



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**

**May 18, 2021 Government Records Council Meeting**

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

Complaint No. 2019-250

v.  
Borough of Chester (Morris)  
Custodian of Record

At the May 18, 2021 public meeting, the Government Records Council (“Council”) considered the May 11, 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 requested records on the basis that the Township, with which the Borough had a shared services agreement, possessed the records. N.J.S.A. 47:1A-6; Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010); and Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). The Custodian had an obligation to obtain the responsive records from the Township and provide same to the Complainant. See Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005). However, the GRC declines to order disclosure of the responsive records since the evidence of record demonstrates that the Complainant received same on December 17, 2019.
2. The Custodian unlawfully denied access to the requested records. N.J.S.A. 47:1A-6. However, the Custodian ultimately cured the response issue on January 29, 2020. 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 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, 71 (2008). Specifically, the evidence of record supports that the responsive records provided to the Complainant were disclosed via a separate OPRA request with the Township and not the Borough. See Nuckel v. N.J. Econ. Dev. Auth., 2020 N.J.

Super. Unpub. LEXIS 948, at \*6-7 (App. Div. 2020). 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.

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 18<sup>th</sup> Day of May 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: May 20, 2021**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
May 18, 2021 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of African American  
Data & Research Institute)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2019-250**

v.

**Borough of Chester (Morris)<sup>2</sup>  
Custodial Agency**

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

1. Drug Recognition Evaluation/Expert (“DRE”) Rolling Log from January 2019 through present.
2. Summonses and complaints that were prepared by the Police Department relating to each of the defendants listed in the DRE Rolling Logs mentioned in item No. 1 above.
3. Driving While Intoxicated/Driving under the Influence (“DWI/DUI”) complaints and summonses prepared and filed by the Police Department from January 2019 through present.
4. Drug possession complaints and summonses prepared and filed by the Police Department from January 2019 through present.
5. Drug paraphernalia complaints and summonses prepared by the Police Department from January 2019 through present.
6. Police Department’s “Arrest Listings” from January 2019 to present.

**Custodian of Record:** Denean Probasco

**Request Received by Custodian:** December 9, 2019

**Response Made by Custodian:** December 9, 2019

**GRC Complaint Received:** December 16, 2019

**Background<sup>3</sup>**

**Request and Response:**

On December 6, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 9, 2019, the

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<sup>1</sup> The Complainant represents the African American Data & Research Institute.

<sup>2</sup> Represented by Brian W. Mason, Esq. and Lisa Thompson, Esq., of Mason & Thompson, LLC (Dover, NJ).

<sup>3</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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Custodian responded in writing advising that the Borough of Chester (“Borough”) did not have a police department and that the Complainant should submit his OPRA request to Chester Township (“Township”).

#### Denial of Access Complaint:

On December 16, 2019, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant contended that the Custodian failed to disclose the records responsive to the subject OPRA request, as well as failed to get the records from the Township which was maintaining responsive records on the Borough’s behalf. See Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010); Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). The Complainant included the e-mail correspondence between himself, the Custodian, and Counsel. The Custodian also provided a copy of an “OPRA ALERT” issued by the GRC.

#### Additional Correspondence

On December 19, 2019, the Custodian e-mailed the Complainant confirming receipt of the instant complaint. The Custodian also stated that it was her understanding that the Complainant received the requested records from the Township, and therefore asked if the Complainant would withdraw the matter. On December 20, 2019, the Complainant responded to the Custodian stating that he would withdraw the matter if there was an agreement for counsel fees and verified compliance with his OPRA request.

#### Statement of Information:

On January 28, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on December 9, 2019. The Custodian certified that she responded in writing that same day, denying the request because the Borough did not have a police department and that the Complainant should forward his request to the Township.

The Custodian argued that she was not the Custodian of Records for the police department, as the Borough did not have one. The Custodian asserted that even if the Borough had a police department, the request would have been handled by the custodian for the department. The Custodian also stated that she received confirmation that the requested records were provided by the Township’s police department.

On January 28, 2020, the Complainant e-mailed the Custodian stating that he never received a response from the Custodian regarding his December 20, 2019 correspondence. The Complainant also stated that the Custodian did not produce the responsive records nor attached them to the SOI.

On January 29, 2020, the Custodian submitted an amended SOI in response to the Complainant’s January 28, 2020 e-mail. Therein, the Custodian stated that separate OPRA requests seeking the same records were submitted to the Borough and Township on December 6, 2019, and

were provided to the Complainant on December 17, 2019, within the seven (7) business day deadline. The Custodian included copies of the responsive records provided by the Township's police department. The Custodian also included the Township's December 17, 2019 e-mail containing the records, as well as the Complainant's same-day response acknowledging receipt.

#### Additional Submissions:

On February 1, 2020, the Complainant submitted a brief in response to the Custodian's SOI. The Complainant maintained that the records provided by the Custodian as part of the amended SOI were provided by the Township's police department in response to a separate OPRA request from one at issue in the current matter. The Complainant asserted that there was no mention of the Borough in the response provided by the Township on December 17, 2019. The Complainant maintained that he has not received responsive records to the request that was sent directly to the Borough.

The Complainant asserted that the GRC should compel the Custodian to comply with his OPRA request seeking complaints and summonses. The Complainant also requested the GRC to award counsel fees pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006).

### 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.

In Burnett, 415 N.J. Super. 506, the Appellate Division determined that the defendant was required to obtain settlement agreements from its insurance broker. The court's decision largely rested on the fact that there was no question that the broker was working on behalf of the defendant to execute settlement agreements. The court noted that it previously held that although a third party, such as insurance broker or outside counsel, may execute settlement agreements, "they nonetheless bind the county as principal, and the agreements are made on its behalf." Id. at 513. In determining that the defendant had an obligation to obtain responsive records from the insurance broker, the court distinguished Bent, 381 N.J. Super. at 38-39, from the facts before it. The court reasoned that:

In Bent, the requester sought records and information regarding a criminal investigation of his credit card activities conducted jointly by the Stafford Township Police Department [{"STPD"}], the United States Attorney for New Jersey and a special agent of the Internal Revenue Service. As part of his request, Bent sought "discrete records of the 1992 criminal investigation conducted by the STPD," which were fully disclosed. Id. at 38. Additionally, he sought a "[c]opy of contact memos, chain of custody for items removed or turned over to third parties

of signed Grand Jury reports and recommendations.” Bent v. Stafford Twp. Police Dept., GRC 2004-78, final decision (October 14, 2004). Affirming the determination of the [GRC], we stated: “to the extent Bent's request was for records that either did not exist or were not in the custodian's possession, there was, of necessity, no denial of access at all.” Bent, supra, 381 N.J. Super. at 38 . . . We continued by stating:

“Of course, even if the requested documents did exist, the custodian was under no obligation to search for them beyond the township's files. OPRA applies solely to documents ‘made, maintained or kept on file in the course of [a public agency's] official business,’ as well as any document ‘received in the course of [the agency's] official business.’ N.J.S.A. 47:1A-1.1. Contrary to Bent's assertion, although OPRA mandates that ‘all government records . . . be subject to public access unless exempt,’ the statute itself neither specifies nor directs the type of record that is to be ‘made, maintained or kept on file.’ In fact, in interpreting OPRA's predecessor statute, the Right to Know Law, we found no requirement in the law concerning ‘the making, maintaining or keeping on file the results of an investigation by a law enforcement official or agency into the alleged commission of a criminal offense. . . Thus, even if the requested documents did exist in the files of outside agencies, Bent has made no showing that they were, by law, required to be ‘made, maintained or kept on file’ by the custodian so as to justify any relief or remedy under OPRA. N.J.S.A. 47:1A-1.1.”

[T]he circumstances presented in Bent [are] far removed from those existing in the present matter because, as we have previously concluded, the settlement agreements at issue here were “made” by or on behalf of the Board in the course of its official business. Were we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply delegate their creation to third parties or relinquish possession to such parties, thereby thwarting the policy of transparency that underlies OPRA. N.J.S.A. 47:1A-1.

[Id. at 516-17.]

The Council subsequently expanded the court’s holding in Burnett to agencies entered into a shared services agreement. See Michalak, GRC 2010-220. In that case, the complainant sought police dispatch logs from the Borough of Helmetta (“Helmetta”). The custodian asserted that Helmetta did not maintain the records as dispatch calls were routed through the Spotswood Police Department (“SPD”). The Council held that since Helmetta entered into a shared services agreement with the Borough of Spotswood to operate Helmetta’s dispatch log, the custodian was obligated to obtain the requested records from SPD. The Council found that SPD “made, maintained, or kept on file” the dispatch logs on behalf of Helmetta pursuant to the shared services agreement. See Burnett, 415 N.J. Super. at 517.

Moreover, in Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005), the complainant requested e-mails sent to various individuals regarding official business but located on the mayor's home computer. The custodian alleged that due to the records' location, they were not government records. The Council found that the definition of a government record was not restricted its physical location. The Council further found that the requested records should be released in accordance with OPRA, to the extent they fell within the definition of a government record. Thus, the Council held that the location of a document was immaterial to its status as a government record.

Both Burnett and Michalak are directly applicable in the instant matter. Although not explicitly stated by the Custodian, the GRC located the shared services agreement with the Township to provide law enforcement services posted on the Borough's website.<sup>4</sup> Thus, the requested records were created and maintained in the Township on behalf of the Borough. Additionally, the Custodian was obligated to retrieve the records from the Township, as their physical location was immaterial. See Meyers, GRC 2005-127.

Accordingly, the Custodian unlawfully denied access to the requested records on the basis that the Township, with which the Borough had a shared services agreement, possessed the records. N.J.S.A. 47:1A-6; Burnett, 415 N.J. Super. 506; and Michalak, GRC 2010-220. The Custodian had an obligation to obtain the responsive records from the Township and provide same to the Complainant. See Meyers, GRC 2005-127. However, the GRC declines to order disclosure of the responsive records since the evidence of record demonstrates that the Complainant received same on December 17, 2019.

### **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,

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<sup>4</sup> See <https://www.chesterborough.org/wp-content/uploads/2016/12/Executed-Agreement-for-Provision-Police-Services.pdf> (last accessed May 7, 2021).

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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 requested records. N.J.S.A. 47:1A-6. However, the Custodian ultimately cured the response issue on January 29, 2020. 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, 387 N.J. Super. 423, 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 (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.

[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.]

In Mason, the plaintiff submitted an OPRA request on February 9, 2004. The defendant responded on February 20, eight (8) business days later, or one day beyond the statutory limit. Id. at 79. As a result, the Court shifted the burden to the defendant to prove that the plaintiff's lawsuit, filed on March 4, was not the catalyst behind defendant's voluntary disclosure. Id. Because defendant's February 20 response included a copy of a memo dated February 19 -- the seventh (7<sup>th</sup>) business day -- which advised that one of the requested records should be available on February 27 and the other one week later, the Court determined that the plaintiff's lawsuit was not the catalyst for the release of the records and found that she was not entitled to an award of prevailing party attorney fees. Id. at 80.

Additionally, although unpublished and decided during the pendency of this complaint, Nuckel v. N.J. Econ. Dev. Auth., 2020 N.J. Super. Unpub. LEXIS 948 (App. Div. 2020) is instructive. In Nuckel, the Plaintiff filed an action when he was denied access under OPRA to

records pertaining to a third-party vendor (“Vendor”). Slip op. at 3. While the matter was pending, the Plaintiff issued a subpoena against the Vendor in a related tax litigation, seeking the same records withheld under OPRA. Slip op. at 4. The Vendor provided the records in response to the subpoena. Slip op. at 4. The Plaintiff acknowledged he received the records at issue in response to the subpoena and moved for an award of counsel fees under OPRA. Slip op. at 4. The trial court denied the Plaintiff’s motion, stating that the elements of the catalyst theory were not met:

[T]he documents are ultimately provided by [the Vendor] in the context of WREIT versus Farmland Dairies, New Jersey Tax Docket Number 590-2017. [Vendor] was subpoenaed to provide information in that case. We have representations and there have been certification[s] filed by [Vendor’s] counsel and documents attached to show what the subpoena requested and what they provided. But the documents that [Plaintiff] got through that litigation with Farmland Dairies in the tax court were documents that were also requested here, but the catalyst for his getting those documents was the subpoena in the tax case and not any ruling from this Court, not any settlement that was achieved by the parties in this court, and not any voluntary action from the [NJ]EDA that is connected to this litigation.

[Slip op. at 6-7.]

The Appellate Division affirmed the trial court’s ruling since the catalyst resulting in the Plaintiff’s receipt of the requested records was the subpoena in the tax litigation, and not from any ruling in the OPRA action.

In determining whether the Complainant is a prevailing party, the GRC acknowledges that the Custodian unlawfully denied access to the records pursuant to Burnett, 415 N.J. Super. 506, Michalak, GRC 2010-220, and Meyers, GRC 2005-127. N.J.S.A. 47:1A-6. Thus, the burden of proving this complaint was not the catalyst for providing the responsive records to the Complainant on March 20, 2019 shifts to the Custodian pursuant to Mason, 196 N.J. 51.

In the matter before the Council, the Complainant alleged that the Borough failed to provide responsive records in response to his OPRA request, resulting in the filing of the instant matter. The Custodian asserted that the records were held with the Township since they provided law enforcement services for the Borough. While this matter was pending, the Complainant received responsive records from the Township via a separate OPRA request seeking the same categories of records.

In her amended SOI, the Custodian asserted that on December 17, 2019, the Complainant received records from the Township responsive to the instant OPRA request since the Township provided law enforcement services on the Borough’s behalf. The Custodian included a copy of the Township’s response as part of the SOI, including the December 17, 2019 e-mail to the Complainant. In his February 1, 2020 response, the Complainant asserted that he did not receive a direct response to the OPRA request at issue.

A review of the responsive records provided on December 17, 2019 reveals that they contained complaints and summonses pertaining to incidents occurring within both the Township

and the Borough, corroborating the Custodian's contention that the Township provided records responsive to both requests.

Furthermore, the Complainant noted that the Borough was not mentioned in the December 17, 2019 e-mail, thus demonstrating that the Township provided the records only in response to the OPRA request they received directly from the Complainant. Moreover, the records were not provided in response to a ruling from the GRC. Accordingly, just as the records in Nuckel were provided in response to a subpoena in a separate matter, the records at issue here were provided in response to a separate OPRA request submitted to the Township, and not through any action connected with the instant matter. Slip op. at 7. Thus, the GRC finds that the evidence supports that the complaint was not the catalyst for the Custodian's disclosure and that no casual nexus exists. Thus, the Complainant is not a prevailing party and is not entitled to an award of reasonable attorney's fees. Nuckel, slip op. at 7.

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, the evidence of record supports that the responsive records provided to the Complainant were disclosed via a separate OPRA request with the Township and not the Borough. See Nuckel, slip op. at 6-7. 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 Custodian unlawfully denied access to the requested records on the basis that the Township, with which the Borough had a shared services agreement, possessed the records. N.J.S.A. 47:1A-6; Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010); and Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). The Custodian had an obligation to obtain the responsive records from the Township and provide same to the Complainant. See Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005). However, the GRC declines to order disclosure of the responsive records since the evidence of record demonstrates that the Complainant received same on December 17, 2019.
2. The Custodian unlawfully denied access to the requested records. N.J.S.A. 47:1A-6. However, the Custodian ultimately cured the response issue on January 29, 2020. 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 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, 71 (2008). Specifically, the evidence of record supports that the responsive records provided to the Complainant were disclosed via a separate OPRA request with the Township and not the Borough. See Nuckel v. N.J. Econ. Dev. Auth., 2020 N.J. Super. Unpub. LEXIS 948, at \*6-7 (App. Div. 2020). 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

May 11, 2021