



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 25, 2022 Government Records Council Meeting

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

Complaint No. 2020-38

v.

Borough of East Newark (Hudson)
Custodian of Record

At the January 25, 2022 public meeting, the Government Records Council (“Council”) considered the January 18, 2022, Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that Complainant’s Counsel failed to comply with the Council’s Interim Order because he failed to submit an application for attorney’s fees within the extended deadline. N.J.A.C. 5:105-2.13(b). Accordingly, the Executive Director recommends that the Council close the matter, as no further analysis is necessary.

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

Final Decision Rendered by the
Government Records Council
On The 25th Day of January 2022

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: January 27, 2022



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

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

GRC Complaint No. 2020-38

v.

**Borough of East Newark (Hudson)²
Custodial Agency**

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

1. The General Order for your Police Department.
2. Records Retention Police, records Retention Directive or records Retention Standard Operating Procedure relating to summonses and complaints prepared by your Police Department.
3. Records showing the name, rank, and date of hire of each employee in your Police Department who has access to eCDR. For clarification, we need to know how many members of your Police Department have access to eCDR.
4. Records showing the name, rank, and date of hire of each employee in your Police Department who has access to ATS/ACS. For clarification, we need to know how many members of your Police Department have access to ATS/ACS.
5. Records showing where your municipality retains the records for 15 years as mandated by the attached schedule.
6. The Law Enforcement Manual for eCDR or Standard Operating Procedure (“SOP”) for eCDR that is used by your Police Department.

Custodian of Record: Kevin D. Harris, Esq.⁴
Request Received by Custodian: December 28, 2019
Response Made by Custodian: N/A
GRC Complaint Received: February 12, 2020

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

² Represented by John M. Johnson, Esq. of Johnson & Johnson, Esqs. (Florham Park, NJ).

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

⁴ The Custodian of Record at the time of the request was Brigitte Goncalves.

Background

September 28, 2021 Council Meeting:

At its September 28, 2021 public meeting, the Council considered the September 21, 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 original Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the original Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007). However, the Council need not order disclosure since the evidence of record demonstrates that the Custodian provided the responsive records to the Complainant on October 16, 2020.
2. The original Custodian unlawfully denied access to the Complainant's OPRA request by failing to respond within the allotted period. See N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), N.J.S.A. 47:1A-6. However, the Custodian ultimately disclosed responsive records after the instant complaint was filed. Additionally, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. The Complainant has 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 provided the responsive records after the instant complaint was filed. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Procedural History:

On September 29, 2021, the Council distributed its Interim Order to all parties. On November 3, 2021, the Government Records Council (“GRC”) advised the parties that the fee agreement time frame expired. The GRC further advised that the Complainant’s Counsel had twenty (20) business days to submit a fee application. On November 5, 2021, the Complainant’s Counsel responded to the GRC requesting an additional thirty (30) days to file for counsel fees. The GRC responded to the Complainant’s Counsel granting an additional twenty (20) business days to submit a fee application. The Complainant’s Counsel did not submit a fee application within the extended period.

Analysis

Compliance

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

On November 3, 2021, following the expiration of the time frame to reach a settlement, the GRC advised the parties that Complainant’s Counsel had twenty (20) business days, or until November 30, 2021 to submit a fee application in accordance with N.J.A.C. 5:105-2.13. On November 5, 2021, Complainant’s Counsel requested an additional thirty (30) days to submit a fee application. The GRC granted Complainant’s Counsel an additional twenty (20) business days, or until December 29, 2021, to submit a fee application. As of December 29, 2021, the Council has received neither a fee agreement between the parties nor an application for an award of attorney’s fees from Complainant’s Counsel.

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

Conclusions and Recommendations

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

Prepared By: Samuel A. Rosado, Staff Attorney

January 18, 2022



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

September 28, 2021 Government Records Council Meeting

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

Complaint No. 2020-38

v.
Borough of East Newark (Hudson)
Custodian of Record

At the September 28, 2021 public meeting, the Government Records Council (“Council”) considered the September 21, 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 original Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the original Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007). However, the Council need not order disclosure since the evidence of record demonstrates that the Custodian provided the responsive records to the Complainant on October 16, 2020.
2. The original Custodian unlawfully denied access to the Complainant’s OPRA request by failing to respond within the allotted period. See N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), N.J.S.A. 47:1A-6. However, the Custodian ultimately disclosed responsive records after the instant complaint was filed. Additionally, the evidence of record does not indicate that the original Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. The Complainant has 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 provided the responsive records

after the instant complaint was filed. 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**

**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. 2020-38

v.

**Borough of East Newark (Hudson)²
Custodial Agency**

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

1. The General Order for your Police Department.
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3. Records showing the name, rank, and date of hire of each employee in your Police Department who has access to eCDR. For clarification, we need to know how many members of your Police Department have access to eCDR.
4. Records showing the name, rank, and date of hire of each employee in your Police Department who has access to ATS/ACS. For clarification, we need to know how many members of your Police Department have access to ATS/ACS.
5. Records showing where your municipality retains the records for 15 years as mandated by the attached schedule.
6. The Law Enforcement Manual for eCDR or Standard Operating Procedure (“SOP”) for eCDR that is used by your Police Department.

Custodian of Record: Kevin D. Harris, Esq.⁴

Request Received by Custodian: December 28, 2019

Response Made by Custodian: N/A

GRC Complaint Received: February 12, 2020

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

² Represented by John M. Johnson, Esq. of Johnson & Johnson, Esqs. (Florham Park, NJ).

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

⁴ The Custodian of Record at the time of the request was Brigitte Goncalves.

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute) v. Borough of East Newark (Hudson), 2020-38 – Findings and Recommendations of the Executive Director

Background⁵

Request:

On December 28, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the original Custodian seeking the above-mentioned records. On February 1, 2020, the Complainant submitted an e-mail to the original Custodian stating that he has not received a response to his request and that the allotted period had expired. That same day, the Custodian’s Counsel e-mailed the Complainant requesting to speak over telephone. The Complainant replied stating he requested a response via e-mail.

Denial of Access Complaint:

On February 12, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that as of February 8, 2020, he has not received the requested records. The Complainant therefore requested the GRC compel compliance with the OPRA request and to award counsel fees.

Response:

On October 16, 2020, the Custodian responded to the Complainant’s request in writing. The Custodian stated that the original Custodian was no longer employed with the Borough, and in conjunction with her departure and the COVID-19 pandemic, the OPRA request went unanswered. The Custodian also provided records responsive to each request item.

Statement of Information:

On October 19, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that the Borough received the Complainant’s OPRA request on December 28, 2019. The Custodian certified that a search was conducted on October 15, 2020 and responsive records were provided to the Complainant on October 16, 2020.

The Custodian asserted that any inaction on the part of the Borough was a result of “excusable neglect.” The Borough asserted that the original Custodian did not act on the request, but that the submissions presented demonstrated that the Borough possessed the records and could have provided them within the allotted period. The Custodian further asserted that the inaction was not deliberate or with malicious intent.

Additional Submissions:

On October 28, 2020, the Complainant filed a letter brief in response to the Custodian’s SOI. The Complainant stated that the only outstanding issue was the award of counsel fees and that the instant complaint was the catalyst which caused the Borough to provide the records. Thus,

⁵ 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 East Newark (Hudson), 2020-38 – Findings and Recommendations of the Executive Director

the Complainant argued that the GRC should award counsel fees pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006).

The Complainant also provided an e-mail exchange between himself, the original Custodian, and Counsel. The Complainant asserted that in response to his February 1, 2020 e-mail, the original Custodian asked Counsel whether there was any action she needed to take. The Complainant asserted that the decision not to respond to the request was made by Counsel as evidenced by the exchange.

On October 29, 2020, the Custodian responded to the Complainant's reply brief, asserting that the e-mail provided by the Complainant pertained to an OPRA request regarding a separate complaint,⁶ and not the instant matter. The Custodian argued that Counsel was responding to the original Custodian as to whether she needed to provide anything pertaining to completing the SOI for the other matter.

That same day, the Complainant replied to the Custodian asserting that the February 1, 2020 e-mail directly referenced the December 28, 2019 OPRA request at issue here. The Complainant further stated that the e-mails demonstrated that the original Custodian was employed by the Borough at the time of the February 1, 2020 e-mail, which was well beyond the allotted deadline to respond to his request.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁷ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).

The Complainant submitted his OPRA request on December 28, 2019. The Complainant also requested an update from the original Custodian on February 1, 2020, since no response was received. Additionally, the Custodian conceded that a response was not made due to the pandemic and the original Custodian's departure from the Borough.

Therefore, the original Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the original

⁶ Owoh, Esq. (O.B.O. AADARI) v. Borough of East Newark (Hudson), GRC Complaint No. 2019-256 (April 2021).

⁷ A custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute) v. Borough of East Newark (Hudson), 2020-38 – Findings and Recommendations of the Executive Director

Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11. However, the Council need not order disclosure since the evidence of record demonstrates that the Custodian provided the responsive records to the Complainant on October 16, 2020.

Knowing & Willful

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . ." N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically, OPRA states ". . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . ." N.J.S.A. 47:1A-7(e).

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

In the matter before the Council, the original Custodian unlawfully denied access to the Complainant's OPRA request by failing to respond within the allotted period. See N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), N.J.S.A. 47:1A-6. However, the Custodian ultimately disclosed responsive records after the instant complaint was filed. Additionally, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the

custodian's decision by filing an action in Superior Court . . . ; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

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

In Teeters, 387 N.J. Super. at 432, 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. 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 Mason, the plaintiff submitted an OPRA request on February 9, 2004. The defendant responded on February 20, eight (8) business days later, or one day beyond the statutory limit. Id. at 79. As a result, the Court shifted the burden to the defendant to prove that the plaintiff’s lawsuit, filed on March 4, was not the catalyst behind defendant’s voluntary disclosure. Id. Because defendant’s February 20 response included a copy of a memo dated February 19 -- the seventh (7th) business day -- which advised that one of the requested records should be available on February 27 and the other one week later, the Court determined that the plaintiff’s lawsuit was not the catalyst for the release of the records and found that she was not entitled to an award of prevailing party attorney fees. Id. at 80.

In determining whether the Complainant is a prevailing party, the GRC acknowledges that the original Custodian’s failure to respond in writing in a timely manner resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). Thus, the burden of proving that this complaint was not the catalyst for providing the responsive records to the Complainant shifts to the Custodian pursuant to Mason, 196 N.J. 51.

In the matter before the Council, the Complainant asserted that the Borough failed to respond to his December 28, 2019 OPRA request until after filing the instant complaint. The Custodian contended that the original Custodian failed to respond due to her departure from the Borough and the COVID-19 pandemic, and that the inaction was a result of “excusable neglect.”

A review of the evidence demonstrates that the Complainant is a prevailing party. The Custodian contended that the issues caused by COVID-19 pandemic attributed to the original Custodian’s failure to respond. However, the Public Health Emergency and State of Emergency pertaining to the COVID-19 pandemic was not declared until March 9, 2020. See Executive Order No. 103 (Gov. Murphy 2020). The OPRA request at issue was submitted on December 28, 2019, several months prior to the Governor’s declaration. Additionally, the evidence provided by the Complainant demonstrates that the original Custodian was still employed by the Borough on February 1, 2020, well after the time to respond had expired. Thus, the Custodian had ample time to respond to the Complainant’s OPRA request prior to her departure from the Borough. Therefore, the Custodian has not met the burden of proof that the instant complaint was not the catalyst for

providing the responsive records. Mason, 196 N.J. at 76. Accordingly, the Complainant is a prevailing party entitled to attorney's fees.⁸

Therefore, 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 provided the responsive records after the instant complaint was filed. 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 original Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the original Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007). However, the Council need not order disclosure since the evidence of record demonstrates that the Custodian provided the responsive records to the Complainant on October 16, 2020.
2. The original Custodian unlawfully denied access to the Complainant's OPRA request by failing to respond within the allotted period. See N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), N.J.S.A. 47:1A-6. However, the Custodian ultimately disclosed responsive records after the instant complaint was filed. Additionally, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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.

⁸ 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).

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute) v. Borough of East Newark (Hudson), 2020-38 – Findings and Recommendations of the Executive Director

3. 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 provided the responsive records after the instant complaint was filed. 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