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FINAL DECISION

November 7, 2024 Government Records Council Meeting

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

Complaint No. 2022-80

v.

Bernardsville Police Department (Somerset)
Custodian of Record

At the November 7, 2024, public meeting, the Government Records Council (“Council”) considered the October 29, 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 February 25, 2022 response was insufficient because he 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); Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013). Specifically, the Custodian failed to indicate whether responsive agreements existed between the Borough of Bernardsville and any separated police officer.
2. Notwithstanding the Custodian’s insufficient response, he has borne his burden of proof that she lawfully denied access to the Complainant’s OPRA request seeking any “agreement[s]” between the Borough of Bernardsville and 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. Notwithstanding the Custodian’s insufficient response, he did not unlawfully deny access to the portion of the Complainant’s February 25, 2022 OPRA request seeking disclosable personnel information of police officers who separated from the Borough of Bernardsville. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that the Borough of Bernardsville provided all responsive records in its possession. See Owoh, Esq. (O.B.O. AADARI) v. Voorhees Twp. Police Dep’t (Camden), GRC Complaint No. 2022-12 (March 2024); Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010).
4. 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

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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 he provided the Complainant with all responsive records in the Borough of Bernardsville's possession, and that no responsive agreements exist between the Borough and separated police officers. 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 7th Day of November 2024

John A. Alexy, 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: November 12, 2024

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 7, 2024 Council Meeting**

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

GRC Complaint No. 2022-80

v.

**Bernardsville Police Department (Somerset)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: Anthony Suriano
Request Received by Custodian: February 16, 2022
Response Made by Custodian: February 25, 2022
GRC Complaint Received: March 28, 2022

Background³

Request and Response:

On February 16, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 25, 2022, the

¹ The Complainant represents African American Data & Research Institute.

² Represented by John Pidgeon, Esq., of Pidgeon & Pidgeon (Princeton, 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.

Rotimi Owoh, Esq. (on Behalf of African American Data & Research) v. Bernardsville Police Department (Somerset), 2022-80 – Findings and Recommendations of the Executive Director

Custodian responded to the Complainant in writing, providing the requested personnel information via spreadsheet.

Denial of Access Complaint:

On March 28, 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 creating a new spreadsheet or list stating “terminated” or “resigned” or “retired” is not sufficient. The Complainant also stated that the response did not state whether any officers left due to a plea deal or court proceeding that precludes them from law enforcement positions.

The Complainant requested the GRC to order the Custodian to comply with the Supreme Court decision Libertarians for Transparent Gov't v. Cumberland Cnty., 250 N.J. 46 (2022), issued on March 7, 2022. The Complainant also requested the GRC award counsel fees.⁴

Statement of Information:

On May 13, 2022, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on February 16, 2022. The Custodian certified that his search included taking the information from an Excel file of retired officers who separated from the Borough of Bernardsville (“Borough”) since 2014. The Custodian also certified that he added salaries, pension, and whether they resigned or retired as requested. The Custodian certified that he responded on February 25, 2022, providing a spreadsheet containing the requested information.

The Custodian maintained that the list contained all the information requested by the Complainant, including separation by retirement or resignation. The Custodian added that no police officer was terminated.

Additional Submissions:

On May 13, 2022, the Complainant e-mailed the GRC, stating that no additional response was necessary when considering the Court’s decision in Libertarians, and the Appellate Division’s decision in African Am. Data & Research Inst. v. Profitt, 2022 N.J. Super. Unpub. LEXIS 622 (App. Div. 2022). Custodian’s Counsel responded the same day stating that because all separated officers either retired or resigned, neither Libertarians nor Profitt have any bearing in the instant matter.

On October 1, 2024, the GRC submitted a request for additional information to the Custodian. Specifically, the GRC inquired whether the information from the provided spreadsheet

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.

Rotimi Owoh, Esq. (on Behalf of African American Data & Research) v. Bernardsville Police Department (Somerset), 2022-80 – Findings and Recommendations of the Executive Director

was collected from an electronic database, and whether the spreadsheet was created via Excel. The GRC further inquired whether the Borough conducted a search for any agreements between the Borough and any separated officers at the time of the request, and whether any such agreements were located.

On October 3, 2024, the Custodian responded to the GRC's request for additional information. The Custodian certified that the personnel information was collected from an Excel spreadsheet listing the names of former police officers and columns were added to include additional personnel information. The Custodian further certified that a search for agreements was conducted at the time of the request, but no such agreements were located.

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 by providing a spreadsheet containing the responsive personnel information. However, the response failed to identify whether the Borough was denying access to any records and did not indicate whether any “agreement” existed between the Borough and the listed officers. It was not until the Custodian’s response to the GRC’s request for additional information that she certified the Borough did not possess any responsive agreements. Furthermore, it was not until responding to the GRC’s additional information request that the Custodian certified that the Borough did not possess any responsive agreements. 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 February 25, 2022 response was insufficient because she failed to address each request item. N.J.S.A. 47:1A-5(g); see Paff, GRC 2007-272; Lenchitz, GRC 2012-265. Specifically, the Custodian failed to indicate whether responsive agreements existed between the Borough and any separated police officer.

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.

Agreements

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.” In response to the GRC’s request for additional information, the Custodian certified that the Borough conducted a search for such agreements, and none were located. Furthermore, the Complainant failed to present any evidence that the Borough possessed same at the time of the request.

Accordingly, notwithstanding the Custodian’s insufficient response, he has borne his burden of proof that he lawfully denied access to the Complainant’s OPRA request seeking any “agreement[s]” between the Borough and 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.

Personnel Information

Additionally, the Council in Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010) determined that a public 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. Additionally, prior GRC case law supports the disclosure of database information regarding personnel actions. See Matthews v. City of Atlantic City (Atlantic), GRC Complaint No. 2008-123 (February 2009). However, in that case the Council also held that a custodian was not required to disclose a record that did not exist in the format requested.

Further, while longstanding case law supports that a custodian is not required to create records to respond to OPRA requests, those requests seeking “information stored or maintained electronically” as defined in N.J.S.A. 47:1A-1.1 require a different analysis. In Paff v. Twp. of Galloway, 229 N.J. 340 (2017), the New Jersey Supreme Court determined there that an agency’s electronically stored information is a “government record” under OPRA, unless otherwise exempt. The Court thus reversed the Appellate Division, holding that basic e-mail information stored electronically is a “government record” under OPRA, unless an exemption applies to that information. The Court reasoned that:

A document is nothing more than a compilation of information -- discrete facts and data. By OPRA’s language, information in electronic form, even if part of a larger document, is itself a government record. Thus, electronically stored information extracted from an email is not the creation of a new record or new information; it is a government record.

. . . .

With respect to electronically stored information by a municipality or other public entity, we reject the Appellate Division's statement that "OPRA only allows requests for records, not requests for information." Paff, 444 N.J. Super. at 503, (quoting [Bent, 381 N.J. Super. at 37]). That position cannot be squared with OPRA's plain language or its objectives in dealing with electronically stored information.

[Id. at 353, 356.]

The Supreme Court's ruling in Paff squares with the Council's past decisions on the issue of coalescing information from electronic systems. Specifically, in Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014), the Council addressed the custodian's argument that she was not required to create a record to satisfy an OPRA request for database information pursuant to Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-156 (Interim Order dated February 27, 2008). Therein, the complainant sought access to a list of adjuncts to include certain information. The custodian produced a list that did not include all information sought; however, the evidence of record indicated that she could have produced a fully responsive record. Specifically, evidence existed to support that all information the complainant sought existed within a few different databases.

The Council first noted that the definition of a "government record" included "information stored or maintained electronically." N.J.S.A. 47:1A-1.1. The Council then distinguished the facts of Morgano and held that the custodian unlawfully denied access to the responsive list containing all elements identified in the subject OPRA request. The Council reasoned that:

The Morgano decision refers to compiling certain disclosable information from a paper record and listing or creating another paper record responsive to a request. However, in terms of certain electronic filing systems, general querying of information cannot be viewed as equal to creating a new paper record. While information stored electronically may include additional pieces of information/fields, many programs have the capability to extract requested information/fields for disclosure . . . Further, querying electronic file systems for responsive information is not unlike searching an e-mail account for e-mails responsive to an OPRA request.

[Id. at 12 (emphasis added).]

Thus, if the information sought is maintained electronically and can be provided as such, Paff and the GRC's prior decisions require disclosure. See also McBride v. City of Camden (Camden), GRC Complaint No. 2014-54 (Interim Order dated September 30, 2014).

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 February 16, 2022. On February 25, 2022, the Custodian responded in writing providing a list containing the requested personnel information. The Complainant claimed the

provided list was insufficient to satisfy his request for the “reasons for separation.” The Complainant also contended the response failed to indicate whether officers were separated due to a plea agreement or court proceeding.

While this matter was awaiting adjudication, the GRC issued its decision in Owoh, Esq. (O.B.O. AADARI) v. Voorhees Twp. Police Dep’t (Camden), GRC Complaint No. 2022-12 (March 2024). There, the complainant raised the same objections as the instant matter, with the custodian providing a spreadsheet containing the requested personnel information. However, the Council found that in accordance with Paff, 229 N.J. at 353, the provided spreadsheet was an acceptable form of disclosure, as it was generated through the agency’s electronic database. The Council further held that, under Matthews, GRC 2008-123, the custodian was not obligated to explicitly denote whether an officer’s separation was the result of a plea agreement or other court proceeding.

Here, the facts parallel those in Voorhees, GRC 2022-12. The Custodian certified in the SOI and in response to the GRC additional information request that the requested personnel information was collected via an Excel spreadsheet maintained by the Borough. Additionally, the Custodian certified in the SOI that no other responsive records exist containing the requested personnel information.

Accordingly, notwithstanding the Custodian’s insufficient response, he did not unlawfully deny access to the portion of the Complainant’s February 25, 2022 OPRA request seeking disclosable personnel information of police officers who separated from the Borough. 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 Voorhees, GRC 2022-12; 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 in part 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.” In response, the Custodian provided payroll and employee records containing the requested personnel information. The Complainant then filed the instant complaint on March 28, 2022, asserting the Custodian failed to provide the “real reason” for the officers’ separations. However, the Custodian certified in the SOI that a complete response was provided at the time of the request, and subsequently certified that no responsive agreements exist between the Borough and separated officers. 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 he provided the Complainant with all responsive records in the Borough’s possession, and that no responsive agreements exist between the Borough and separated police officers. 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 February 25, 2022 response was insufficient because he 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); Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013). Specifically, the Custodian failed to indicate whether responsive agreements existed between the Borough of Bernardsville and any separated police officer.
2. Notwithstanding the Custodian’s insufficient response, he has borne his burden of proof that she lawfully denied access to the Complainant’s OPRA request seeking any “agreement[s]” between the Borough of Bernardsville and 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. Notwithstanding the Custodian’s insufficient response, he did not unlawfully deny access to the portion of the Complainant’s February 25, 2022 OPRA request seeking disclosable personnel information of police officers who separated from the Borough of Bernardsville. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that the Borough of Bernardsville provided all responsive records in its possession. See Owoh, Esq. (O.B.O. AADARI) v. Voorhees Twp. Police Dep’t

(Camden), GRC Complaint No. 2022-12 (March 2024); Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156, *et seq.* (Interim Order dated April 28, 2010).

4. 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 he provided the Complainant with all responsive records in the Borough of Bernardsville's possession, and that no responsive agreements exist between the Borough and separated police officers. 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
Senior Staff Attorney

October 29, 2024