SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2941-20
A-2943-20
A-2981-20

ROTIMI OWOH, ESQ.
(O/B/O AFRICAN AMERICAN
DATA AND RESEARCH
INSTITUTE),

Appellant,

v.

BOROUGH OF NORWOOD,

Respondent.

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ROTIMI OWOH, ESQ.
(O/B/O AFRICAN AMERICAN
DATA AND RESEARCH
INSTITUTE),

Appellant,

v.

CITY OF NEW BRUNSWICK,

Respondent.

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ROTIMI OWOH, ESQ.
(O/B/O AFRICAN AMERICAN
DATA AND RESEARCH
INSTITUTE),

Appellant,

v.

BOROUGH OF EAST NEWARK
(HUDSON),

Respondent.

Argued (A-2943-20) and Submitted (A-2941-20, A-2981-20) November 9, 2022 – Decided January 10, 2023

Before Judges Susswein and Berdote Byrne.

On appeal from the New Jersey Department of Community Affairs, Government Records Council, GRC Complaint Nos. 2019-256, 2020-83, and 2020-111.

Rotimi Owoh argued the cause for appellant.

Archer & Greiner, PC, attorneys for respondent Borough of Norwood (Andrew T. Fede, of counsel and on the brief).

Nicole M. Grzeskowiak argued the cause for respondent City of New Brunswick (Hoagland, Longo, Moran, Dunst & Doukas, LLP, attorneys; Nicole M. Grzeskowiak, of counsel and on the brief).

Weiner Law Group LLP, attorneys for respondent Borough of East Newark (Stephen J. Edelstein and Dustin F. Glass, on the brief).

Matthew J. Platkin, Attorney General, attorney for respondent Government Records Council (Debra A. Allen, Deputy Attorney General, on the statements in lieu of briefs).

PER CURIAM

These three appeals arise from orders entered by Government Record Council (GRC) in three actions involving requests for records pursuant to the New Jersey Open Public Records Act[1] (OPRA) and the Common Law Right of Access from separate municipalities. We scheduled the appeals back-to-back-to-back and now consolidate them for purposes of issuing a single opinion. Resolution of the three appeals centers upon two common issues: 1) did the GRC err in applying then-existing case law in denying these OPRA requests and, 2) given a subsequent Supreme Court ruling, should the GRC's decisions be reversed retroactively. In each case, the GRC issued its final administrative decision relying upon a published and binding Appellate Division decision that was subsequently overturned by the Supreme Court. Based upon our review of the records and applicable law, we conclude the GRC correctly applied then-

[1] N.J.S.A. 47:1A-1 to -13.

existing case law and the Supreme Court's subsequent decision does not apply retroactively to final administrative determinations adjudicated by the GRC. The subsequent Supreme Court's ruling in Simmons v. Mercado, 247 N.J. 24 (2021), did not announce a new rule but merely clarified existing statutory language, rendering the decision not retroactively applicable to these three administrative appeals. We affirm the three challenged orders. Nothing prevents requestors from submitting new OPRA requests, which would have to be responded to in the manner set forth in the Supreme Court's Simmons decision.

Prior to addressing the orders from which the appeals are taken, we identify the parties and summarize the proceedings to provide context for our discussion of the legal issues presented. Requestor Rotimi Owoh o/b/o the African American Data & Research Institute (AADARI) appeals three final decisions of the Government Record Council (GRC) denying his various OPRA requests.

The A-2943-20 Appeal

On April 16, 2020, AADARI sought production of certain records from the Town of New Brunswick pursuant to OPRA and the common law right of access, including 1) DUI/DWI summonses and complaints that were prepared

by the New Brunswick Police Department [NBPD] from January of 2020 through the time responded; 2) copies of drug possession complaints and summonses that were prepared by NBPD during the same timeframe; and 3) copies of drug paraphernalia summonses and complaints that were prepared by NBPD during the same timeframe.

On May 8, 2020, NBPD provided responses to the requests on the custodian's behalf, advising the requests for DUI/DWI summonses and complaints and criminal complaints and summonses for drug paraphernalia are "court documents and not maintained by the New Brunswick Police Department." The responses recommended requestor contact the New Brunswick Municipal Court. On June 4, 2020, requestor filed a denial of access complaint with the GRC. The custodian responded to the denial of access complaint on December 28, 2020, filing a statement of information certifying NBPD did not maintain the requested complaints and summonses.

During the pendency of the denial of access complaint before the GRC, we decided Simmons v. Mercado, 464 N.J. Super. 77 (App. Div. 2020) on June 11, 2020. Simmons had similar facts to the present appeal. On May 11, 2021, the Executive Director recommended the GRC find the custodian lawfully denied access to complainant's OPRA requests. The GRC considered the

findings and recommendations of the Executive Director, and on May 18, 2021, voted unanimously to adopt those findings and recommendations. The council noted the final disposition of Simmons was still pending disposition,[2] but ruled the custodian lawfully denied AADARI's access to the OPRA requests. Relying on the then-binding Appellate Division decision in Simmons, the GRC found the custodian was correct in asserting the records were neither possessed nor maintained by NBPD, but rather once created were maintained instead by the judiciary.

The GRC distributed its decision on May 20, 2021, accompanied by a notification that any request for reconsideration "must be completed and delivered to the council within ten business days following receipt" pursuant to GRC administrative regulation N.J.A.C. 5:105-2.10. Requestor did not file a request for reconsideration within ten days. Our Supreme Court decided Simmons v. Mercado, 247 N.J. 24 (2021), on June 17, 2021. Thereafter, on June 21, 2021, a month after the GRC distributed the final decision in question, requestor submitted an application for reconsideration in light of the recent Supreme Court holding in Simmons, 247 N.J. 24. On June 22, 2021, the GRC

[2] The GRC findings and recommendation note certification was granted in the Simmons case.

denied requestor's application for reconsideration as untimely filed pursuant to N.J.A.C. 5:105-2.10.

Requestor filed the present appeal, challenging the GRC May 18, 2021 final decision, but not the June 21, 2021 denial of reconsideration.

The A-2941-20 Appeal

On March 13, 2020, AADARI sought production of certain records pursuant to OPRA and the common law right of access from the Borough of Norwood, including 1) DUI/DWI summonses and complaints that were prepared by Norwood Police Department (NPD) from June 2019 through the time responded; 2) copies of drug possession complaints and summonses that were prepared by NPD during the same timeframe; 3) copies of drug paraphernalia summonses and complaints that were prepared by NPD during the same timeframe; and 4) summonses and complaints that were prepared by NPD relating to each one of the defendants listed in the Drug Recognition Evaluation/Expert ("DRE") Rolling Log.

The records custodian forwarded the OPRA request to NPD and on April 3, 2020, Norwood's deputy borough clerk responded on behalf of the custodian, including copies of four documents referring to summonses issued by the NPD

as the responsive records and stating it could not compile the other requested summonses and complaints.

On April 27, 2020, AADARI filed a denial of access complaint with the GRC, alleging the borough violated OPRA denying his request. On April 21, 2021, after asking the records custodian if the borough had responsive requests for the remaining items, and whether the borough or NPD officers keep or maintain physical copies of the requested items, the borough responded, certifying the four pages of summonses provided were responsive to the first item, and no responsive records existed regarding the remaining item requests.

On May 11, 2021, the GRC Executive Director issued findings and recommendations, recommending the GRC deny the complaint. The GRC held despite a technical deficiency in the response, in which each request was not responded to as required by OPRA, N.J.S.A. 47:1A-5(i) to -5(g), the failure to respond to requestor items two through four was prompted by the fact that no responsive records existed. The GRC unanimously adopted those recommendations on May 18, 2021, citing our decision in Simmons, 464 N.J. Super. 77, and finding the OPRA requests were lawfully denied. The GRC distributed its final administrative decision on May 20, 2021, and notified any

request for reconsideration must be delivered within ten days pursuant to the GRC regulation N.J.A.C. 5:105-2.10.

On June 17, 2021, AADARI requested reconsideration of the GRC decision in light of the Supreme Court ruling in Simmons, 247 N.J. 24, which issued on that same day. On June 21, 2017, the GRC responded, confirming receipt of the reconsideration request, but highlighting it was untimely because it was filed more than ten days after the GRC issued its decision pursuant to N.J.A.C. 5:105-2.10(b). AADARI filed the present appeal of both the GRC final administrative decision and the denial of reconsideration on June 24, 2022.

The A-2981-20 Appeal

On December 9, 2019, AADARI sought production of certain records pursuant to OPRA and the common law right of access from the Borough of East Newark, including 1) copies of drug possession complaints and summonses that were prepared by the East Newark Police Department (ENPD) from January 2019 through the time responded; and 2) copies of drug paraphernalia summonses and complaints that were prepared by ENPD during the same timeframe.

On December 10, 2019, the records custodian responded, providing records to part of the requests, and advising there were no records responsive to the two requests at issue in this present appeal.

On December 23, 2019, AADARI filed a denial of access complaint with the GRC. The custodian responded to the complaint certifying it contacted the borough's police chief to search for the records, but the police chief informed the custodian there were no summonses and/or complaints for drug possession or paraphernalia.

On April 8, 2021, in response to a GRC request for additional information, the custodian certified: the custodian contacted the ENPD police chief to search for the records, the borough can access summonses and complaints through its computer search database ("CAD") maintained by ENPD and it asked the police chief to conduct a search using the previously mentioned CAD, which yielded no additional information. The custodian included screenshots of the CAD systems demonstrating same.

On April 27, 2021, the GRC, considering findings and recommendations of the Executive Director, issued a final decision finding the custodian lawfully denied access, having twice certified no responsive records existed. The decision was distributed on April 29, 2021, and provided "requests for

reconsideration must be completed . . . [and] delivered to the council within ten (10) business days following receipt a council decision . . . ."

On June 21, 2021, after the Court decided Simmons, AADARI requested the GRC reconsider its decision. Because the ten-day time to request reconsideration expired, the GRC rejected the request as untimely. On June 25, 2021, requestor filed a motion to appeal both the April 27, 2021, final decision and June 21, 2021, denial of reconsideration as within time. That motion was granted on July 23, 2021.

The New Jersey State Constitution provides for judicial review of actions by administrative agencies. N.J. Const. art. VI, §5, ¶4. Judicial review of quasi-judicial agency determination is limited. Allstars Auto Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018) (citing Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 143 N.J. 22, 25 (1995)). "An appellate court reviews agency decisions under an arbitrary and capricious standard." Zimmerman v. Sussex Cnty. Educ. Servs. Comm'n, 237 N.J. 465, 475 (2019). "An administrative agency's final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." In re Herrmann,192 N.J.19, 27-28 (2007).

On appeal, the party challenging the administrative action bears the burden of making that showing. Lavezzi v. State, 219 N.J. 163, 171 (2014).

On appeal, the judicial role in reviewing all administrative action is generally limited to three inquiries:

> (1) whether the agency's action violated express or implied legislative policies, that is did the agency follow the law;
> (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and
> (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonable have been made on a showing of the relevant factors.
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> [Allstars, 234 N.J. at 157 (quoting In re Stallworth, 208 N.J. 182, 194 (2011)).]

Our review of agency rulings of law and issues regarding the applicability, validity (including constitutionality) or interpretation of laws, statutes, or rules is de novo. See In re Ridgefield Park Bd. of Educ., 244 N.J. 1, 17 (2020) (agency's interpretation of a statute). "[D]eterminations about the applicability of OPRA and its exemptions are legal conclusions and are therefore subject to de novo review." Simmons v. Mercado, 247 N.J. at 38 (quoting In re N.J. Firemen's Ass'n Obligation, 230 N.J. 258, 273-74 (2017)).

On June 17, 2021, our Supreme Court reversed the Appellate Division in Simmons, and ruled summonses and complaints resulting in CDR-1 complaints and summonses, although forwarded to and maintained by the municipal courts, and by extension, the judiciary, are created by municipal police departments, and are therefore the type of record requestors are entitled to pursuant to OPRA, and the type of record law enforcement is required to retain and turn over. Simmons, 247 N.J. at 42.

AADARI urges us to conclude the GRC's decision was unreasonable because it failed to interpret the statute's plain language in the same manner as the Supreme Court ultimately concluded. We note the GRC did not act arbitrarily or capriciously in deciding the OPRA requests before it pursuant to controlling holding in Simmons, 464 N.J. Super 77. Simply stated, Simmons, 247 N.J. 24, had not been decided yet.

The respective boroughs, joined by the GRC, argue the Court's decision in Simmons, 247 N.J. 24, was not binding on it at the time of its final decision in these matters because Simmons did not exist at the time. The boroughs and the GRC concede the facts of Simmons, 464 N.J. Super. 77, are similar to the underlying facts of the appeal at bar. They argue because the GRC is bound by published appellate decisions, and the holding in Simmons, 464 N.J. Super. 77,

was operative at the time it issued its final decision, it decided the case pursuant to the correct controlling standard.

AADARI's argument on this point fails because it ignores then prevailing law in the appellate division's decision in Simmons. We conclude the GRC did not act arbitrarily, capriciously, or unreasonably and the record contains ample support for the conclusions reached in the three cases.

Our inquiry does not end there as the Supreme Court has held "determinations about the applicability of OPRA and its exemptions are legal conclusions and are therefore subject to de novo review." In re N.J. Firemen's Ass'n Obligation, 230 N.J. 258, 273-74 (2017). Additionally, the issue of retroactivity is a legal determination not presented by AADARI to the GRC while the agency was making its determination,[3] but one raised on appeal, and one we review de novo.

Each borough, joined by the State on behalf of the GRC, argues this reviewing court should not retroactively apply the Court's decision from

[3] Respondent filed his motion for the GRC to reconsider approximately one-month after it issued its final decision, and based the motion on the Court's decision in Simmons, 247 N.J. 24. Although our court rules allow motions for reconsideration within twenty days based on new evidence, or controlling decisions which counsel believes the court has overlooked, GRC reconsideration is a creature of the administrative code, and provides such motions "must be filed within ten days." Compare R. 4:49-2 with N.J.A.C. 5:105-2.10(b).

Simmons, 247 N.J. 24, to these appeals. They argue judicial decisions apply prospectively to all cases that have not reached final judgment and this is an instance where neither "pipeline retroactivity,"[4] nor "full retroactivity"[5] should apply. They assert the Simmons Court simply clarified the intent of the OPRA statute in holding CDR-1s "fall well within the OPRA's definition of a government record" and clarifying those records can be obtained from more than one entity even if the requested agency did not maintain same. Simmons, 247 N.J. at 30.

Retroactivity has a specific legal meaning, and courts do not endeavor a retroactivity analysis unless there is a new pronouncement of law. In general, we apply the law in effect at the time of the decision being appealed. See Battaglia v. United Parcel Serv., 214 N.J. 518, 555 n. 8 (2013) ("[i]n general we apply statutes as they existed at the time the relevant facts and circumstances

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[4] Referencing generally cases in the "pipeline" as those in which a final judgment has not issued and the merits are thus undecided. See Henderson v. Camden Cnty. Mun. Util. Auth., 176 N.J. 554, 561-62 (2003) (deciding because the Court had announced a new rule, it would apply prospectively).

[5] Referencing generally cases where a final judgment has issued, and the court determines settled issues should remain undisturbed. See e.g. Kuhnel v. CAN Ins. Cos. 322, N.J. Super. 568, 579-80 (App. Div. 1999) (declining to grant full retroactivity where the impact on the administration of justice would be "significant and negative").

occurred."); see also In re Contest of November 8, 2011, 210 N.J. 29, 68 (2012) (citing Fischer v. Canario, 143 N.J. 235, 243 (1996)); see also Mandel, Appellate Practice, §28:4-1.[6]

We first engage in "the threshold inquiry of whether the rule at issue is a 'new rule of law' for purposes of the retroactivity analysis." State v. Cummings, 184 N.J. 84, 97-98 (2005) (citations omitted). If a decision does not announce a new rule of law, retroactivity is not at issue, the reason being new rules tend to "disrupt[] a practice long accepted and widely relied upon . . . ." and therefore have the potential to create confusion and disruption. State v. Chirokoskcic, 373 N.J. Super. 125, 130 (App. Div. 2004) (alteration in original) (quoting State v. Lark, 117 N.J. 331 338 (1989)).

In order to be deemed a new rule "there must be a 'sudden and generally unanticipated repudiation of a long-standing practice.' . . . there must be some 'appreciable past from which the rule departs.'" State v. Afandor, 151 N.J. 41, 58 (1997) (internal citations omitted). As the Court in State v. Cummings further explained:

> The test for determining whether "the rule at issue is a 'new rule of law'" is whether a "case announces a new rule when it breaks new ground or imposes a new

[6] "[T]he general rule on appeal is that the court will apply the law in effect at the time of the decision being reviewed." Mandel, cmt. c to §28:4-2.

> obligation . . . [or] if the result was not dictated by precedent existing at the time the [trial result] became final." . . . Stated differently "a decision involving an 'accepted legal principle' announces a new rule for retroactivity purposes so long as the decision's application of that general principle is `sufficiently novel and unanticipated.'"
>
> [Cummings, 184 N.J. at 97. (quoting State v. Knight, 145 N.J. 233, 249-51 (1996)).]

Thus, where a decision is "not a clear break with the past, but a simple extension of the principle of [prior] cases," it is not a new rule of law requiring retroactivity analysis. State v. Bey, 112 N.J. 123, 213 (1988).

Where a decision merely clarifies legislative intent in enacting a statute, it has been held not to be a new rule of law. State v. Afanador, 151 N.J. 41, 57 (1997) (declining to treat its decision in State v. Alexander, 136 N.J. 563 (1994), as a new rule of law). The Court in Simmons did not explicitly state whether it was announcing a new rule, and the absence of that pronouncement alone may evidence the Court was not contemplating its holding would apply retroactively, as it typically embarks on the retroactive versus prospective application when it acknowledges a departure with established "long-standing practice." See Henderson, 176 N.J. at 561-62.

The Court emphasized it was holding up a magnifying glass to the intent evinced by the plain language OPRA and drew from the wellspring of common

law interpreting the statute to do so. See Simmons 247 N.J. at 40 ("That is what AADARI is seeking here . . . . [a]s we made clear in Paff, and continue to emphasize 'information' is the key word for purposes of OPRA") (emphasis in original) (quoting Paff, 229 N.J. at 353).

Although the Court in Simmons clarified the responder's interpretation of the law was incorrect, it did not explicitly depart with its own earlier interpretations of OPRA. On the contrary, drawing on Paff v. Galloway Twp., 229 N.J. 340 (2017) the Court expanded on its own definition of the "research" exemption to OPRA when it held requiring a records custodian to conjure up CDR-1s did not constitute a research exemption pursuant to OPRA. Id. at 43. In doing so, the Court did not depart with any long-standing precedent, but instead expanded on previous holdings and clarified codified language. Afandor, 151 N.J. at 57. Because the Court in Simmons was not espousing a new rule when it emphasized clarifying prior case law and statutory language, Simmons, 247 N.J. at 43; Afandor, 151 N.J. at 57, we decline to apply its ruling retroactively to these three matters decided by the GRC prior to the Court's ruling.

Although state agencies have relied on later reversed case law, because the Court did not hold it was announcing a new rule of law, our analysis may

end there. Compare Spiewak, 90 N.J. at 83, with Simmons, 247 N.J. at 39-41 (reaffirming Paff).

Affirmed as to all three orders.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION