



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

November 9, 2021 Government Records Council Meeting

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

Complaint No. 2018-186

v.

Township of Berkeley (Ocean)
Custodian of Record

At the November 9, 2021 public meeting, the Government Records Council (“Council”) considered the October 26, 2021 Supplemental 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 the Council should dismiss this complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant’s Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

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 9th Day of November 2021

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: November 15, 2021



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
November 9, 2021 Council Meeting**

**Rotimi Owoh, Esq., (On Behalf of Baffi Simmons¹
& African American Data and Research Institute)
Complainant**

GRC Complaint No. 2018-186

v.

**Township of Berkeley (Ocean)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:³

1. Drug possession complaints prepared and filed by the Berkeley Township Police Department (“BPD”) from January 2017 through present.
2. Drug paraphernalia complaints and summonses prepared by the BPD from January 2017 through present.

Custodian of Record: Sandra Brelsford
Request Received by Custodian: August 9, 2018
Response Made by Custodian: August 16, 2018
GRC Complaint Received: August 17, 2018

Background

August 24, 2021 Council Meeting:

At its August 24, 2021 public meeting, the Council considered the August 17, 2021 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, found that:

1. The Custodian unlawfully denied access to the Complainant’s August 9, 2018 OPRA request. N.J.S.A. 46:1A-6. Specifically, the Custodian had an obligation to conduct a search for responsive records through Berkeley Police Department’s access to eCDR. Simmons v. Mercado, 247 N.J. 24, 29 (2021). However, the Council declines to order disclosure since the evidence of record demonstrates that responsive records were provided to the Complainant on September 7, 2018.

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

² Represented by Lauren R. Staiger, Esq. of Rothstein, Mandell, Strohm & Halm, P.C. (Toms River, NJ).

³ The Complainant sought additional records that are not at issue in this complaint.

2. The Custodian unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. However, the Custodian ultimately disclosed responsive records after the instant complaint was filed. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. The Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a 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, 71 (2008). Specifically, the Custodian provided the responsive records after the instant complaint was filed. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is 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. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Procedural History:

On August 25, 2021, the Council distributed its Interim Order to all parties. On September 21, 2021, the Complainant e-mailed the Government Records Council ("GRC") notifying that the parties have settled the issue of counsel fees and will be formally approved by the Township of Berkeley ("Township") on September 27, 2021.

On September 29, 2021, the GRC advised the parties that the deadline to notify same of any fee settlement expired at the end of business on September 23, 2021 and requested a fee application from Complainant's Counsel. That same day, the Complainant responded to the GRC stating that Custodian's Counsel confirmed that the Township approved the settlement pertaining to the matter.

Analysis

Prevailing Party Attorney's Fees

At its August 24, 2021 meeting, the Council determined that the Complainant was a prevailing party entitled to an award of reasonable attorney's fees. The Council thus ordered that the "parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days." The Council further ordered that the parties

notify of any settlement prior to the expiration of the twenty (20) business day time frame. Finally, the Council ordered that, should the parties not reach an agreement, the Complainant's Counsel would be required to "submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13."

On August 25, 2021, the Council distributed its Interim Order to all parties; thus, the Complainant's response was due by close of business on September 23, 2021. On September 21, 2021, the Complainant e-mailed the GRC, advising that the parties have settled the matter subject to formal approval by the Township. On September 29, 2021, the GRC notified the parties that the time to inform the GRC of a settlement expired on September 23, 2021. That same day, the Complainant responded to the GRC stating he received confirmation from Custodian's Counsel that the Township approved the settlement agreement.

Accordingly, the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant's Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council should dismiss this complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant's Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Prepared By: Samuel A. Rosado
Staff Attorney

October 26, 2021



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

August 24, 2021 Government Records Council Meeting

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

Complaint No. 2018-186

v.

Township of Berkeley (Ocean)
Custodian of Record

At the August 24, 2021 public meeting, the Government Records Council (“Council”) considered the August 17, 2021 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 unlawfully denied access to the Complainant’s August 9, 2018 OPRA request. N.J.S.A. 46:1A-6. Specifically, the Custodian had an obligation to conduct a search for responsive records through Berkeley Police Department’s access to eCDR. Simmons v. Mercado, 247 N.J. 24, 29 (2021). However, the Council declines to order disclosure since the evidence of record demonstrates that responsive records were provided to the Complainant on September 7, 2018.
2. The Custodian unlawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. However, the Custodian ultimately disclosed responsive records after the instant complaint was filed. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. The Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a 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, 71 (2008). Specifically, the Custodian provided the responsive records after the instant complaint was filed. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is 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. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify**



the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

Interim Order Rendered by the
Government Records Council
On The 24th Day of August 2021

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: August 25, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 24, 2021 Council Meeting**

**Rotimi Owoh, Esq., (On Behalf of Baffi Simmons¹
& African American Data and Research Institute)
Complainant**

GRC Complaint No. 2018-186

v.

**Township of Berkeley (Ocean)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:³

1. Drug possession complaints prepared and filed by the Berkeley Township Police Department (“BPD”) from January 2017 through present.
2. Drug paraphernalia complaints and summonses prepared by the BPD from January 2017 through present.

Custodian of Record: Sandra Brelsford
Request Received by Custodian: August 9, 2018
Response Made by Custodian: August 16, 2018
GRC Complaint Received: August 17, 2018

Background⁴

Request and Response:

On August 9, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 16, 2018, Karen Stallings responded on the Custodian’s behalf to the Complainant in writing stating that the requested records were court records, and the Complainant would need to access them from the Berkeley Township Municipal Court (“Municipal Court”). Ms. Stallings also provided the Municipal Court’s contact information.

Later that same day on August 16, 2018, the Custodian responded to the Complainant requesting that Ms. Stallings reconsider her denial of access to his OPRA request. The

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

² Represented by Lauren R. Staiger, Esq. of Rothstein, Mandell, Strohm & Halm, P.C. (Toms River, NJ).

³ The Complainant sought additional records that are not at issue in this complaint.

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Rotimi Owoh, Esq. (On Behalf of Baffi Simmons & African American Data and Research Institute) v. Township of Berkeley (Ocean), 2018-186 – Findings and Recommendations of the Executive Director

Complainant also stated that police departments were required to retain copies of the requested records for at least thirty (30) days after disposition. Ms. Stallings replied to the Complainant stating that his request was not denied but instead fell under N.J. Court Rules, R. 1:38 and would need to be accessed using that process.

Denial of Access Complaint:

On August 17, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that other police departments in the State have been able to disclose responsive records. The Complainant further argued that prior GRC case law supports the disclosure of summonses and complaints. See Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004). The Complainant also asserted that the New Jersey Superior Court has held that the requested summonses and complaints were subject to disclosure under OPRA. See Obafemi v. Plainsboro Twp., Docket No. MID-L-5752-16 (Law Div. June 30, 2017). The Complainant also contended that the State’s Records Retention and Disposition Schedule requires agencies to maintain the records sought. The Complainant thus requested the GRC to compel compliance with his OPRA request and to award counsel fees.

Supplemental Response:

On August 17, 2018, the Custodian e-mailed the Complainant requesting an extension of time to provide the responsive records. That same day, the Complainant stated that a complaint had already been filed with the GRC. On September 7, 2018, the Custodian provided the Complainant with the responsive records via e-mail.

Statement of Information:

On September 11, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that although she received the Complainant’s OPRA request on August 10, 2018, she was having e-mail issues, so a member of her staff responded to the Complainant that same day. The Custodian certified that she was not able to send or receive e-mails between August 13-15, and when she tried to contact the Complainant on August 15, 2018 to request a time extension to respond, the e-mail came returned as “undeliverable.” The Custodian certified that on August 16, 2018, Ms. Stallings responded to the Complainant on her behalf stating that he could obtain the requested records from the Municipal Court.

The Custodian asserted that she contacted the Complainant on August 17, 2018 after the complaint was filed to seek a time extension to respond. The Custodian argued that because of her e-mail issues, she was still within the allotted period when she sought the extension. The Custodian asserted that the Township of Berkeley (“Township”) provided the Complainant with the records via e-mail on September 7, 2018. The Custodian argued that her e-mail issues disrupted effective communications with the Complainant.

Additional Submissions:

On September 14, 2018, the Complainant filed a brief in response to the Custodian’s SOI.

The Complainant first argued that police departments in the State were required to retain summonses and complaints until thirty (30) days after disposition of same. M900000, Record Series No. 0082-0000.⁵ The Complainant further asserted that municipalities were required to retain these records for at least fifteen (15) years if they are part of a “Municipal Prosecutor’s Case File.” M170000, Records Series No. 0001-0000. The Complainant argued that because PPD officers and prosecutors were Township employees, their records were subject to access under OPRA and should have been disclosed accordingly. The Complainant further contended that if the records were in storage, OPRA required the Custodian to obtain an extension of time to respond. The Complainant argued that instead of disclosing records, the Custodian denied access and required the Complainant to submit a request with the Municipal Court.

The Complainant also contended that the Council has previously found that summonses and complaints were subject to disclosure under OPRA. The Complainant stated that in Merino, GRC 2003-110, the Council held that the custodian was required to disclose responsive summonses that existed in their possession regardless of whether they exceeded their retention period. The Complainant contended that the Council’s decision supported the contention that the Township should have disclosed all responsive summonses and complaints it retained. The Complainant further contended that Merino, GRC 2003-110 was consistent with court decisions where defendants argued that a requestor was required to obtain records from the courts. See O.R., Docket No. MID-L-5752-16; Woodbridge Twp., Docket No. MID-L-2052-18. The Complainant further noted that several other municipalities throughout New Jersey have complied recently with identical OPRA requests. The Complainant identified fourteen (14) such agencies and argued that their actions demonstrated that police departments in the State have access to the requested summonses and complaints.

The Complainant further noted that the Township’s obligation to disclose responsive records was not diminished simply because Judiciary also made them available to the public. See Keddie v. Rutgers Univ., 144 N.J. 377 (1996). The Complainant also noted that it was far cheaper to obtain the responsive records via OPRA than through R. 1:38. The also Complainant argued that OPRA should not be used as “a money generating scheme (another form of taxation) for government.” The Complainant thus argued that the Township should have disclosed the responsive records just as the previous municipalities and police departments have.

Lastly, the Complainant argued that on August 17, 2018, he filed the instant complaint with the GRC. The Complainant asserted that it was not until after filing the complaint that he received an e-mail from the Custodian requesting an extension of time to respond. The Complainant also noted that he did not receive responsive records until September 7, 2018, or twenty (20) days after filing the complaint. The Complainant therefore argued that the complaint was the catalyst which prompted the Custodian to produce the responsive records. The Complainant thus argued that the GRC should award the Complainant with attorney’s fees in accordance with Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006).

⁵ The Complainant noted his experience was that DUI/DWI or drug possession charges normally included sample testing by the New Jersey State Police. The Complainant alleged that this testing averaged between three (3) and six (6) months.

Rotimi Owoh, Esq. (On Behalf of Baffi Simmons & African American Data and Research Institute) v. Township of Berkeley (Ocean), 2018-186 – Findings and Recommendations of the Executive Director

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.

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). In Merino, GRC 2003-110, the custodian argued that the requested complaints and summonses were not subject to access since they were dated beyond the required retention period via the State’s retention schedule. The Council held that if the agency in fact possessed the responsive records, they were subject to access under OPRA even if they were supposed to have been destroyed in accordance with the retention schedule.

Additionally, the New Jersey Supreme Court has held that retention schedules created in accordance with the Destruction of Public Records Law, N.J.S.A. 47:3-15 to -32, did not satisfy the “required by law” standard under OPRA. See N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 568 (2017), aff’g in relevant part and rev’g in part, 441 N.J. Super. 70, 106-07 (App. Div. 2015). The Court found that if the retention schedules carried the force of law, parts of OPRA would be rendered meaningless due to the retention schedules’ comprehensive list of records. Id. The Court therefore held that “the retention schedules adopted by the State Records Committee [do not] meet the ‘required by law’ standard for purposes of OPRA.” Id.

Furthermore, although decided during the pendency of this complaint, the GRC finds the Court’s holding in Simmons v. Mercado, 247 N.J. 24 (2021) relevant and binding. There, the Complainant requested the same records as those at issue in the instant matter, with the custodian asserting that the records were not maintained by the Millville Police Department (“MPD”) once its officers created and submitted the records through eCDR. Simmons, 247 N.J. at 24. The Court reversed the Appellate Division and found that the requested records were government records subject to disclosure under OPRA. Id. The Court found that notwithstanding which government branch created the CDR-1 and -2 forms, it is the information contained within those forms by MPD officers that is sought by AADARI. Id. at 26. Thus, the Court held that:

Because MPD officers create the completed CDR-1s by populating the forms with the information necessary to generate a summons and submit it to the court, there is no question that the CDR-1s are government records subject to disclosure pursuant to OPRA.

[Id. at 27.]

Additionally, the Court rejected MPD’s argument that they did not maintain the records, holding that OPRA’s definition of a government record is not restricted to records maintained by

the agency, but rather includes records it creates, even if not maintained. Id. at 26. Thus, the Court found, “that the Judiciary might maintain on its servers the information that MPD made does not absolve MPD of its obligation to produce that information pursuant to a proper OPRA request made to MPD.” Id. at 29.

In the current matter, Ms. Stallings responded to the Complainant stating that the Township did not maintain copies of the requested summonses and complaints and directed the Complainant to request them from the Municipal Court. The Complainant asserted that the retention schedules required police departments and municipal prosecutors to possess copies of the requested records for the stated period. Furthermore, the Complainant asserted that BPD had access to the complaints and/or summonses through eCDR.

Initially, the GRC addresses the Complainant’s arguments pertaining to retention schedules. Upon review, the Complainant’s reliance on Merino, GRC 2003-110 to contend that BPD and the Township’s municipal prosecutor are required by law to maintain the requested records based upon the retention schedules ignores the prevailing caselaw. Instead, the retention schedules determine how records that may be in an agency’s possession are to be maintained, and are not a legal requirement to make, maintain, or keep on file every identified record. See N. Jersey Media Grp. Inc., 229 N.J. at 568.

However, considering the Court’s decision in Simmons, the Custodian maintains the obligation to provide the Complainant with the responsive records available through eCDR. Notwithstanding whether the BPD maintained physical copies of same, the Court held that since police departments created the CDR-1s and CDR-2s when inputting information, they were government records even if the records are maintained by the Judiciary’s electronic databases. Simmons, 247 N.J. at 29.

Accordingly, the Custodian unlawfully denied access to the Complainant’s August 9, 2018 OPRA request. N.J.S.A. 46:1A-6. Specifically, the Custodian had an obligation to conduct a search for responsive records through BPD’s access to eCDR. Simmons, 247 N.J. at 29. However, the Council declines to order disclosure since the evidence of record demonstrates that responsive records were provided to the Complainant on September 7, 2018.

Knowing & Willful

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . .” N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically, OPRA states “. . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . .” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following

statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the matter before the Council, the Custodian unlawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. However, the Custodian ultimately disclosed responsive records after the instant complaint was filed. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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, 432 (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 complaints and summonses prepared by BPD pertaining to drug paraphernalia and drug possession. Ms. Stallings responded to the Complainant stating that the records needed to be requested and retrieved from the Municipal Court. The Complainant then filed the instant complaint on August 17, 2018, asserting that BPD had access to the responsive records at issue and did not need to seek same from the Municipal Court. On September 7, 2018, the Custodian provided the requested records to the Complainant via e-mail. However, the

Custodian argued that her production of responsive records was not due to the complaint filing, and that she requested an extension of time within the allotted period.

In determining whether the Complainant is a prevailing party entitled to attorney's fees, the GRC is satisfied that the evidence of record supports a conclusion in the affirmative. Ms. Stallings responded on the Custodian's behalf denying access to the Complainant's request by directing him to the Municipal Court. It was therefore reasonable for the Complainant to file the complaint the next day, since Ms. Stallings' response was definitive regarding the requested records. Although the Custodian reversed her subordinate's denial, the reversal came after the complaint was filed. Teeters, 387 N.J. Super. at 432. Thus, a causal nexus exists between this complaint and the change in the Custodian's conduct. Mason 196 N.J. at 76. Accordingly, the Complainant is a prevailing party entitled to attorney's fees.⁶

Therefore, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. at 432. Additionally, a 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 provided the responsive records after the instant complaint was filed. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is 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. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian unlawfully denied access to the Complainant's August 9, 2018 OPRA request. N.J.S.A. 46:1A-6. Specifically, the Custodian had an obligation to conduct a search for responsive records through Berkeley Police Department's access to eCDR. Simmons v. Mercado, 247 N.J. 24, 29 (2021). However, the Council declines to order disclosure since the evidence of record demonstrates that responsive records were provided to the Complainant on September 7, 2018.
2. The Custodian unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. However, the Custodian ultimately disclosed responsive records after the instant complaint was filed. Additionally, the evidence of record does not indicate that

⁶ The Council makes this determination with the understanding that the Complainant acted on behalf of a bona fide client at the time of the request. Although the Complainant's status as representing an actual client has been previously challenged, the available evidence on the record is insufficient to address that issue herein. See Owoh, Esq. (O.B.O. AADARI) v. Neptune City Police Dep't (Monmouth), GRC Complaint No. 2018-153 (April 2020) and Owoh, Esq. (O.B.O. AADARI) v. Freehold Twp. Police Dep't (Monmouth), GRC Complaint No. 2018-155 (Interim Order dated September 29, 2020).

Rotimi Owoh, Esq. (On Behalf of Baffi Simmons & African American Data and Research Institute) v. Township of Berkeley (Ocean), 2018-186 – Findings and Recommendations of the Executive Director

the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. The Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a 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, 71 (2008). Specifically, the Custodian provided the responsive records after the instant complaint was filed. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is 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. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Prepared By: Samuel A. Rosado
Staff Attorney

August 17, 2021