



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

November 9, 2021 Government Records Council Meeting

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

Complaint No. 2020-112

v.

Borough of Paramus (Bergen)
Custodian of Record

At the November 9, 2021 public meeting, the Government Records Council (“Council”) considered the October 26, 2021 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Council dismiss this complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant’s Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 9th Day of November 2021

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: November 15, 2021



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
November 9, 2021 Council Meeting**

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

GRC Complaint No. 2020-112

v.

**Borough of Paramus (Bergen)²
Custodial Agency**

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

1. Driving Under the Influence (“DUI”) and Driving While Intoxicated (“DWI”) summonses and complaints that were prepared by the Police Department from January 2019 through present.
2. Drug possession complaints and summonses prepared and filed by the Police Department from January 2019 through present.
3. Drug paraphernalia complaints and summonses prepared and filed by the Police Department from January 2019 through present.

Custodian of Record: Chief Kenneth R. Ehrenberg

Request Received by Custodian: March 16, 2020

Response Made by Custodian: April 16, 2020

GRC Complaint Received: June 4, 2020

Background

September 28, 2021 Council Meeting:

At its September 28, 2021 public meeting, the Council considered the September 21, 2021 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian failed to comply with the Council’s June 29, 2021 Interim Order because he failed to timely provide responsive records to the Complainant. Additionally, the Custodian failed to simultaneously provide certified confirmation of

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

² Represented by Paul Kaufman, Esq., of Kaufman, Semeraro, & Leibman, LLP (Fort Lee, NJ).

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

compliance to the Executive Director. Notwithstanding, the Council need not address this issue further since the Complainant confirmed he received the responsive records on July 9, 2021.

2. The Custodian unlawfully denied access to the Complainant's March 16, 2020 OPRA request. N.J.S.A. 47:1A-6. Further, the Custodian failed to comply with the Council's June 29, 2021 Interim Order. However, the Complainant confirmed that the Custodian provided responsive records on July 9, 2021. 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 June 29, 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. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Custodian was ordered to locate and produce the requested records maintained by the Borough. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Procedural History:

On September 29, 2021, the Council distributed its Interim Order to all parties. On September 30, 2021, the Complainant e-mailed the Government Records Council ("GRC") notifying that the parties have settled the issue of counsel fees pending formal approval by the Borough of Paramus ("Borough") at its next meeting. Custodian's Counsel confirmed the Complainant's notice via e-mail that same day.

On October 15, 2021, the GRC inquired both parties as to whether the settlement on counsel fees has been approved by the Borough. That same day, Counsel responded to the GRC stating that the Borough approved the settlement via Resolution 21-10-601, which was signed by the mayor. The Complainant subsequently responded stating that he received a copy of the signed resolution.

Analysis

Prevailing Party Attorney's Fees

At its September 28, 2021 meeting, the Council determined that the Complainant was a prevailing party entitled to an award of reasonable attorney's fees. The Council thus ordered that the "parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days." The Council further ordered that the parties notify of any settlement prior to the expiration of the twenty (20) business day time frame. Finally, the Council ordered that, should the parties not reach an agreement, the Complainant's Counsel would be required to "submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13."

On September 29, 2021, the Council distributed its Interim Order to all parties; thus, the Complainant's response was due by close of business on October 28, 2021. On September 30, 2021, the Complainant e-mailed the GRC, advising that the parties have settled the matter, pending approval by the Borough. On October 15, 2021, Custodian's Counsel informed the GRC that the Borough approved the settlement via Resolution 21-10-601. Additionally, the Complainant confirmed that he received a copy of said resolution.

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

October 26, 2021



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

September 28, 2021 Government Records Council Meeting

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

Complaint No. 2020-112

v.

Borough of Paramus (Bergen)
Custodian of Record

At the September 28, 2021 public meeting, the Government Records Council (“Council”) considered the September 21, 2021 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian failed to comply with the Council’s June 29, 2021 Interim Order because he failed to timely provide responsive records to the Complainant. Additionally, the Custodian failed to simultaneously provide certified confirmation of compliance to the Executive Director. Notwithstanding, the Council need not address this issue further since the Complainant confirmed he received the responsive records on July 9, 2021.
2. The Custodian unlawfully denied access to the Complainant’s March 16, 2020 OPRA request. N.J.S.A. 47:1A-6. Further, the Custodian failed to comply with the Council’s June 29, 2021 Interim Order. However, the Complainant confirmed that the Custodian provided responsive records on July 9, 2021. 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 June 29, 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. 432. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Custodian was ordered to locate and produce the requested records maintained by the Borough. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of**



reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

Interim Order Rendered by the
Government Records Council
On The 28th Day of September 2021

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: September 29, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

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

GRC Complaint No. 2020-112

v.

**Borough of Paramus (Bergen)²
Custodial Agency**

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

1. Driving Under the Influence (“DUI”) and Driving While Intoxicated (“DWI”) summonses and complaints that were prepared by the Police Department from January 2019 through present.
2. Drug possession complaints and summonses prepared and filed by the Police Department from January 2019 through present.
3. Drug paraphernalia complaints and summonses prepared and filed by the Police Department from January 2019 through present.

Custodian of Record: Chief Kenneth R. Ehrenberg
Request Received by Custodian: March 16, 2020
Response Made by Custodian: April 16, 2020
GRC Complaint Received: June 4, 2020

Background

June 29, 2021 Council Meeting:

At its June 29, 2021 public meeting, the Council considered the June 22, 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 Complainant’s March 16, 2020 OPRA request. N.J.S.A. 46:1A-6. The Custodian must either: 1) locate and disclose the responsive records if they are physically maintained by the Borough of

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

² Represented by Paul Kaufman, Esq., of Kaufman, Semeraro, & Leibman, LLP (Fort Lee, NJ).

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

Paramus (“Borough”); or 2) certify that the Borough does not keep or maintain physical copies of the responsive records.

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 deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Executive Director.⁶**
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 June 30, 2021, the Council distributed its Interim Order to all parties. On August 25, 2021, the GRC e-mailed the Custodian, stating that the deadline to respond to the Council’s Order had long passed and as of that date no such response had been provided. The GRC included copies of the cover letter and Interim Order sent to the parties on June 30, 2021. The GRC also requested an update from the Custodian regarding compliance by no later than the end of business on August 30, 2021.

On August 25, 2021, Custodian’s Counsel replied to the GRC, stating that the responsive records were provided to the Complainant on July 9, 2021, and received an acknowledgment from the Complainant. That same day, the Complainant e-mailed the GRC and Counsel confirming that he received the responsive records.

On August 26, 2021, the GRC responded to Counsel, stating that while it was acknowledged that the Complainant received the responsive records based on his confirmation, the Council’s Interim Order still required the Custodian to provide certified confirmation of compliance to the Executive Director. The GRC again attached a copy of the Interim Order (which includes a template for a proper certification) to the correspondence and requested confirmation by August 30, 2021. That same day, Counsel responded to the GRC stating that the Complainant confirmed receipt of the requested records. Counsel also stated that if the GRC requested a

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

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

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

particular form to be signed, it should be submitted. Counsel further stated that, “[o]therwise, as counsel to the Custodian, this email certifies that we sent the documents that Mr. Ohow [sic] acknowledged he received.”

Analysis

Compliance

At its June 29, 2021 meeting, the Council ordered the Custodian to locate and disclose responsive records physically maintained by the Borough or certify that no such records exist. 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 June 30, 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 July 8, 2021.

On August 25, 2021, well after the deadline’s expiration, the GRC requested an update on the Custodian’s compliance, including the production of a certification. That same day, Counsel alerted the GRC for the first time that responsive records were e-mailed to the Complainant on July 9, 2021. However, Counsel did not also include the Custodian’s certified confirmation of compliance. Thus, the GRC again requested the Custodian’s certification on August 26, 2021. Counsel responded that same day stating that the Complainant had already acknowledged receipt of the responsive records. Furthermore, instead of providing the Custodian’s certification as per the Interim Order, Counsel stated that the response could serve as certification that the records were provided to the Complainant. Thus, despite providing multiple opportunities, the Custodian failed to provide a certified confirmation of compliance to the Executive Director.

Based on the forgoing, the evidence of record wholly supports that the Custodian failed to comply with the Council’s Order. Specifically, although the Custodian disclosed records to the Complainant, such response was not timely. Further, the Custodian failed to notify the GRC of his response and further failed to provide certified confirmation of compliance to the Executive Director. This is notwithstanding the Council’s Order requiring it, the Interim Order letter’s inclusion of a certification template, and the GRC’s multiple attempts to obtain same.

Therefore, the Custodian failed to comply with the Council’s June 29, 2021 Interim Order because he failed to timely provide responsive records to the Complainant. Additionally, the Custodian failed to simultaneously provide certified confirmation of compliance to the Executive Director. Notwithstanding, the Council need not address this issue further since the Complainant confirmed he received the responsive records on July 9, 2021.

Knowing & Willful

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . .” N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access

under the totality of the circumstances. Specifically OPRA states “. . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . .” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the instant matter, the Custodian unlawfully denied access to the Complainant’s March 16, 2020 OPRA request. N.J.S.A. 47:1A-6. Further, the Custodian failed to comply with the Council’s June 29, 2021 Interim Order. However, the Complainant confirmed that the Custodian provided responsive records on July 9, 2021. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney’s Fees

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

[N.J.S.A. 47:1A-6.]

In Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006), the Appellate Division held that a complainant is a “prevailing party” if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. *Id.* at 432. Additionally, the court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008), the Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct” (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court held that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” Id. at 603 (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . .” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney’s fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

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

OPRA itself contains broader language on attorney’s fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney’s fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney’s fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature’s revisions therefore: (1) mandate, rather than permit, an award of attorney’s fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

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

The Court in Mason, further held that:

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

[Id. at 76.]

In the instant matter, the Complainant sought complaints and summonses prepared by the Paramus Police Department pertaining to drug possession, drug paraphernalia, and DUI/DWI offenses. The Custodian asserted that the Borough did not possess responsive records and forwarded the request to the municipal court. The Complainant then filed the instant complaint asserting that BPD had access to the requested records.

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 June 29, 2021 Interim Order, the Custodian was ordered to locate and produce the requested records maintained by the Borough, 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.⁷

Therefore, pursuant to the Council's June 29, 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. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Custodian was ordered to locate and produce the requested records maintained by the Borough. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to comply with the Council's June 29, 2021 Interim Order because he failed to timely provide responsive records to the Complainant. Additionally, the Custodian failed to simultaneously provide certified confirmation of compliance to the Executive Director. Notwithstanding, the Council need not address this issue further since the Complainant confirmed he received the responsive records on July 9, 2021.

⁷ 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).

2. The Custodian unlawfully denied access to the Complainant's March 16, 2020 OPRA request. N.J.S.A. 47:1A-6. Further, the Custodian failed to comply with the Council's June 29, 2021 Interim Order. However, the Complainant confirmed that the Custodian provided responsive records on July 9, 2021. 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 June 29, 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. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Custodian was ordered to locate and produce the requested records maintained by the Borough. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Prepared By: Samuel A. Rosado
Staff Attorney

September 21, 2021



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

June 29, 2021 Government Records Council Meeting

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

Complaint No. 2020-112

v.

Borough of Paramus (Bergen)
Custodian of Record

At the June 29, 2021 public meeting, the Government Records Council (“Council”) considered the June 22, 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 may have unlawfully denied access to the Complainant’s March 16, 2020 OPRA request. N.J.S.A. 46:1A-6. The Custodian must either: 1) locate and disclose the responsive records if they are physically maintained by the Borough of Paramus (“Borough”); or 2) certify that the Borough does not keep or maintain physical copies of the responsive records.
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**
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.

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.

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
Government Records Council
On The 29th Day of June 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: June 30, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 29, 2021 Council Meeting**

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

GRC Complaint No. 2020-112

v.

**Borough of Paramus (Bergen)²
Custodial Agency**

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

1. Driving Under the Influence (“DUI”) and Driving While Intoxicated (“DWI”) summonses and complaints that were prepared by the Police Department from January 2019 through present.
2. Drug possession complaints and summonses prepared and filed by the Police Department from January 2019 through present.
3. Drug paraphernalia complaints and summonses prepared and filed by the Police Department from January 2019 through present.

Custodian of Record: Chief Kenneth R. Ehrenberg
Request Received by Custodian: March 16, 2020
Response Made by Custodian: April 16, 2020
GRC Complaint Received: June 4, 2020

Background⁴

Request and Response:

On March 16, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 20, 2020, the Custodian requested and was granted an extension of time to respond. On April 16, 2020, Kari Polifrone responded on the Custodian’s behalf, stating that there were no responsive records, and the request was forwarded to the Borough of Paramus Municipal Court (“Court”).

That same day, the Complainant responded to Ms. Polifrone, stating that he submitted his

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

² Represented by Paul Kaufman, Esq., of Kaufman, Semeraro, & Leibman, LLP (Fort Lee, NJ).

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

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute) v. Borough of Paramus (Bergen), 2020-112 – Findings and Recommendations of the Executive Director

OPRA request to the Borough of Paramus Police Department (“PPD”) and not the Court. The Complainant stated that PPD had access to eCDR and ACS/ATS, and therefore should provide responsive records. The Complainant requested that Ms. Polifrone respond to his e-mail if PPD would reconsider their denial.

Additional Correspondence:

On April 21, 2020, Cynthia Holmes of the Court e-mailed the Complainant providing a form to request records from the Court. The Complainant responded stating that he submitted his OPRA request to the PPD. Ms. Holmes replied stating that PPD forwarded the OPRA request to the Court for the documents they were unable to provide. The Complainant responded stating that he was not told by PPD of what documents they could not provide.

Denial of Access Complaint:

On June 4, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that New Jersey police departments have direct access to eCDR as well as the ATS/ACS database. The Complainant argued that PPD did not need the assistance or permission of the Court to access the databases containing the responsive records and included excerpts of relevant court opinions in support of his position. The Complainant therefore requested the GRC compel compliance with the OPRA request and to award counsel fees.

Statement of Information:

On January 29, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on March 16, 2020. The Custodian certified that because PPD did not have access to the databases containing records responsive to the remaining items, the request was forwarded to the Court. The Custodian certified that on April 16, 2020, Ms. Polifrone responded on his behalf stating that no responsive records exist and forwarded the request to the Court to provide responsive records.

The Custodian, through Counsel, asserted that as an initial matter the complaint was defective because it failed to identify the Custodian and failed to provide the OPRA request at issue. Counsel also noted that the complaint should have been directed to the PPD and not the Borough of Paramus (“Borough”) itself, since PPD had its own Custodian of Records. Counsel also asserted that the OPRA request included copies of a CDR-1 form for Medford Township.

Counsel next argued that PPD did not have access to the eCDR and ATS/ACS databases, and the Custodian properly forwarded the OPRA request to the Court. Counsel asserted that the definition of “public agency” under OPRA did not include the Judiciary, and that the GRC had no jurisdiction over same. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-7.

Additional Submissions:

On May 12, 2021, the Complainant filed a letter brief in opposition to the Custodian’s SOI.

Therein, the Complainant argued that notwithstanding the reference to another municipality, the complaint and the accompanying e-mail communications demonstrated that the Borough was the agency that denied access, and not the other municipality. The Complainant also stated that the CDR-1 form attached to the OPRA request was intended to provide examples of the records sought by the Complainant. On May 13, 2021, Counsel responded to the Complainant maintaining that PPD did not have the records sought and that the GRC did not have jurisdiction.

On May 26, 2021, the GRC submitted a request for additional information from the Custodian. Specifically, the GRC asked the Custodian:

1. Do the PPD police officers keep or maintain copies of the requested summonses and complaints upon submission to the Court?
2. Does the PPD or Borough keep or maintain copies of the requested summonses and complaints in archives or storage?

That same day, Counsel responded to the GRC stating that the GRC did not have jurisdiction to request the certification. On May 27, 2021, the GRC responded to the Complainant stating that the GRC had the authority to request additional information from the Custodian under N.J.A.C. 5:105-2.4(1), and that it had jurisdiction since the complaint was filed against the Borough. Counsel responded, stating that the GRC had no jurisdiction over the Judiciary and that the GRC should address the jurisdictional challenge before moving forward. The GRC replied stating that because the Complainant filed a denial of access complaint against the Borough, a public agency, alleging a denial of access under OPRA, the GRC had jurisdiction. The GRC also reiterated its request for a response to the request for additional information and advised that failure to respond may result in the GRC moving forward with adjudication without a certification.

On May 28, 2021, Counsel responded to the GRC, asserting that the Custodian's SOI certification stated that PPD did not have access to the Judiciary's databases containing the responsive records and was therefore forwarded to the Court. Counsel contended that no additional information was needed for the GRC to adjudicate the matter.

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). In Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004), the custodian argued that the requested complaints and summonses were not subject to access since they were dated beyond the required retention period via the State's

retention schedule. However, the Council held that if the agency in fact possessed the responsive records, they were subject to access under OPRA even if they were supposed to have been destroyed in accordance with the retention schedule.

OPRA also provides that the GRC “shall not have jurisdiction over the Judicial or Legislative Branches of State Government or any agency, officer, or employee of those branches. N.J.S.A. 47:1A-7(g). In Pitts v. N.J. Dep’t of Corr., GRC Complaint No. 2013-299 (September 2014), the custodian argued in part that because the requested presentence report was a court record created by the Judiciary, it was not a government record under N.J.S.A. 47:1A-1.1, and not within the GRC’s jurisdiction under N.J.S.A. 47:1A-7(g). The Council disagreed, holding that because the agency received and kept on file a copy of the record, it still met the definition of a government record. N.J.S.A. 47:1A-1.1. The Council further held that OPRA’s jurisdictional prohibition applies when the Judiciary is the records custodian.

In the current matter, Ms. Poliforne responded on the Custodian’s behalf stating that the Borough did not possess or maintain copies of the requested summonses and complaints and forwarded the request to the Court. The Custodian maintained this position in the SOI. The Complainant asserted that all police departments have access to eCDR and the ACS/ATS databases and should be required to print and disclose the responsive records. The Custodian certified in the SOI that the Borough did not have access to those databases.

Upon review, the Custodian’s certification that the Borough does not have access to eCDR and ACS/ATS raises questions on how PPD processes complaints and summonses. Furthermore, the certification did not confirm whether the Borough possessed physical copies of the records. In previous matters containing similar fact patterns, the GRC proffered requests for additional information in accordance with N.J.A.C. 5:105-2.4(l), requesting the custodian confirm whether the agency keeps or maintains physical copies of the requested records, notwithstanding the agency’s access to the Judiciary’s electronic databases.

However, despite repeated attempts to obtain this information, Counsel refused to provide a certification from the Custodian. Counsel contended that because PPD denied access and forwarded the request to the Court, the GRC had no jurisdiction to adjudicate the instant matter. See N.J.S.A. 47:1A-7(g). However, in accordance with Pitts and Merino, if the Borough possessed physical copies of the complaints and summonses, they may be subject to access under OPRA regardless of whether the Borough forwarded the request to the Court. Therefore, the Custodian’s SOI certification alone is insufficient to determine whether the Borough physically possesses the responsive records.

Accordingly, the Custodian may have unlawfully denied access to the Complainant’s March 16, 2020 OPRA request. N.J.S.A. 46:1A-6. The Custodian shall either: 1) locate and disclose the responsive records if they are physically kept and maintained by the Borough; or 2) certify that the Borough does not keep or maintain physical copies of the responsive records.

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 Complainant's March 16, 2020 OPRA request. N.J.S.A. 46:1A-6. The Custodian must either: 1) locate and disclose the responsive records if they are physically maintained by the Borough of Paramus ("Borough"); or 2) certify that the Borough does not keep or maintain physical copies of the responsive records.
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 deliver⁵ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁶ to the Executive Director.⁷**
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.

Prepared By: Samuel A. Rosado
Staff Attorney

June 22, 2021

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

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

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

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute) v. Borough of Paramus (Bergen), 2020-112 – Findings and Recommendations of the Executive Director