



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

March 29, 2022 Government Records Council Meeting

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

Complaint No. 2019-35

v.

Stockton Borough (Hunterdon)
Custodian of Record

At the March 29, 2022 public meeting, the Government Records Council (“Council”) considered the March 22, 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 the Council dismiss this complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant’s Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 29th Day of March 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: March 31, 2022



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
March 29, 2022 Council Meeting**

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

GRC Complaint No. 2019-35

v.

**Stockton Borough (Hunterdon)²
Custodial Agency**

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

1. Driving While Intoxicated/Driving under the Influence (“DWI/DUI”) complaints, tickets, and summonses that occurred within Stockton Borough (“Borough”) from January 2018 to January 2019.
2. Drug possession and drug paraphernalia complaints, tickets, and summonses that occurred within the Borough from January 2018 to January 2019.
3. “Arrest Listings” from January 2018 to January 2019.
4. Drug possession and drug paraphernalia criminal complaints and summonses that occurred within the Borough from January 2017 to January 2019.

Custodian of Record: Michele Hovan

Request Received by Custodian: January 31, 2019

Response Made by Custodian: January 31, 2019

GRC Complaint Received: February 13, 2019

Background

January 25, 2022 Council Meeting:

At its January 25, 2022 public meeting, the 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, found that:

1. The Custodian complied with the Council’s February 23, 2021 Interim Order because she responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.

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

² Represented by Victoria D. Britton, Esq., of Eckert, Seamans, Cherin & Mellott, LLC (Lawrence, N.J.).

2. The Custodian unlawfully denied access to the Complainant's OPRA request. However, the Custodian complied with the Council's February 23, 2021 Interim Order by locating and providing the Complainant with the requested 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 February 23, 2021 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, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 76 (2008). Specifically, the Custodian was ordered to produce the responsive records from the Township of Delaware. 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. at 432, and Mason, 196 N.J. at 76. **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 January 26, 2022, the Council distributed its Interim Order to all parties. On February 9, 2022, Complainant's Counsel notified the GRC that a settlement had been reached between the parties, subject to formal approval by Stockton Borough ("Borough"). The GRC responded that same day requesting an estimated date of approval. Custodian's Counsel responded stating that the Borough's next meeting was on February 14, 2022. On February 17, 2022, Custodian's Council notified the GRC that the Borough had approved the settlement at its February 14, 2022 meeting.

Analysis

Compliance

At its January 25, 2022 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 January 26, 2022, 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 February 24, 2022.

On February 9, 2022, Complainant's Counsel notified the GRC that the parties have settled the issue of attorney's fees. That same day, Custodian's Counsel notified the GRC that the Borough would likely approve the settlement at its next meeting on February 14, 2022. On February 17, 2022, Custodian's Counsel confirmed that the Borough approved the settlement.

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

Conclusions and Recommendations

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

Prepared By: Samuel A. Rosado
Staff Attorney

March 22, 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

January 25, 2022 Government Records Council Meeting

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

Complaint No. 2019-35

v.

Stockton Borough (Hunterdon)
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:

1. The Custodian complied with the Council’s February 23, 2021 Interim Order because she responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to the Complainant’s OPRA request. However, the Custodian complied with the Council’s February 23, 2021 Interim Order by locating and providing the Complainant with the requested 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 February 23, 2021 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, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 76 (2008). Specifically, the Custodian was ordered to produce the responsive records from the Township of Delaware. 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. at 432, and Mason, 196 N.J. at 76. **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 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 26, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 25, 2022 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of African American
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GRC Complaint No. 2019-35

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Custodian of Record: Michele Hovan
Request Received by Custodian: January 31, 2019
Response Made by Custodian: January 31, 2019
GRC Complaint Received: February 13, 2019

Background

February 23, 2021 Council Meeting:

At its February 23, 2021 public meeting, the Council considered the February 16, 2021 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian may have unlawfully denied access to the requested records on the basis that the Township of Delaware (“Township”), with which Stockton Borough May 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

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

² Represented by Victoria D. Britton, Esq., of Eckert, Seamans, Cherin & Mellott, LLC (Lawrence, N.J.).

Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). The Custodian had an obligation contact the Township to obtain responsive records generated in accordance with the agreement. See Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005). Thus, the Custodian shall obtain the responsive records from the Township and provide same to the Complainant. Alternatively, if no responsive records exist from within the Township, the Custodian shall certify to same.

2. **The Custodian shall comply with conclusion No. 1 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 deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director.⁵**
3. 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.
4. 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 February 24, 2021, the Council distributed its Interim Order to all parties. On March 2, 2021, the Custodian responded to the Council's Interim Order, providing the Complainant with responsive records via e-mail.

Analysis

Compliance

At its February 23, 2021 meeting, the Council ordered the Custodian to locate and provide the Complainant with the requested records. The Council also 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 February 24, 2021, 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 March 3, 2021.

³ 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.

⁴ "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."

⁵ 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 March 2, 2021, the fourth (4th) business day after receipt of the Council’s Order, the Custodian provided the Complainant with the requested records. The Custodian also provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council’s February 23, 2021 Interim Order because she responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.

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 instant matter, the Custodian unlawfully denied access to the Complainant’s OPRA request. However, the Custodian complied with the Council’s February 23, 2021 Interim Order by locating and providing the Complainant with the requested 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 held that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” Id. at 603 (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, citing Teeters, 387 N.J. Super. at 429; see, e.g., Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), certif. denied, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$500.00.”

N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

[196 N.J. at 73-76.]

The Court in Mason, further held that:

[R]equestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved"; and (2) "that the relief ultimately secured by plaintiffs had a basis in law." Singer v. State, 95 N.J. 487, 495, cert. denied, New Jersey v. Singer, 469 U.S. 832 (1984).

[Id. at 76.]

Here, the Complainant sought complaints and summonses prepared by the Borough of Stockton ("Borough") pertaining to drug paraphernalia, drug possession, and DUI/DWI offenses. The Custodian asserted that the records were maintained by the Township of Delaware ("Township") due to a shared services agreement. The Complainant then filed the instant complaint asserting that the Borough had an established obligation to obtain the responsive records from the municipality pursuant to Burnett, 415 N.J. Super. 506 and Michalak, GRC 2010-220.

In determining whether the Complainant is a prevailing party entitled to attorney's fees, the GRC is satisfied that the evidence of record supports a conclusion in the affirmative. In accordance with the Council's February 23, 2021 Interim Order, the Custodian was ordered to produce the responsive records maintained by the Township, which was the Complainant's desired result in filing the instant complaint. Teeters, 387 N.J. Super. at 432. Thus, a causal nexus exists between this complaint and the change in the Custodian's conduct. Mason 196 N.J. at 76. Accordingly, the Complainant is a prevailing party entitled to attorney's fees.⁶

Therefore, pursuant to the Council's February 23, 2021 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. at 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 76. Specifically, the Custodian was ordered to produce the responsive records from the Township. 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. at 432, and Mason, 196 N.J. at 76.

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

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 complied with the Council's February 23, 2021 Interim Order because she responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to the Complainant's OPRA request. However, the Custodian complied with the Council's February 23, 2021 Interim Order by locating and providing the Complainant with the requested 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 February 23, 2021 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, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 76 (2008). Specifically, the Custodian was ordered to produce the responsive records from the Township of Delaware. 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. at 432, and Mason, 196 N.J. at 76. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Prepared By: Samuel A. Rosado
Staff Attorney

January 18, 2022



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INTERIM ORDER

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1. The Custodian may have unlawfully denied access to the requested records on the basis that the Township of Delaware (“Township”), with which Stockton Borough May 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 contact the Township to obtain responsive records generated in accordance with the agreement. See Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005). Thus, the Custodian shall obtain the responsive records from the Township and provide same to the Complainant. Alternatively, if no responsive records exist from within the Township, the Custodian shall certify to same.
2. **The Custodian shall comply with conclusion No. 1 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 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.

3. 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.
4. 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
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On The 23rd Day of February 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: February 24, 2021

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**Findings and Recommendations of the Executive Director
February 23, 2021 Council Meeting**

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

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

1. Driving While Intoxicated/Driving under the Influence (“DWI/DUI”) complaints, tickets, and summonses that occurred within Stockton Borough (“Borough”) from January 2018 to January 2019.
2. Drug possession and drug paraphernalia complaints, tickets, and summonses that occurred within the Borough from January 2018 to January 2019.
3. “Arrest Listings” from January 2018 to January 2019.
4. Drug possession and drug paraphernalia criminal complaints and summonses that occurred within the Borough from January 2017 to January 2019.

Custodian of Record: Michele Hovan

Request Received by Custodian: January 31, 2019

Response Made by Custodian: January 31, 2019

GRC Complaint Received: February 13, 2019

Background³

Request and Response:

On January 31, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. That same day, Christine Rosikiewicz responded in writing on the Custodian’s behalf advising that the Borough did not have a police department. Ms. Rosikiewicz stated that the New Jersey State Police (“NJSP”) provided police services through their Kingwood Station, and that Delaware Township

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

² Represented by Victoria D. Britton, Esq., of Eckert, Seamans, Cherin & Mellott, LLC (Lawrence, N.J.).

³ 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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("Township") provided supplementary services. Ms. Rosikiewicz stated that the Complainant should reach out to those agencies for his request.

On February 2, 2019, the Complainant responded to Ms. Rosikiewicz, stating that she should reconsider and obtain the records. On February 6, 2019, the Custodian responded to the Complainant, reiterating that the Borough was not the custodian of the requested records. The Custodian stated that NJSP provided police services for the Borough, and by a contractual shared service, "Title 39 enforcement services" were provided by the Township. The Custodian also provided the telephone numbers for NJSP and the Township.

Denial of Access Complaint:

On February 13, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that as of February 12, 2019, the Custodian has not provided any records or requested an extension of time to respond. The Complainant requested that the Council compel compliance and to award counsel fees.

Statement of Information:

On February 21, 2019, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on January 31, 2019. The Custodian certified that Ms. Rosikiewicz responded on her behalf that same day denying the request because the Borough did not maintain responsive records. The Custodian certified that she responded to the Complainant on February 6, 2019, stating that the Borough did not have a police department and advised the Complainant to contact the Township and NJSP to obtain responsive records.

The Custodian maintained that the Borough was not the Custodian of the requested records and did not have copies of same.

Additional Submissions:

On February 27, 2019, the Complainant filed a brief in response to the SOI. Therein, the Complainant contended that the Custodian had an obligation to obtain records from either NJSP's barracks or the Borough's municipal prosecutor. 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 argued that NJSP had an agency relationship with the Borough under N.J.S.A. 53:2-1. The Complainant argued that the Borough had a municipal court⁴ and NJSP officers required the services of the Borough's prosecutor to adjudicate matters within the Borough's jurisdiction.

The Complainant further asserted that municipalities were required to retain summonses and complaints for at least fifteen (15) years if part of a "Municipal Prosecutor's Case File."

⁴ The Complainant included an excerpted list of New Jersey State municipal courts and highlighted "Stockton Municipal Court" therein.
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M170000, Records Series No. 0001-0000. The Complainant argued that because the Borough's prosecutor was an employee, their records were subject to access under OPRA and should have been disclosed accordingly. The Complainant also asserted that the Borough's prosecutor had access to the New Jersey Judiciary's ("Judiciary") eCDR filing system, and could therefore make copies available to the Borough.

The Complainant also argued that if the responsive records were in storage or otherwise unavailable, the Custodian was obligated to extend the response time frame but failed to do so.⁵ N.J.S.A. 47:1A-5(i). The Complainant asserted that this requirement was consistent with court decisions where defendants argued that a requestor was required to obtain records from the courts. AADARI v. Woodbridge Twp., Docket No. MID-L-2052-18.

The Complainant further argued that the Borough's obligation to disclose responsive records was not diminished simply because the Judiciary also made them available to the public. See Keddie v. Rutgers, 148 N.J. 36, 52 (1997). The Complainant also noted that it was far cheaper to obtain the responsive records via OPRA than through R. 1:38. The Complainant argued that OPRA should not be used as "a money generating scheme (another form of taxation) for government." The Complainant thus argued that the Borough should be required to disclose the responsive records by retrieving them from the municipal prosecutor.

Later that same day, the Complainant submitted an addendum to his response brief. The Complainant noted that the Custodian also directed him to seek records from the Township, since they also provided police services to the Borough. The Complainant argued that in accordance with Burnett, 415 N.J. Super. 506, and Michalak, GRC 2010-220, the Custodian failed to obtain the records from the Township.

On March 8, 2019, the Custodian submitted a brief in response to the Complainant. The Custodian argued that she was not the Custodian of Record for the requested records since they were not made, maintained, or kept on file with the Borough. The Custodian maintained that the Borough did not have a police department and that the Township and NJSP provided law enforcement services.

The Custodian next argued that the Borough had no agency relationship with NJSP, since NJSP's authority to police within the Borough's borders was made automatic via State law, and not through a contractual agreement. The Custodian also argued that unlike the binding agreements in Burnett, the tickets, complaints, and summonses issued within the Borough's borders by NJSP or the Township did not bind the Borough. The Custodian asserted that the Borough obtained no fines or penalties paid as a result of any violations committed within its borders, and thus no records of same were maintained by the Borough. Additionally, the Custodian asserted that unlike the plaintiff in Burnett, the Complainant had other means of obtaining the responsive records, such as requesting them directly from the Joint Court of East Amwell ("Court"), NJSP, or the Township.

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

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Furthermore, the Custodian argued that the powers and duties of the municipal prosecutor were derived from the State through the county prosecutor, and were not inherent from the municipality. See Kershenblatt v. Kozmor, 264 N.J. Super. 432, 439 (Law Div. 1993). The Custodian argued that like a municipal judge who was also paid by the municipality, the municipal prosecutor exercises independent authority separate and apart from the municipality. The Custodian also noted that the GRC had no jurisdiction over whether the Borough or the municipal prosecutor should have retained copies of the requested records in accordance with the State's retentions schedules. Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 35 (App. Div. 2005); Toscano v. N.J. Dep't of Labor, GRC Complaint No. 2007-296 (March 2008).

The Custodian also asserted that unpublished decisions such as Woodbridge did not have precedential value and was not binding on the GRC, as noted in Michalak, GRC 2012-220.

On January 29, 2021, the GRC requested additional information from the Custodian. Specifically, the GRC asked the Custodian whether "the Borough [has] a shared services agreement with the Township to provide police services, in whole or in part, on behalf of the Borough?"

On February 4, 2021, the Custodian responded to the GRC's request. The Custodian certified that the Borough has a shared services agreement with the Township for the provision of supplemental traffic enforcement services. The Custodian certified that the Borough does not compensate the Township for the service, and that the Township prosecuted all traffic offenses at the Court it shares with East Amwell Township. The Custodian further certified that the Township retained all fines, fees, and court costs resulting from providing this supplemental service to the Borough. The Custodian certified that all other law enforcement services are provided to the Borough by NJSP.

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, GRC 2005-127, 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.

NJSP Records

In the matter before the Council, the Complainant sought access to summonses and complaints for DWI/DUI and drug offenses, as well as an arrest listing. On the basis that the Borough did not have a police department, the Custodian denied access to the OPRA request and directed the Complainant to NJSP as well as the Township. This complaint ensued, wherein the Complainant contended that the Custodian had an obligation to obtain and disclose the responsive records under Burnett, 415 N.J. Super. 506 and Michalak, GRC 2010-220. In the SOI, the Custodian maintained the position that she was under no obligation to obtain and disclose records the Borough did not possess and had no authority to compel NJSP to turn over the requested records. In response to the SOI, the Complainant argued that the Custodian had an obligation to contact NJSP or the Township to obtain responsive records.

The crux of this complaint is whether the Custodian had an obligation to contact either the NJSP or the Township to obtain records submitted to that agency by the NJSP as part of their patrol coverage of the Township. Upon review, the facts of this complaint depart somewhat from Burnett, 415 N.J. Super. 506 and Michalak, GRC 2010-220.

First, in contrast to Michalak, GRC 2010-220, there is no evidence of any contractual or shared services-type agreement between the Township and NJSP. Instead, N.J.S.A. 53:2-1 grants NJSP the ability to patrol certain areas as it deems necessary to ensure adequate police protection. Thus, in the absence of a shared services agreement, there is no evidence supporting that NJSP is making or maintaining summons, complaints, or arrest listings on behalf of the Borough.

Second, there is no evidence to suggest that NJSP was making or maintaining records on behalf of the Borough. Burnett, 415 N.J. Super. 506. Further, the evidence of record does not support that NJSP submitted to the Borough’s municipal prosecutor copies of those records associated with DWI//DUI or drug issues, or arrests occurring within municipal limits. Although the Complainant relied upon a list of municipal courts identifying a “Stockton Municipal Court,” the court’s address is the same as the joint Court shared by the Township and East Amwell Township. Moreover, the Borough’s website directs visitors seeking information on the municipal

court to the “Joint Service – East Amwell Court.”⁶ Thus, while it is evident that the Borough was sharing services with the Township for court services, OPRA does not apply to the Judiciary. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-7(g).

Therefore, the relationship between NJSP and the Borough is not like the relationships between the parties in Burnett and Michalak. Specifically, the NJSP was neither a third-party vendor for the Borough, nor engaged in a shared services agreement with the Borough for its police services.

Instead, the facts here are more closely aligned with those in Bent, 381 N.J. Super. 30. Specifically, the evidence of record supports that the Borough and NJSP are separate public agencies operating within the State. Further, there is no evidence supporting that the Borough has any control over NJSP’s operations within its municipal limits. Instead, NJSP provides law enforcement to the area and operates within its capacity as provided in N.J.S.A. 53:2-1. Further, that statute does not include any requirement that NJSP provide law enforcement records to a municipality wherein it has assumed full law enforcement duties. For these reasons, the GRC is persuaded that the Custodian was not required to contact other agencies to obtain records that were clearly beyond the Borough’s own files. Bent, 381 N.J. Super. at 38.

Accordingly, the Custodian was under no obligation to obtain and disclose records created by the NJSP resulting from law enforcement activities within the Borough. Bent, 381 N.J. Super. 30; N.J.S.A. 53:2-1.

Township Records

Next, the GRC looks to determine whether the Borough was obligated to contact the Township to obtain responsive records. The evidence of record demonstrates that the Borough entered into a shared services agreement with the Township to provide law enforcement services within the Borough in addition to the services provided by NJSP. Although the Custodian certified that the agreement was supplemental, responsive records may have been created and maintained in the Township on behalf of the Borough. See Burnett and Michalak. Thus, 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 may have unlawfully denied access to the requested records on the basis that the Township, with which the Borough had a shared services agreement, possessed responsive 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 contact the Township to obtain responsive records generated in accordance with the agreement. See Meyers, GRC 2005-127. Thus, the Custodian shall obtain the responsive records from the Township and provide same to the Complainant. Alternatively, if no responsive records exist from within the Township, the Custodian shall certify to same.

⁶ “Municipal Court/Violations | Stockton Borough”, <http://stocktonboronj.us/municipal-courtviolations> (Last Accessed February 5, 2021).

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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 may have unlawfully denied access to the requested records on the basis that the Township of Delaware ("Township"), with which Stockton Borough May 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 contact the Township to obtain responsive records generated in accordance with the agreement. See Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005). Thus, the Custodian shall obtain the responsive records from the Township and provide same to the Complainant. Alternatively, if no responsive records exist from within the Township, the Custodian shall certify to same.
2. **The Custodian shall comply with conclusion No. 1 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 deliver⁷ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁸ to the Executive Director.⁹**
3. 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.

⁷ 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.

⁸ "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."

⁹ 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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4. 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: Samuel A. Rosado
Staff Attorney

February 16, 2021