



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

December 14, 2021 Government Records Council Meeting

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

Complaint No. 2020-49

v.

Borough of Lincoln Park (Morris)
Custodian of Record

At the December 14, 2021 public meeting, the Government Records Council (“Council”) considered the December 8, 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 14th Day of December 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: December 16, 2021



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
December 14, 2021 Council Meeting**

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

GRC Complaint No. 2020-49

v.

**Borough of Lincoln Park (Morris)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: Cynthia Sloane
Request Received by Custodian: January 6, 2020
Response Made by Custodian: January 22, 2020
GRC Complaint Received: February 24, 2020

Background

November 9, 2021 Council Meeting:

At its November 9, 2021 public meeting, the 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, found that:

1. The Custodian did not fully comply with the Council’s April 27, 2021 Interim Order. Specifically, although Ms. Fitzpatrick timely provided the Complainant with access to

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

² Represented by Chris DiLorenzo, Esq. & Ken Rush, Esq., of DiLorenzo & Rush (Hackensack, NJ).

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

the responsive records and certified to same, the Custodian did not submit certified confirmation of compliance to the Executive Director.

2. The Custodian unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Additionally, the Custodian failed to fully comply with the Council's April 27, 2021 Interim Order. However, evidence of record demonstrates that the Borough of Lincoln Park provided the responsive records to the Complainant in accordance with said Order. 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 April 27, 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 maintained by the Lincoln Park Police Department. 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. 423, 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 November 10, 2021, the Council distributed its Interim Order to all parties. On November 23, 2021, the Complainant notified the GRC that the parties have resolved the issue of counsel fees per the Interim Order. On November 24, 2021, Custodian's Counsel e-mailed the GRC confirming that a settlement had been reached between the parties regarding counsel fees.

Analysis

Compliance

At its November 9, 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 November 10, 2021, the Council distributed its Interim Order to all parties; thus, the parties' response was due by close of business on December 10, 2021. On November 23, 2021, the Complainant notified the GRC that the parties resolved the issue of counsel fees. On November 24, 2021, Custodian's Counsel e-mailed the GRC to confirm that the parties have settled the issue of counsel fees.

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

December 8, 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

November 9, 2021 Government Records Council Meeting

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

Complaint No. 2020-49

v.

Borough of Lincoln Park (Morris)
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:

1. The Custodian did not fully comply with the Council’s April 27, 2021 Interim Order. Specifically, although Ms. Fitzpatrick timely provided the Complainant with access to the responsive records and certified to same, the Custodian did not submit certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Additionally, the Custodian failed to fully comply with the Council’s April 27, 2021 Interim Order. However, evidence of record demonstrates that the Borough of Lincoln Park provided the responsive records to the Complainant in accordance with said Order. 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 April 27, 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 maintained by the Lincoln Park Police Department. 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. 423, 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 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 10, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**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. 2020-49

v.

**Borough of Lincoln Park (Morris)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: Cynthia Sloane
Request Received by Custodian: January 6, 2020
Response Made by Custodian: January 22, 2020
GRC Complaint Received: February 24, 2020

Background

April 27, 2021 Council Meeting:

At its April 27, 2021 public meeting, the Council considered the April 20, 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 complaints and summonses responsive to the Complainant’s OPRA request. N.J.S.A. 47:1A-6; Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004). Thus, the Custodian must perform a search for responsive records kept and maintained by the

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

² Represented by Chris DiLorenzo, Esq. & Ken Rush, Esq., of DiLorenzo & Rush (Hackensack, NJ).

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

Lincoln Park Police Department. Should the Custodian not locate and responsive records, she must certify to this fact. Also, should the Custodian determine that a special service charge is warranted thereafter, she must provide the Complainant with the amount of the special service charge required to purchase the requested records.

2. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order by disclosing the responsive records with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director.**⁵
3. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC's 14-point analysis⁶ and calculate the appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall deliver to the Executive Director certified confirmation of compliance as first provided above. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification in accordance with R. 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.**
4. 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.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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.

⁶ See <https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf>.

Procedural History:

On April 28, 2021, the Council distributed its Interim Order to all parties. May 4, 2021, Deputy Clerk Courtney Fitzpatrick responded to the Council's Interim Order. Therein, Ms. Fitzpatrick certified that the records clerks for the Lincoln Park Police Department ("LPPD") were able to locate responsive records and provide them to the Complainant electronically. Ms. Fitzpatrick also certified that redactions were made to some of the records for personally identifying information as well as juvenile information.

Analysis

Compliance

At its April 27, 2021 meeting, the Council ordered the Custodian to locate and provide access to the requested records or provide an estimated special service charge. 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 April 28, 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 May 5, 2021.

On May 4, 2021, the fourth (4th) business day after receipt of the Council's Order, Ms. Fitzpatrick responded to the Council's Order. Ms. Fitzpatrick certified that responsive records were made available to the Complainant that same day electronically. However, the Custodian did not submit certified confirmation of compliance to the Executive Director as required by the Council's Order.

Therefore, the Custodian did not fully comply with the Council's April 27, 2021 Interim Order. Specifically, although Ms. Fitzpatrick timely provided the Complainant with access to the responsive records and certified to same, the Custodian did not submit 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 matter before the Council, the Custodian unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Additionally, the Custodian failed to fully comply with the Council's April 27, 2021 Interim Order. However, evidence of record demonstrates that the Borough of Lincoln Park provided the responsive records to the Complainant in accordance with said Order. 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 LPPD pertaining to drug paraphernalia, drug possession, and DUI/DWI offenses. The Custodian asserted that the records were maintained by the municipal court and retrieved through a process separate from OPRA. The Complainant then filed the instant complaint asserting that LPPD 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 April 27, 2021 Interim Order, the Custodian was ordered to produce the responsive records maintained by LPPD, 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 April 27, 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 maintained by LPPD. 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. 423, 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 did not fully comply with the Council's April 27, 2021 Interim Order. Specifically, although Ms. Fitzpatrick timely provided the Complainant with access to the responsive records and certified to same, the Custodian did not submit certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Additionally, the Custodian failed to fully comply with the Council's April 27, 2021 Interim Order. However, evidence of record demonstrates that the Borough of Lincoln Park provided the responsive records to the Complainant in accordance with said Order. 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.

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).

3. Pursuant to the Council’s April 27, 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 maintained by the Lincoln Park Police Department. 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. 423, 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

October 26, 2021



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
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PHILIP D. MURPHY
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LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

April 27, 2021 Government Records Council Meeting

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

Complaint No. 2020-49

v.

Borough of Lincoln Park (Morris)
Custodian of Record

At the April 27, 2021 public meeting, the Government Records Council (“Council”) considered the April 20, 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 requested complaints and summonses responsive to the Complainant’s OPRA request. N.J.S.A. 47:1A-6; Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004). Thus, the Custodian must perform a search for responsive records kept and maintained by the Lincoln Park Police Department. Should the Custodian not locate and responsive records, she must certify to this fact. Also, should the Custodian determine that a special service charge is warranted thereafter, she must provide the Complainant with the amount of the special service charge required to purchase the requested records.
2. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council’s Interim Order by disclosing the responsive records with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,¹ to the Executive Director.²**
3. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC’s 14-point analysis³ and calculate the appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council’s Interim Order. The Complainant shall, within five (5) business days from receipt of the**

¹ "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."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium.

³ See <https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf>.

special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall deliver to the Executive Director certified confirmation of compliance as first provided above. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification in accordance with R. 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.

4. 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.
5. 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 27th Day of April 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: April 28, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 27, 2021 Council Meeting**

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

GRC Complaint No. 2020-49

v.

**Borough of Lincoln Park (Morris)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: Cynthia Sloane

Request Received by Custodian: January 6, 2020

Response Made by Custodian: January 22, 2020

GRC Complaint Received: February 24, 2020

Background⁴

Request and Response:

On January 6, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 13, 2020, Courtney Fitzpatrick, Deputy Municipal Clerk, requested an extension of time to respond on the Custodian’s behalf. On January 22, 2020, Ms. Fitzpatrick responded in writing on the Custodian’s behalf stating that the records were court records and need to be requested through the Judiciary. Ms. Fitzpatrick also provided a copy of the Judiciary’s records request form.

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

² Represented by Chris Dilorenzo, Esq. & Ken Rush, Esq., of DiLorenzo & Rush (Hackensack, 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.

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Denial of Access Complaint:

On February 24, 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 police departments did not need the assistance or permission of the municipal court to access the database which contain the responsive records.

The Complainant also asserted that the Records Retention Schedule for both Municipal Police Departments and Municipal Prosecutors required retention of the requested records. The Complainant also contended that several superior courts have held that complaint-summons prepared by police departments were subject to disclosure under OPRA. The Complainant also noted that other police departments have retrieved, printed, and furnished the Complainant with the requested summonses and complaints. The Complainant therefore requested the GRC compel compliance with the OPRA request and to award counsel fees.

Statement of Information:

On March 6, 2020, the Custodian filed a Statement of Information (“SOI”) attaching a certification from. The Custodian certified that she received the Complainant’s OPRA request on January 6, 2020 and requested an extension on January 13, 2020. The Custodian certified that on January 22, 2020, she responded to the Complainant stating that the records were court documents and needed to be requested from same.

The Custodian asserted that she directed the Complainant to the Lincoln Park Municipal Court (“Court”) Administrator in accordance with N.J.S.A. 47:1A-5(h). The Custodian asserted that the records were court records and therefore must follow the procedure for accessing court records pursuant to N.J. Court Rules, R. 1:38.

Additional Submissions:

On March 12, 2020, the Complainant filed a letter brief in opposition to the Custodian’s SOI. Therein, the Complainant first argued that the because Lincoln Park Police Department (“LPPD”) officers “made” the complaints upon issuing them, they qualified as “government records” under OPRA. Further, the Complainant contended that according to an Attorney General Directive, if the complaints were unable to be entered electronically, police officers were required to prepare the complaints manually and then transmitted to the municipal court for filing.

The Complainant next argued that police departments in the State were required to retain summonses and complaints until thirty (30) days after disposition of same.⁵ The Complainant further asserted that municipalities were required to retain these records for at least fifteen (15) years after disposition. The Complainant argued that because LPPD officers and municipal prosecutors were Borough of Lincoln Park (“Borough”) employees, their records were subject to

⁵ The Complainant noted that his experience was 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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access under OPRA and should have been disclosed accordingly. The Complainant noted that if the responsive records were in storage or otherwise unavailable, the Custodian had an obligation to extend the response time frame but failed to do so.

The Complainant also argued that in accordance with Paff v. Galloway Twp., 229 N.J. 340 (2017), agencies were required to provide access to electronically stored information. The Complainant asserted that eCDR was set up by the New Jersey State Police (“NJSP”) in cooperation with the Administrative Office of the Courts (“AOC”), and that eCDR was a separate system from eCourts. Notwithstanding, the Complainant contended that since LPPD officers had direct access to the database maintaining the records and could retrieve and print the records without any assistance, help, or permission from the Court, they were obligated to retrieve same.

The Complainant further argued that he specifically requested records that were prepared by the police department, and not the judiciary. Additionally, the Complainant asserted that R. 1:38 was inapplicable since the request was made directly to an executive branch agency. The Complainant asserted that they had the right to decide where to send their request to the Judiciary or Executive branches.

The Complainant further noted that LPPD’s obligation to disclose responsive records was not diminished simply because the Judiciary also made them available to the public. See Keddie v. Rutgers Univ., 144 N.J. 377 (1996). 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 LPPD should be required to disclose the responsive records.

The Complainant also argued that LPPD should not be allowed to erect technological barriers as means to deny access to government records. The Complainant contended that the complaints should remain subject to access under OPRA regardless of whether they were prepared manually in the past but now entered electronically. The Complainant asserted that the standard under OPRA was not “actual possession” but rather “access” to the requested records, citing Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), and Verry v. Franklin Fire Dist. No. 1, 230 N.J. 285 (2017).

The Complainant also noted that several other judges have ruled that summons and complaints prepared by police officers were subject to disclosure and ordered counsel fees as a result. The Complainant asked the GRC to take notice of the decisions in favor of AADARI in AADARI v. Town of West New York, Docket No. HUD-L-31-20, and AADARI v. City of Millville, Docket No. CUM-L-712-18.⁶

Lastly, the Complainant maintained his request for the GRC to compel compliance with order and award counsel fees. Furthermore, the Complainant requested mediation to facilitate the resolution of the matter, noting that mediation was not requested in the original complaint.

On April 1, 2021, the GRC submitted a request for additional information from the

⁶ This matter was reversed on appeal, Simmons v. Mercado, 464 N.J. Super. 77 (App. Div.), certif. granted, 2020 LEXIS 1218 (Oct. 26, 2020).

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Custodian. Specifically, the GRC asked the Custodian:

1. Do the [LPPD] police officers keep or maintain copies of the requested summonses and complaints upon submission to the [Court]?
2. Does the [Borough's] municipal prosecutor keep or maintain copies of summonses and complaints as part of a "Municipal Prosecutor's Case File"?
3. Does the [Borough] keep or maintain copies of the requested summonses and complaints in archives or storage?
4. Please describe the search undertaken to look for the requested complaints and summonses.

On April 9, 2021, Ms. Fitzpatrick responded on behalf of the Custodian to the GRC's request for additional information. Regarding the first question, Ms. Fitzpatrick certified that the police records unit prints and maintains a copy of a summons or complaint in a case file. Ms. Fitzpatrick certified that if they are not printed, they can be accessed through an online database, though the databases are not owned by the Borough. Regarding the second question, Ms. Fitzpatrick certified that the Borough's municipal prosecutor did not keep or maintain files, but instead obtains a copy of a police case file from the police to use during a court session. Ms. Fitzpatrick certified that once the case is resolved, the paperwork is shredded.

Regarding the third question, Ms. Fitzpatrick certified that LPPD kept paper copies all traffic summonses and criminal complaints in storage until transitioning to the electronic production of summonses and complaints and using an e-ticketing system and eCDR. Ms. Fitzpatrick certified that the LPPD maintains handwritten tickets during the rare occasion that the e-ticketing system was down. Ms. Fitzpatrick also certified that regarding DWI and drug offenses, LPPD does maintain them in storage in compliance with the law. Lastly, Ms. Fitzpatrick certified that no search was undertaken regarding the complaints and summonses since it was the Borough's contention that such records were court documents.

Analysis

Unlawful Denial of Access

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

OPRA 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. Furthermore, the Council has previously held that criminal complaints

and summonses are government records subject to disclosure. Merino, GRC 2003-110; see also Mawhinney v. Egg Harbor City Police Dep't (Atlantic), GRC Complaint No. 2015-85 (January 2016).

In the instant matter, the Complainant asserted that the Borough was required to keep and maintain copies of the requested records for a set period in accordance with the State's retention schedules. The Custodian asserted that the requested summonses and complaints were court records, and that the Complainant should obtain them through the Court.

Upon review, the GRC is persuaded that the Custodian may have unlawfully denied access to the Complainant's OPRA request. The Custodian asserted that the requested complaints and summonses were court documents, and therefore under the control of the Judiciary. The Custodian thus directed the Complainant to the Court. However, the Custodian later certified that LPPD may possess and maintain hard copies of the requested records on file or in storage. Since such records are subject to disclosure under Merino, GRC 2003-110, the Custodian should have conducted a search for responsive records possessed by LPPD. Additionally, that the responsive records are available at the Court does not absolve the Borough's obligation to produce those government records it in fact keeps and maintains. See Pitts, GRC 2013-299; Merino, GRC 2003-110; N.J.S.A. 47:1A-1.1.

Accordingly, the Custodian may have unlawfully denied access to the requested complaints and summonses responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6; Merino, GRC 2003-110. Thus, the Custodian must perform a search for responsive records kept and maintained by LPPD. Should the Custodian not locate and responsive records, she must certify to this fact. Also, should the Custodian determine that a special service charge is warranted thereafter, she must provide the Complainant with the amount of the special service charge required to purchase the requested 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 requested complaints and summonses responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6; Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004). Thus, the

Custodian must perform a search for responsive records kept and maintained by the Lincoln Park Police Department. Should the Custodian not locate and responsive records, she must certify to this fact. Also, should the Custodian determine that a special service charge is warranted thereafter, she must provide the Complainant with the amount of the special service charge required to purchase the requested records.

2. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order by disclosing the responsive records with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁷ to the Executive Director.⁸**
3. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC's 14-point analysis⁹ and calculate the appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall deliver to the Executive Director certified confirmation of compliance as first provided above. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification in accordance with R. 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.**
4. 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.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

⁷ "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."

⁸ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium.

⁹ See <https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf>.

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Prepared By: Samuel A. Rosado
Staff Attorney

April 20, 2021