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 African American Data and Research Institute)
Complainant
v.
Borough of Avalon (Cape May)
Custodian of Record

Complaint No. 2018-198

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 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

[1]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 African American Data and Research Institute)[2]
Complainant

GRC Complaint No. 2018-198

v.

Borough of Avalon (Cape May)[3]
Custodial Agency

Records Relevant to Complaint: Electronic copies via e-mail of:[4]

1. Driving While Intoxicated ("DWI")/Driving Under the Influence ("DUI") complaints and summonses that were prepared by the Borough of Avalon Police Department ("APD") from January 2017 through present.
2. Drug possession complaints prepared and filed by the APD from January 2017 through present.
3. Drug paraphernalia complaints and summonses prepared by the APD from January 2017 through present.

Custodian of Record: Marie Hood
Request Received by Custodian: August 27, 2018
Response Made by Custodian: August 28, 2018
GRC Complaint Received: September 6, 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 October 9, 2018 OPRA request. N.J.S.A. 46:1A-6. Specifically, the Custodian had an obligation to conduct a

[1] The current Custodian of Record is Danielle Nollett.
[2] The Complainant represents the African American Data and Research Institute.
[3] Represented by Nicole J. Curio, Esq. of Gruccio, Pepper, De Santo & Ruth, PA (Vineland, NJ).
[4] The Complainant sought additional records that are not at issue in this complaint.

search for responsive records through Avalon 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 October 11, 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.**

Procedural History:

On August 25, 2021, the Council distributed its Interim Order to all parties. On September 29, 2021, the Complainant e-mailed the Government Records Council ("GRC") notifying that the parties have settled the issue of counsel fees. The GRC responded that same day, noting that the deadline to notify it of a settlement expired on September 23, 2021. The GRC added that given the notification of a settlement, it inquired as to whether an extension of time was needed for the Borough of Avalon ("Borough") to formally approve the settlement. Custodian's Counsel replied stating that because the Borough's next council meeting was scheduled for October 13, 2021, she needed a twenty-one (21) day extension. Counsel added that the settlement had already been discussed in closed session and did not anticipate any issues. On September 30, 2021, the GRC extended the notification period to close of business on October 14, 2021.

On October 15, 2021, the GRC informed the parties that the extended deadline to notify of a settlement on counsel fees had expired on October 14, 2021. The GRC requested confirmation of said settlement but noted that the Complainant had twenty (20) business days from October 14, 2021 to submit a fee application. That same day, Counsel informed the GRC that the settlement

was approved by the Borough on October 13, 2021 and she would provide the GRC with an executed copy of the resolution.

On October 18, 2021, Counsel provided the GRC with a copy of the Borough's resolution No. 190-2021, authorizing payment to the Complainant in the amount of $4,350.00. The resolution was signed by the Borough's Council President and Clerk.

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 29, 2021, the Complainant e-mailed the GRC, advising that the parties have settled the matter. On September 30, 2021, the GRC granted Custodian's Counsel's request for an extension to close of business on October 14, 2021. On October 15, 2021, Counsel notified the GRC that the Borough approved the settlement via resolution on October 13, 2021. On October 18, 2021, Counsel provided the GRC with a copy of the executed resolution authorizing payment to the Complainant for counsel fees pertaining to the instant matter.

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 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 African American Data and Research Institute)
Complainant
v.
Borough of Avalon (Cape May)
Custodian of Record

Complaint No. 2018-198

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 October 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 Avalon 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 October 11, 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 African American Data and Research Institute)[1]
Complainant

GRC Complaint No. 2018-198

v.

Borough of Avalon (Cape May)[2]
Custodial Agency

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

1. Driving While Intoxicated ("DWI")/Driving Under the Influence ("DUI") complaints and summonses that were prepared by the Borough of Avalon Police Department ("APD") from January 2017 through present.
2. Drug possession complaints prepared and filed by the APD from January 2017 through present.
3. Drug paraphernalia complaints and summonses prepared by the APD from January 2017 through present.

Custodian of Record: Marie Hood
Request Received by Custodian: August 27, 2018
Response Made by Custodian: August 28, 2018
GRC Complaint Received: September 6, 2018

Background[4]

Request and Response:

On August 27, 2018, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On August 28, 2018, Danielle Nollett 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 Borough of Avalon Municipal Court ("Municipal Court").

[1] The Complainant represents the African American Data and Research Institute.
[2] Represented by Nicole J. Curio, Esq. of Gruccio, Pepper, De Santo & Ruth, PA (Vineland, 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.

Denial of Access Complaint:

On September 6, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant contended that the Custodian violated OPRA by not making the request items available and by failing to seek an extension of time to respond. The Complainant contended that other police departments in the State have provided responsive records without issue. 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 requested the GRC find that the Custodian violated OPRA and award counsel fees.

Supplemental Response:

On October 11, 2018, Custodian's Counsel responded to the Complainant via e-mail, providing the responsive records.

Statement of Information:

On October 19, 2018, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's request on August 27, 2018. The Custodian certified that on August 28, 2018, Ms. Nollett responded to the Complainant on her behalf stating that the Complainant needed to contact the Municipal Court to obtain the records.

The Custodian asserted that Ms. Nollett was mistaken when she informed the Complainant that she needed to obtain the records through the Municipal Court. The Custodian asserted that the mistake was memorialized in an October 5, 2018 letter from the police records administrator to the police chief. The Custodian asserted that once the mistake was discovered, the records were disclosed to the Complainant via e-mail on October 11, 2018.

The Custodian argued that the Complainant was not denied access but instead directed to where she believed the records were maintained. The Custodian argued that there was no intent to keep the records from the Complainant, but instead was a misunderstanding of where the records were located. The Custodian asserted that the records were disclosed once the mistake was realized, and therefore argued that the Complainant did not meet the definition of a "prevailing party" entitled to an attorney fee award. See Wolosky v. Twp. of Stillwater (Sussex), GRC Complaint No. 2010-242 (February 2012).

Additional Submissions:

On October 19, 2018, the Complainant filed a brief in response to the Custodian's SOI. The Complainant acknowledged receipt of the responsive records and asserted that the only outstanding issue was the award of counsel fees. The Complainant asserted that based upon the "catalyst" theory outlined in Teeters v. DYFS, 387 N.J. Super. 423, 429-31 (App. Div. 2006), a prevailing party must show that the lawsuit was casually related to securing the relief obtained, and that the relief granted had some basis in law. The Complainant argued that under Warrington v. Vill. Supermarkets, Inc., 328 N.J. Super. 410, 420 (App. Div. 2000), a prevailing party succeeds

when the relief on the merits materially alters the relationship between the parties.

The Complainant asserted that the chronology of the instant matter demonstrated that the Borough of Avalon ("Borough") received notice of the complaint in September 2018 and did not provide the responsive records until October 2018. The Complainant therefore argued that the complaint was the catalyst that prompted the Borough to disclose responsive records and was thus a prevailing party entitled to a fee award. Warrington, 328 N.J. Super. at 420.

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. Nollett responded to the Complainant stating that the Borough 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 APD had access to the complaints and/or summonses through eCDR. Following the Denial of Access Complaint, the Custodian responded disclosing responsive records on October 11, 2018 and subsequently noted in the SOI that Ms. Nollett's denial was in error. Notwithstanding the eventual disclosure of the records, the GRC will address whether a denial of access occurred here.

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 APD and the Borough'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 physically or through eCDR. Notwithstanding whether APD 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 October 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 APD'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 October 11, 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 APD pertaining to drug paraphernalia, drug possession, and DUI/DWI offenses. Ms. Nollett responded to the Complainant stating that the records needed to be retrieved by the Municipal Court. The Complainant then filed the instant complaint on September 6, 2018 asserting that APD had access to the responsive records at issue and did not need to seek same from the Municipal Court. Subsequently, on October 11, 2018, Counsel provided the Complainant with the requested records via e-mail. However, the Custodian argued that the Complainant was not a prevailing party based on this mistake, relying on Wolosky, GRC 2010-242.

In Wolosky, GRC 2010-242, the custodian responded to the subject OPRA request disclosing what she believed to be the responsive record. However, upon receipt, the complainant quickly determined that it was the wrong record and filed a complaint without contacting the custodian. After being made aware of the error through the Denial of Access Complaint, the custodian immediately cured the issue. The Council, relying on past case law in Wolosky v. Twp. of Stillwater (Sussex), GRC Complaint No. 2009-22 (September 2011), determined that the complainant was not a prevailing party in part because the complainant failed to engage in "the cooperative balance contemplated by the Supreme Court in Mason." Id.

The evidence of record here is inapposite to Wolosky. Specifically, the Custodian did not disclose the wrong records; she failed to disclose certain records until after the filing of this complaint. Although the Custodian realized her subordinate's mistake prior to a GRC determination, the acknowledgment did not occur until on or around October 5, 2018, several weeks after the filing of the instant complaint. 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.[5]

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

[5] 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).

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 October 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 Avalon 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 October 11, 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.**

Prepared By: Samuel A. Rosado
Staff Attorney

August 17, 2021