



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

January 25, 2022 Government Records Council Meeting

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

Complaint No. 2018-247

v.
City of Atlantic City (Atlantic)
Custodian of Record

At the January 25, 2022 public meeting, the Government Records Council (“Council”) considered the January 18, 2022 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 Complainant’s Counsel failed to comply with the Council’s Interim Order because he failed to submit an application for attorney’s fees within the prescribed deadline. N.J.A.C. 5:105-2.13(b). Accordingly, the Executive Director recommends that the Council close the matter, as no further analysis is necessary

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 25th Day of January 2022

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: January 27, 2022



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
January 25, 2022 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of African¹
American Data & Research Institute
& Baffi Simmons)
Complainant**

GRC Complaint No. 2018-247

v.

**City of Atlantic City (Atlantic)²
Custodial Agency**

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

1. Driving While Intoxicated/Driving under the Influence (“DWI/DUI”) complaints, summonses, and tickets prepared and filed by the Atlantic City Police Department (“ACPD”) from January 2016 through present.
2. Drug possession complaints, summonses, and tickets prepared and filed by the ACPD from January 2016 through present.
3. ACPD’s “Arrest Listings” inclusive of arrest number, date, name, sex, race, and offense from January 2016 through present.
4. Drug paraphernalia complaints, summonses, and tickets prepared and filed by the ACPD from January 2016 through present.

Custodian of Record: Monica Webb

Request Received by Custodian: September 10, 2018

Response Made by Custodian: July 24, 2018

GRC Complaint Received: October 22, 2018

Background

September 28, 2021 Council Meeting:

At its September 28, 2021 public meeting, the Council considered the September 21, 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, found that:

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

² Represented by Karl Timbers, Esq. (Atlantic City, NJ).

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

1. The Custodian failed to comply with the Council's April 28, 2020 Interim Order. Specifically, the Custodian did not seek an extension within the five (5) business day time frame to respond to the Order. Further, the Custodian never submitted certified confirmation of compliance to the Executive Director. However, no further action is required here because the Custodian disclosed all records and the Complainant confirmed receipt of same in an e-mail to the GRC on September 16, 2021.
2. The Custodian unlawfully denied access to those records responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Further, the Custodian failed to submit an SOI, which resulted in a violation of N.J.A.C. 5:105-2.4(a), and failed to comply with the Council's April 28, 2020 Interim Order. Notwithstanding, the Complainant confirmed in an e-mail to the GRC on September 16, 2021 that he received all responsive records. 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. Pursuant to the Council's April 28, 2020 Interim Order, 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 (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 disclosed responsive records as a direct result of the instant complaint. 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 September 29, 2021, the Council distributed its Interim Order to all parties. On November 16, 2021, the Government Records Council ("GRC") advised the parties that the fee agreement time frame expired on October 28, 2021. The GRC further advised that the Complainant's Counsel had twenty (20) business days to submit a fee application. The Complainant's Counsel did not submit a fee application within the appropriate time frame to do so.⁴

⁴ On January 19, 2022, following notification to the parties of this complaint's scheduling at the January 2022 meeting, the Complainant advised the GRC via e-mail that this complaint was settled. However, the Complainant's correspondence is well beyond either time frame and is only noted herein for completeness of the record.
Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institution & Baffi Simmons) v. City of Atlantic City (Atlantic), 2018- 2
247 – Supplemental Findings and Recommendations of the Executive Director

Analysis

Compliance

At its September 28, 2021 meeting, the Council ordered the parties to “confer in an effort to decide the amount of reasonable attorney’s fees” and notify the GRC of any fee agreement. Further, the Council ordered that, should the parties not reach an agreement, the Complainant’s Counsel “shall submit a fee application . . . in accordance with N.J.A.C. 5:105-2.13.” On September 29, 2021, the Council distributed its Interim Order to all parties, providing the parties twenty (20) business days to reach a fee agreement. Thus, the parties were required to notify the GRC of any agreement by October 28, 2021.

On November 16, 2021, following the expiration of the time frame to reach a settlement, the GRC advised the parties that Complainant’s Counsel had twenty (20) business days, or until December 16, 2021 to submit a fee application in accordance with N.J.A.C. 5:105-2.13. As of December 16, 2021, the Council has received neither a fee agreement between the parties nor an application for an award of attorney’s fees from Complainant’s Counsel.

Therefore, Complainant’s Counsel failed to comply with the Council’s Interim Order because he failed to submit an application for attorney’s fees within the prescribed deadline. N.J.A.C. 5:105-2.13(b). Accordingly, the Executive Director recommends that the Council close the matter, as no further analysis is necessary.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that Complainant’s Counsel failed to comply with the Council’s Interim Order because he failed to submit an application for attorney’s fees within the prescribed deadline. N.J.A.C. 5:105-2.13(b). Accordingly, the Executive Director recommends that the Council close the matter, as no further analysis is necessary

Prepared By: Frank F. Caruso
Executive Director

January 18, 2022



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

September 28, 2021 Government Records Council Meeting

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

Complaint No. 2018-247

v.
City of Atlantic City (Atlantic)
Custodian of Record

At the September 28, 2021 public meeting, the Government Records Council (“Council”) considered the September 21, 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:

1. The Custodian failed to comply with the Council’s April 28, 2020 Interim Order. Specifically, the Custodian did not seek an extension within the five (5) business day time frame to respond to the Order. Further, the Custodian never submitted certified confirmation of compliance to the Executive Director. However, no further action is required here because the Custodian disclosed all records and the Complainant confirmed receipt of same in an e-mail to the GRC on September 16, 2021.
2. The Custodian unlawfully denied access to those records responsive to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Further, the Custodian failed to submit an SOI, which resulted in a violation of N.J.A.C. 5:105-2.4(a), and failed to comply with the Council’s April 28, 2020 Interim Order. Notwithstanding, the Complainant confirmed in an e-mail to the GRC on September 16, 2021 that he received all responsive records. 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. Pursuant to the Council’s April 28, 2020 Interim Order, 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 (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 disclosed responsive records as a direct result of the instant complaint. 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 28th Day of September 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: September 29, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 28, 2021 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of African¹
American Data & Research Institute
& Baffi Simmons)
Complainant**

GRC Complaint No. 2018-247

v.

**City of Atlantic City (Atlantic)²
Custodial Agency**

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

1. Driving While Intoxicated/Driving under the Influence (“DWI/DUI”) complaints, summonses, and tickets prepared and filed by the Atlantic City Police Department (“ACPD”) from January 2016 through present.
2. Drug possession complaints, summonses, and tickets prepared and filed by the ACPD from January 2016 through present.
3. ACPD’s “Arrest Listings” inclusive of arrest number, date, name, sex, race, and offense from January 2016 through present.
4. Drug paraphernalia complaints, summonses, and tickets prepared and filed by the ACPD from January 2016 through present.

Custodian of Record: Monica Webb

Request Received by Custodian: September 10, 2018

Response Made by Custodian: July 24, 2018

GRC Complaint Received: October 22, 2018

Background

April 28, 2020 Council Meeting:

At its April 28, 2020 public meeting, the Council considered the April 21, 2020 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 Complainant represents the African American Research & Data Institute.

² Represented by Karl Timbers, Esq. (Atlantic City, NJ).

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

1. The Custodian's failure to provide a completed Statement of Information to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian's failure to respond additionally obstructed the GRC in its efforts to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . ." N.J.S.A. 47:1A-7(b).
2. The Custodian may have unlawfully denied access to the responsive records at issue in this complaint. N.J.S.A. 47:1A-6. Specifically, the Custodian failed to prove that directing the Complainant to the Court was a proper response under OPRA. Thus, the Custodian must locate and disclose those records requested by the Complainant. Should the Custodian determine that no records exist, she must certify to this fact.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Executive Director.⁶**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On April 29, 2020, the Council distributed its Interim Order to all parties. On May 11, 2020, Custodian's Counsel sought an extension of time to respond to the Order due to the public health emergency's impact on staffing at the Atlantic City Municipal Court ("Court"). Counsel noted that he was unsure how long it would take to search for, locate, and disclose responsive records, but would alert the Government Records Council ("GRC") to the "estimated completion date" in the future. On May 14, 2020, the GRC responded initially advising that the time frame to comply with the Council's Order expired on May 6, 2020. The GRC stated that notwithstanding the forgoing, it would grant an extension through June 4, 2020 due to exigent circumstances arising from the public health emergency.

⁴ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

On June 17, 2020, the Custodian e-mailed the Complainant disclosing 2018 DWI records. The Custodian noted that the City of Atlantic City (“City”) was still amassing additional records and would disclose them as they became available. On June 22, 2020, the Custodian e-mailed the Complainant disclosing additional DWI records. On June 26, 2020, Municipal Clerk Paula Geletei sent a letter to the Complainant stating that the June 22, 2020 e-mails were returned as “spam.” Ms. Geletei thus asked the Complainant to provide an acceptable e-mail address by which the City could effectuate disclosure. On July 18, 2020, the Complainant responded stating that his e-mail address remained the same, but that the records could be sent on a disk to his law office at the address included in therein.

On September 16, 2021, the GRC e-mailed the Complainant recounting the facts surrounding the City’s attempts to comply with the Interim Order, noting that the public health emergency significantly delayed that process. The GRC thus requested that, due to a lack of evidence indicating disclosure occurred, the Complainant confirm whether he received the records at issue here and was satisfied with the City’s response. On the same day, the Complainant confirmed that he was in possession of the responsive records.

Analysis

Compliance

At its April 28, 2020 meeting, the Council ordered the Custodian to either locate and disclose those records responsive to the subject OPRA request or certify if none exist. Further, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On April 29, 2020, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian’s response was due by close of business on May 6, 2020.

On May 11, 2020, the eighth (8th) business day after receipt of the Council’s Order, Custodian’s Counsel sought an extension of time to respond due to the ongoing public health emergency. While the GRC extended the time frame through June 4, 2020, it acknowledged that the compliance time frame expired on May 6, 2020. Thereafter, the Custodian eventually disclosed the responsive records to the Complainant, but never submitted certified confirmation of compliance to the Executive Director. The GRC ultimately had to contact the Complainant to confirm that he received the records at issue in this complaint, which was confirmed on September 16, 2021.

Therefore, the Custodian failed to comply with the Council’s April 28, 2020 Interim Order. Specifically, the Custodian did not seek an extension within the five (5) business day time frame to respond to the Order. Further, the Custodian never submitted certified confirmation of compliance to the Executive Director. However, no further action is required here because the Custodian disclosed all records and the Complainant confirmed receipt of same in an e-mail to the GRC on September 16, 2021.

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 those records responsive to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Further, the Custodian failed to submit an SOI, which resulted in a violation of N.J.A.C. 5:105-2.4(a), and failed to comply with the Council’s April 28, 2020 Interim Order. Notwithstanding, the Complainant confirmed in an e-mail to the GRC on September 16, 2021 that he received all responsive records. 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 (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 stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (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.

[Mason 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 argued in his Denial of Access Complaint that the Custodian unlawfully denied access to those records sought in the subject OPRA request. The Complainant requested that the GRC order disclosure of those records and determine that he was a prevailing party. The Custodian did not submit an SOI; thus, no position against disclosure was presented. The Council held that the Custodian unlawfully denied access to the responsive records and ordered disclosure of them. The Custodian ultimately disclosed all responsive records in accordance with the Council’s Order. Based on this, the Complainant is a prevailing party entitled to an award of attorney’s fees.

Therefore, pursuant to the Council’s April 28, 2020 Interim Order, 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. 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. 51. Specifically, the Custodian disclosed responsive records as a direct result of the instant complaint. 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 failed to comply with the Council’s April 28, 2020 Interim Order. Specifically, the Custodian did not seek an extension within the five (5) business day time frame to respond to the Order. Further, the Custodian never submitted certified confirmation of compliance to the Executive Director. However, no further action is required here because the Custodian disclosed all records and the Complainant confirmed receipt of same in an e-mail to the GRC on September 16, 2021.
2. The Custodian unlawfully denied access to those records responsive to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Further, the Custodian failed to submit an SOI, which resulted in a violation of N.J.A.C. 5:105-2.4(a), and failed to comply with the Council’s April 28, 2020 Interim Order. Notwithstanding, the

Complainant confirmed in an e-mail to the GRC on September 16, 2021 that he received all responsive records. 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. Pursuant to the Council's April 28, 2020 Interim Order, 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 (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 disclosed responsive records as a direct result of the instant complaint. 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: Frank F. Caruso
Executive Director

September 21, 2021



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

PHILIP D. MURPHY
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INTERIM ORDER

April 28, 2020 Government Records Council Meeting

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American Data & Research Institute &
Baffi Simmons)
Complainant

Complaint No. 2018-247

v.
City of Atlantic City (Atlantic)
Custodian of Record

At the April 28, 2020 public meeting, the Government Records Council (“Council”) considered the April 21, 2020 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s failure to provide a completed Statement of Information to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond additionally obstructed the GRC in its efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b).
2. The Custodian may have unlawfully denied access to the responsive records at issue in this complaint. N.J.S.A. 47:1A-6. Specifically, the Custodian failed to prove that directing the Complainant to the Court was a proper response under OPRA. Thus, the Custodian must locate and disclose those records requested by the Complainant. Should the Custodian determine that no records exist, she must certify to this fact.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 28th Day of April 2020

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: April 29, 2020

record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 28, 2020 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of African¹
American Data & Research Institute
& Baffi Simmons)
Complainant**

GRC Complaint No. 2018-247

v.

**City of Atlantic City (Atlantic)²
Custodial Agency**

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

1. Driving While Intoxicated/Driving under the Influence (“DWI/DUI”) complaints, summonses, and tickets prepared and filed by the Atlantic City Police Department (“ACPD”) from January 2016 through present.
2. Drug possession complaints, summonses, and tickets prepared and filed by the ACPD from January 2016 through present.
3. ACPD’s “Arrest Listings” inclusive of arrest number, date, name, sex, race, and offense from January 2016 through present.
4. Drug paraphernalia complaints, summonses, and tickets prepared and filed by the ACPD from January 2016 through present.

Custodian of Record: Monica Webb

Request Received by Custodian: September 10, 2018

Response Made by Custodian: July 24, 2018

GRC Complaint Received: October 22, 2018

Background⁴

Request and Response:

On September 10, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 11, 2018, the Custodian responded in writing advising that an extension of time through September 25, 2018 was required to respond to the subject OPRA request. On September 28, 2018, the Custodian

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

² No representation listed on the record.

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 African American Data & Research Institution & Baffi Simmons) v. City of Atlantic City (Atlantic), 2018-247 – Findings and Recommendations of the Executive Director

responded in writing advising that additional time was needed to October 15, 2018 “for the retrieval of information responsive” to the subject OPRA request.

On October 16, 2018, the Custodian responded in writing advising the Complainant that his OPRA request was referred to the Atlantic City Municipal Court (“Court”). The Custodian asked that the Complainant complete the attached “Judiciary Records Request Form” and send same to the Court via facsimile or U.S. mail.

Denial of Access Complaint:

On October 22, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that the City of Atlantic City (“City”) unlawfully required him to obtain responsive records from the Court. The Complainant argued that prior court and GRC case law support that summonses and complaints are disclosable under OPRA. See Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004). The Complainant noted that the courts have already awarded him prevailing party attorney’s fees based on an agency’s failure to disclose the records sought here. The Complainant also noted that other police departments disclosed similar records to him.

The Complainant thus requested that the GRC find that the Custodian violated OPRA. Further, the Complainant requested that the GRC determine that he is a prevailing party subject to an award of attorney’s fees.

Statement of Information:

On November 13, 2018, the GRC requested a completed Statement of Information (“SOI”) from the Custodian. On November 30, 2018, the GRC sent a “No Defense” letter to the Custodian, requesting a completed SOI within three (3) business days of receipt. The GRC did not receive any response from the Custodian thereafter.

Analysis

Failure to Submit SOI

OPRA also provides that “Custodians shall submit a completed and signed statement of information (SOI) form to the Council and the complainant simultaneously that details the custodians' position for each complaint filed with the Council[.]” N.J.A.C. 5:105-2.4(a).

OPRA further provides that:

Custodians shall submit a completed and signed SOI for each complaint to the Council's staff and the complainant not later than five business days from the date of receipt of the SOI form from the Council's staff . . . Failure to comply with this time period may result in the complaint being adjudicated based solely on the submissions of the complainant.

[N.J.A.C. 5:105-2.4(f).]

Finally, OPRA provides that “[a] custodian’s failure to submit a completed and signed SOI . . . may result in the Council’s issuing a decision in favor of the complainant.” N.J.A.C. 5:105-2.4(g). In Alterman, Esq. v. Sussex Cnty. Sheriff’s Office, GRC Complaint No. 2013-353 (September 2014), the custodian failed to provide a completed SOI to the GRC within the allotted deadline. Thus, the Council noted the custodian’s failure to adhere to N.J.A.C. 5:1052.4(a). See also Kovacs v. Irvington Police Dep’t (Essex), GRC Complaint No. 2014-196 (January 2015); Howell v. Twp. of Greenwich (Warren), GRC Complaint No. 2015-249 (November 2016).

In the instant matter, the Custodian did not comply with the GRC’s initial request for an SOI. After the expiration of the five (5) business day deadline, the GRC again attempted to obtain a completed SOI from the Custodian by sending a “No Defense” letter and requesting a completed SOI within three (3) business days of receipt. This transmission also included a copy of the original SOI letter providing detailed instructions on how to properly submit an SOI. The GRC received no response thereafter.

Accordingly, the Custodian’s failure to provide a completed SOI to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond additionally obstructed the GRC in its efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b).

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.

Here, the Complainant submitted an OPRA request to the ACPD and was advised to obtain requested records from the Court. Thereafter, the Complainant filed this Denial of Access Complaint arguing that the courts and GRC both determined that the requested records were disclosable (citing Merino, GRC 2003-110). The Custodian failed to file an SOI inclusive of certifications, arguments, and evidence to support the City’s position.

The GRC finds that in the absence of an SOI, there is no support for the Custodian’s initial response that the Complainant had to submit a request to the Court to obtain responsive records. N.J.A.C. 5:105-2.4(f). Thus, it follows that the Custodian did not prove that directing the Complainant to contact the Court was a proper response under OPRA. Such a finding is consistent with both OPRA and GRC regulations. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-6; N.J.A.C. 5:105-2.4(g).

Therefore, the Custodian may have unlawfully denied access to the responsive records at issue in this complaint. N.J.S.A. 47:1A-6. Specifically, the Custodian failed to prove that directing

the Complainant to the Court was a proper response under OPRA. Thus, the Custodian must locate and disclose those records requested by the Complainant. Should the Custodian determine that no records exist, she must certify to this fact.

The GRC finally notes that the instant decision should not be construed to allow for unmitigated access to every type of record at issue here. Indeed, there may be circumstances present in other complaints that could affect the Council's ruling. Further, this decision could be distinguishable from future complaints as the facts may dictate.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to provide a completed Statement of Information to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian's failure to respond additionally obstructed the GRC in its efforts to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . ." N.J.S.A. 47:1A-7(b).
2. The Custodian may have unlawfully denied access to the responsive records at issue in this complaint. N.J.S.A. 47:1A-6. Specifically, the Custodian failed to prove that directing the Complainant to the Court was a proper response under OPRA. Thus, the Custodian must locate and disclose those records requested by the Complainant. Should the Custodian determine that no records exist, she must certify to this fact.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁵**

⁵ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institution & Baffi Simmons) v. City of Atlantic City (Atlantic), 2018-247 – Findings and Recommendations of the Executive Director

certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁶ to the Executive Director.⁷

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

April 21, 2020

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁷ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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