, and “none on file” as the “Separation Reason”.

#### Denial of Access Complaint:

On January 20, 2022, 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 also asserted that the Custodian did not provide a record for the officers whose reasons for separation were identified as “simple misconduct” and “none on file.”

The Complainant requested that the GRC compel the Custodian to comply fully with the OPRA request and award counsel fees.<sup>4</sup>

#### Statement of Information:

On February 16, 2022, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on December 1, 2021. The Custodian certified that her search included forwarding the request to the Borough’s Payroll Department. The Custodian certified that the Payroll Department provided all the records and information available. The Custodian certified that she responded to the Complainant in writing on December 10, 2021, attaching the responsive records.

The Custodian initially asserted that OPRA was not intended to be a research tool for litigants. MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The Custodian next asserted that N.J.S.A. 47:1A-10 exempted personnel and pension records from access, with the exception of summary information about an employee’s position. Kovalcik v. Somerset Cnty. Prosecutor’s Office, 206 N.J. 581, 594 (2011). The Custodian further noted that the Council previously held that a request for an employee’s “name, title, position, salary, payroll record and length of service” was information specifically considered to be a “government record” under N.J.S.A. 47:1A-10. See Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated June 29, 2010). The Custodian noted that in this matter, the Complainant did not raise an issue regarding the separated officers’ names, dated of hire, date of separation, salary, payroll record, amount and type of pension.

The Custodian argued that aside from separation agreements, the Complainant did not identify any government records regarding the “reason for separation.” The Custodian contended that she provided a complete response by stating the reason for separation for each officer as “retired”, “simple misconduct”, and “none on file.” The Custodian next asserted that separation agreements were provided for the two (2) officers who separated due to “retired” and “simple misconduct.”

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<sup>4</sup> The Complainant does not raise an issue of the redactions made to the payroll records. Rotimi Owoh, Esq. (on Behalf of African American Data & Research Institute) v. Borough of Franklin Police Department (Sussex), 2022-11 – Findings and Recommendations of the Executive Director

The Custodian next argued that the statement of “none on file” was apt, since there was no separation agreement on file for that officer. The Custodian asserted that the officer was serving a suspension at the time of the request while a related employment litigation was ongoing. The Custodian contended that the officer was not “separated” in the technical sense, nor in the ways suggested in the Complainant’s request. The Custodian therefore argued that a definitive statement on the officer’s status could not be made, nor any documents provided. The Custodian noted that the Complainant did not request records or information on suspended officers.

Lastly, the Custodian asserted that the Complainant was not a prevailing party entitled an attorney fee award. The Custodian argued that because all separation agreements were provided at the time of the request, and no other records exist, there could not be a change in her conduct stemming from the complaint. Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006).

### **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.

#### **Personnel Information and Agreements**

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 December 1, 2021. The Custodian also sought any “agreement” between the Borough and any separated officer containing the “reason for separation.” On December 10, 2021, the Custodian responded in writing providing records containing the requested information, and separation agreements for two (2) of the three (3) identified officers. The Complainant claimed that the Borough failed to provide any record pertaining to the officer whose reason for separation was stated as “simple misconduct.” However, the Custodian certified, and the record demonstrates that one (1) of the provided separation agreements pertained to that officer.

Accordingly, the Custodian did not unlawfully deny access to the portion of the Complainant’s December 1, 2021 OPRA request seeking disclosable personnel information and

separation agreements pertaining to two (2) of the three (2) identified officers. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that the Borough provided all responsive records in its possession. See Danis, GRC 2009-156, *et seq.*

### Agreement of Officer

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Here, in addition to the requested personnel information, the Complainant sought any “agreement” between the Borough and any separated officer containing the “reason for separation.” On December 10, 2021, the Custodian responded to the Complainant stating that no agreements existed for the officer whose stated reason for separation was “none on file.” In the SOI, the Custodian certified that the officer was suspended at the time of the request pending the outcome of an ongoing employment litigation. The Custodian therefore certified that there was no agreement nor reason for separation since the officer’s status with the Borough was uncertain at the time. Additionally, the Complainant failed to present any evidence that the Borough possessed same at the time of the request, or to refute the Custodian’s certification.

Accordingly, the Custodian has borne her burden of proof that she lawfully denied access to the Complainant’s OPRA request seeking any “agreement[s]” between the Borough and one (1) of the separated police officers. Specifically, the Custodian certified, and the record reflects, that no such records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

### 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 (7<sup>th</sup> 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.” In response, the Custodian provided records containing the requested personnel information, and separation agreements for two (2) of the three (3) identified officers. The Complainant then filed the instant complaint on January 20, 2022, asserting the Custodian failed to provide the “real reason” for the officers’ separations and failed to provide records for two (2) officers whose stated reasons for separation was “simple misconduct” and “none on file”. However, the Custodian certified in the SOI that the Borough did in fact provide an agreement for one of those officers, and that no agreements exist for the other. 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 and that no agreements between the Borough and one (1) of the officers existed. 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 unlawfully deny access to the portion of the Complainant’s December 1, 2021 OPRA request seeking disclosable personnel information and separation agreements pertaining to two (2) of the three (2) identified officers. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that the Borough of Franklin provided all responsive records in its possession. See Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010).
2. The Custodian has borne her burden of proof that she lawfully denied access to the Complainant’s OPRA request seeking any “agreement[s]” between the Borough of Franklin and one (1) of the separated police officers. Specifically, the Custodian certified, and the record reflects, that no such records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
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 Franklin’s possession and that no agreements between the Borough and one (1) of the officers existed.



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

February 20, 2024