



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**

**February 26, 2020 Government Records Council Meeting**

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

Complaint No. 2018-66

v.

Borough of Highland Park (Middlesex)  
Custodian of Record

At the February 26, 2020 public meeting, the Government Records Council (“Council”) considered the February 19, 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, finds that:

1. The evidence of records supports that the Custodian never received the Complainant’s OPRA request, and the Complainant’s evidence is insufficient to overcome the Custodian’s SOI certification. Thus, the Custodian did not unlawfully deny access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. See Martinez v. Morris Cnty. Prosecutor’s Office, GRC Complaint No. 2014-2 (September 2014), and Valdes v. N.J. Dep’t of Educ., GRC Complaint No. 2012-19 (April 2013).
2. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, because there was no unlawful denial of access prior to the complaint filing, the Custodian’s actions were in response to the OPRA request rather than the complaint. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Final Decision Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of February 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: March 3, 2020**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 26, 2020 Council Meeting**

**Rotimi Owoh, Esq. (on behalf of<sup>1</sup>  
African American Data and Research Institute)  
Complainant**

**GRC Complaint No. 2018-66**

v.

**Borough of Highland Park (Middlesex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies of:

1. Drug Recognition Expert (“DRE”) Rolling Log from January of 2016 to the present.
2. Copies of complaints that were prepared by the Borough of Highland Park Police Department (“HPPD”) relating to the DRE Rolling Logs mentioned in item #1 above.
3. Copies of DRE Reports prepared by the HPPD’s DRE Officer(s) from January of 2016 to the present.
4. Copies of Driving While Intoxicated/Driving Under the Influence (“DWI/DUI”) complaints that were prepared and filed by the HPPD from January of 2016 to the present.
5. Copies of drug possession complaints that were prepared and filed by the HPPD from January of 2016 to the present.
6. Copy or copies of the HPPD’s “Arrest Listings.” It is our understating that the record includes: arrest number, date, name, sex, race, and offense. We request it from January of 2016 to the present.

**Custodian of Record:** Joan Hullings

**Request Received by Custodian:** March 2, 2018<sup>3</sup>

**Response Made by Custodian:** March 12, 2018; March 14, 2018

**GRC Complaint Received:** April 10, 2018

**Background**<sup>4</sup>

Request:

On March 2, 2018, the Complainant submitted an Open Public Records Act (“OPRA”)

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<sup>1</sup> The Complainant represents that African American Data and Research Institute.

<sup>2</sup> Represented by Lucille E. Davy, Esq., of Mason, Griffin & Pierson, P.C. (Princeton, NJ).

<sup>3</sup> The Custodian disputes the contention that she received the OPRA request.

<sup>4</sup> 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.

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request to the Custodian seeking the above-mentioned records.

Denial of Access Complaint:

On April 10, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he submitted his OPRA request on March 2, 2018. The Complainant then asserted that as of April 7, 2018, the Custodian has not responded to his request, either seeking an extension, granting access, or denying access.

The Complainant asserted that the Custodian violated OPRA by not responding within the seven (7) business day period. The Complainant requested that the GRC compel compliance with the request and to award counsel fees.

Response:

On April 17, 2018, Custodian’s Counsel responded to the Complainant stating that the Custodian has no record of receiving the Complainant’s OPRA request. Counsel stated that the Custodian asserted that the Borough of Highland Park (“Borough”) did not know of the Complainant’s request until it received the Denial of Access Complaint. Counsel then stated that the Borough was preparing a response to the OPRA request and anticipated a response by April 25, 2018.

On April 18, 2018, the Complainant replied to Counsel via e-mail. The Complainant asserted that his OPRA request was sent and delivered to the Custodian on March 2, 2018. The Complainant stated that if the message was undelivered, the computer would generate an “undeliverable” or “permanent error” message. The Complainant stated that the evidence was undeniable that the e-mail and OPRA request was sent to the Custodian on March 2, 2018.

On April 24, 2018, the Custodian responded to the Complainant’s request, providing responsive records with redactions to dates of birth in records responsive to Item No. 3 to protect personal privacy. N.J.S.A. 47:1A-1. The Custodian also stated that records responsive to Item No. 6 were also expunged and/or redacted pursuant to N.J.S.A. 47:1A-9 and N.J.S.A. 2C:52-15.

Statement of Information:

On April 26, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she did not receive the Complainant’s OPRA request dated March 2, 2018. The Custodian certified that she was unaware of the Complainant’s OPRA request until April 9, 2018, when she was notified that the Complainant submitted a Denial of Access Complaint. The Custodian certified that upon notification, she searched her e-mail account, including her trash and spam e-mail folders, but was unable to locate the OPRA request.

The Custodian certified that she then asked the HPPD whether they received the OPRA request, but was told no. The Custodian certified that she forwarded the request to the HPPD since all the records sought were held by the agency. The Custodian then certified that the HPPD provided her responsive records, with redactions made to protect personally identifying

information, expunged records, and information regarding minors. The Custodian certified that she sent the responsive records to the Complainant on April 24, 2018.

The Custodian certified that had she received the original OPRA request, she would have responded immediately thereafter. The Custodian certified that it was impossible for her to respond to an OPRA request she never received, and she took immediate steps to search for responsive records and provide a response.

Counsel contended that the GRC regularly dismissed complaints when the Custodian certified that they never received the OPRA request. See, e.g., Steele v. Cnty. of Middlesex, GRC Complaint No. 2011-289 (December 2012), Gore v. New Jersey Office of the Public Defender, GRC Complaint No. 2007-231 (July 2008), and Werner v. City of Trenton (Mercer), GRC Complaint No. 2011-152 (September 2012). Counsel argued that even though the Complainant provided a copy of the e-mail allegedly transmitted to the Custodian, the Custodian certified that she did not receive the request. Counsel asserted that as soon as the Custodian became aware of the OPRA request, she took steps to identify the records sought by the Complainant and provided all the requested documentation.

Counsel argued that the Custodian could not respond to an OPRA request that neither she nor the Borough of Highland Park (“Borough”) received. Counsel therefore contended that there was no unlawful denial of access or violation of OPRA. Counsel also requested that the GRC dismiss the matter pursuant to N.J.S.A. 47:1A-7(e), as the Borough provided the Complainant with responsive records.

#### Additional Submissions:

On May 1, 2018, the Complainant submitted a reply to the Custodian’s SOI. The Complainant first contended that the Borough sent some but not all requested records on April 24, 2018. The Complainant contended that the arrest summaries he received from the Borough did not constitute complaints or summonses as requested on March 2, 2018.

The Complainant then contended that the provided screenshots of his e-mail’s sent folder demonstrated that the request was sent to the Borough with the correct e-mail address. The Complainant argued that if the e-mail was not delivered, then Comcast, his e-mail provider, would automatically send a “not deliverable notice.” The Complainant attached an example of the message by sending an e-mail to Counsel with a misspelled e-mail address. The Complainant argued that the evidence was clear and undeniable that the e-mail was sent to the Borough on March 2, 2018.

The Complainant also asserted that the date and time stamps on the March 2, 2018 e-mail were more reliable and credible than the Custodian’s certification, as she and the Borough were facing a financial liability. The Complainant contended that because Comcast’s date and time stamps were automatically generated, it had no reason to “lie” or “deceive.”

The Complainant next contended that the Borough did not respond to the OPRA request until after the complaint was filed. The Complainant also argued that the Borough provided some

but not all responsive records on April 24, 2018, seventeen (17) calendar days after the complaint was verified. The Complainant therefore maintained that he was a prevailing party and entitled to an award of attorney's fees.

On May 2, 2018, Counsel responded to the Complainant via e-mail. Counsel asserted that while it was not questioned that the e-mail containing the OPRA request was transmitted, it was not evidence that the Custodian received the e-mail. Counsel reiterated the Custodian's certification that she did not receive the Complainant's OPRA request, and that she was not lying or deceiving anyone. Counsel asserted that the Custodian was fully aware of her responsibilities under OPRA and fulfilled them when notified of the Complainant's request.

Regarding the Complainant's issues with the April 24, 2018 response, Counsel stated that the provided arrest summaries contained information on individual complaints, but if the Complainant wanted copies of each individual complaint, the Custodian would gather and redact the records and have them provided. Counsel noted that the Complainant's request Item No. 4 sought "DWI/DUI complaints," but such violations were done via summons rather than a criminal complaint. Counsel nevertheless stated that the Custodian would gather, redact, and provide the summonses.

On May 2, 2018, the Complainant sent an e-mail to the GRC, noting that the Borough intended to provide the remaining records responsive to his OPRA request. The Complainant contended that the attached correspondence were additional evidence demonstrating that the complaint was a catalyst which brought the Borough to action in making records available to the Complainant. The Complainant maintained that he was a prevailing party and entitled to an award of attorney's fees.

On May 10, 2018, Counsel sent an e-mail to the Complainant and GRC, stating that copies of complaints and summonses for drug related and DWI/DUI offenses were attached. That same day, the Complainant sent an e-mail to the GRC, confirming receipt of the records and maintaining that he was a prevailing party.

On May 17, 2018, Counsel submitted a reply to the Complainant's May 10, 2018 correspondence. Therein, Counsel maintained that the Custodian did not receive the Complainant's OPRA request. Counsel contended that the Borough did not know of the request until after the complaint was submitted because the Complainant did not contact the Borough to determine why he did not receive a response. Counsel asserted that the Borough ultimately provided responsive records and waived the fee for copying costs.

### **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.

OPRA further provides that, “a request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian.” N.J.S.A. 47:1A-5(g). OPRA further provides that, “the council shall make a determination as to whether the complaint is within its jurisdiction or frivolous or *without any reasonable factual basis.*” N.J.S.A. 47:1A-7(e) (emphasis added).

In Martinez v. Morris Cnty. Prosecutor’s Office, GRC Complaint No. 2014-2 (September 2014), the complainant contended that the custodian should have received his OPRA request and provided a photocopy of the certified mail receipt as evidence. The certified mail receipt identified the date of delivery and confirmed that the address was correct. The Council held that the certified mail receipt was insufficient to show that the custodian received the request.

Furthermore, in Valdes v. N.J. Dep’t of Educ., GRC Complaint No. 2012-19 (April 2013), the complainant filed a complaint after not receiving a response to his OPRA request. As part of his Denial of Access Complaint, the complainant included a certified mail receipt stamped “State of NJ – Capital Post Office.” The Council determined that the custodian did not unlawfully deny access to the complainant’s OPRA request because same was never received. The Council reasoned that “the Custodian did not sign the receipt and there is no indication that DOE received the request, only that the State received it . . . it is entirely possible that the Custodian never received the OPRA request.” Id. See also Bey v. State of New Jersey, Office of Homeland Security & Preparedness, GRC Complainant No. 2013-237 (February 2014) (complainant’s certified mail return receipt sufficient only to show that the State received the request, not the custodian).

In the instant matter, the Complainant contended that he submitted his OPRA request to the Custodian on March 2, 2018 and provided screenshots of his e-mail’s sent folder indicating same. The Complainant also argued that the screenshots demonstrate that the e-mail address was correctly entered, and if there was an error, he would have received a message from his provider. The Custodian certified that she did not receive the Complainant’s OPRA request. The Custodian certified that she searched all her e-mail folders, specifically including her spam and trash folders. Counsel contended that the Complainant’s screenshots did not demonstrate that the e-mail containing the OPRA request was received, only that it was transmitted.

The facts in this matter are analogous to those in Martinez, GRC 2014-2 and Valdes, GRC 2012-19. Like the certified mail receipts, the Complainant’s screenshots are evidence that the e-mail was sent to the correct address, but do not confirm that the Custodian received the e-mail on her server. Furthermore, the contention that the Complainant did not receive an error message is not positive evidence that the Custodian received the e-mail. Thus, the Complainant’s evidence is insufficient to overcome the Custodian’s certification that she searched through her entire e-mail account, including spam and trash folders, and could not locate the e-mail.

Therefore, the evidence of records supports that the Custodian never received the Complainant’s OPRA request, and the Complainant’s evidence is insufficient to overcome the Custodian’s SOI certification. Thus, the Custodian did not unlawfully deny access to the

Complainant's OPRA request. N.J.S.A. 47:1A-6. See Martinez, GRC 2014-2, and Valdes, GRC 2012-19.

### **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 Court 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 (2008), the Supreme 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." Mason, 196 N.J. at 71, (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 (7<sup>th</sup> 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 (2008).]

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, [certif. denied] (1984).

[Id. at 76.]

In the current matter, the Custodian certified that she was unaware of the Complainant's OPRA request prior to being notified of the Denial of Access Complaint. The Custodian also certified that upon notification, she took immediate steps to search for the records and provide a response to the OPRA request. Thus, as there was no unlawful denial of access prior to the complaint filing, the actions the Custodian took were in response to receiving the request, rather than the complaint itself. Therefore, the complaint was not the catalyst for the release of the records, and that no causal nexus exists.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters, 387 N.J. Super. 432. Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, because there was no unlawful denial of access prior to the complaint filing, the Custodian's actions were in response to the OPRA request rather than the complaint. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The evidence of records supports that the Custodian never received the Complainant's OPRA request, and the Complainant's evidence is insufficient to overcome the Custodian's SOI certification. Thus, the Custodian did not unlawfully deny access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. See Martinez v. Morris Cnty. Prosecutor's Office, GRC Complaint No. 2014-2 (September 2014), and Valdes v. N.J. Dep't of Educ., GRC Complaint No. 2012-19 (April 2013).
2. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, because there was no unlawful denial of access prior to the complaint filing, the Custodian's actions were in response to the OPRA request rather than the complaint. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Prepared By: Samuel A. Rosado  
Staff Attorney

February 19, 2020