



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. 2020-50

v.

Town of Morristown (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 14<sup>th</sup> 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<sup>1</sup>  
African American Data and Research Institute)  
Complainant**

**GRC Complaint No. 2020-50**

**v.**

**Town of Morristown (Morris)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of:<sup>3</sup>

1. Summonses and complaints that were prepared by the Morristown Police Department (“MPD”) relating to each one of the defendants listed in the Drug Recognition Evaluation/Expert (“DRE”) Rolling Logs.
2. Driving While Intoxicated/Driving Under the Influence (“DWI/DUI”) complaints prepared and filed by the MPD from January 2019 through present.
3. Drug possession complaints prepared and filed by the MPD from January 2019 through present.
4. Drug paraphernalia complaints and summonses prepared by the MPD from January 2019 through present.

**Custodian of Record:** Margot G. Kaye

**Request Received by Custodian:** January 16, 2020

**Response Made by Custodian:** January 29, 2020

**GRC Complaint Received:** February 24, 2020

**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:

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

<sup>2</sup> Represented by Vaughn Parchment, Esq. of Rainone Coughlin Minchello (Iselin, NJ). Previously represented by Joni Noble McDonnell, Esq. of Inglesino, Webster, Wyciskala & Taylor, LLC (Parsippany, NJ).

<sup>3</sup> The Complainant sought additional records that are not at issue in this complaint.

1. The Custodian unlawfully denied access to the Complainant's January 16, 2020 OPRA request. N.J.S.A. 46:1A-6. Specifically, the Custodian had an obligation to conduct a search for responsive records through Morristown Police Department's access to eCDR. See Simmons v. Mercado, 247 N.J. 24, 42 (2021). However, the Council declines to order disclosure since the evidence of record demonstrates that responsive records were provided to the Complainant on March 3, 2020.
2. The Custodian unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. However, the Custodian ultimately disclosed responsive records after the instant complaint was filed on March 3, 2020. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. The Complainant has 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 GRC informed the parties that the deadline to notify the GRC of a settlement for counsel fees expired on October 28, 2021 and provided a deadline of November 30, 2021 for the Complainant to submit a fee application. That same day, the former counsel for the Custodian notified the GRC that they were no longer representing the Town of Morristown ("Town").

On November 9, 2021, the Complainant e-mailed the GRC informing that the parties have resolved the issue of counsel fees. On November 10, 2021, the GRC e-mailed the Custodian's Counsel acknowledging the Complainant's notification and inquired as to whether the current deadline of November 30, 2021 provided enough time for the Town to formalize the settlement.

On November 15, 2021, Counsel responded to the GRC stating that the current period provided for finalizing settlement was sufficient. Counsel also stated that he would be sending the Complainant a settlement agreement that week.

On November 29, 2021, the GRC asked Counsel whether the Town had approved the settlement. That same day, Counsel stated that he intended to send a copy of the settlement agreement to the GRC the next morning. On November 30, 2021, the Complainant e-mailed the GRC stating that he was requested by Counsel to inform that the parties have resolved the matter.

### **Analysis**

#### **Compliance**

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 parties' response was due by close of business on October 28, 2021. On November 3, 2021, the GRC informed the parties that the deadline to notify the GRC of a settlement for counsel fees expired on October 28, 2021 and provided a deadline for the Complainant to apply for counsel fees. On November 9, 2021, the Complainant notified the GRC that the parties resolved the issue of counsel fees. On November 29, 2021, Counsel informed the GRC that a settlement agreement would be forwarded to the Complainant. On November 30, 2021, the Complainant informed the GRC that the parties have resolved the matter.

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**

**September 28, 2021 Government Records Council Meeting**

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

Complaint No. 2020-50

v.

Town of Morristown (Morris)  
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 Custodian unlawfully denied access to the Complainant’s January 16, 2020 OPRA request. N.J.S.A. 46:1A-6. Specifically, the Custodian had an obligation to conduct a search for responsive records through Morristown Police Department’s access to eCDR. See Simmons v. Mercado, 247 N.J. 24, 42 (2021). However, the Council declines to order disclosure since the evidence of record demonstrates that responsive records were provided to the Complainant on March 3, 2020.
2. The Custodian unlawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. However, the Custodian ultimately disclosed responsive records after the instant complaint was filed on March 3, 2020. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. The Complainant has 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 28<sup>th</sup> 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<sup>1</sup>  
African American Data and Research Institute)  
Complainant**

**GRC Complaint No. 2020-50**

v.

**Town of Morristown (Morris)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of:<sup>3</sup>

1. Summonses and complaints that were prepared by the Morristown Police Department (“MPD”) relating to each one of the defendants listed in the Drug Recognition Evaluation/Expert (“DRE”) Rolling Logs.
2. Driving While Intoxicated/Driving Under the Influence (“DWI/DUI”) complaints prepared and filed by the MPD from January 2019 through present.
3. Drug possession complaints prepared and filed by the MPD from January 2019 through present.
4. Drug paraphernalia complaints and summonses prepared by the MPD from January 2019 through present.

**Custodian of Record:** Margot G. Kaye  
**Request Received by Custodian:** January 16, 2020  
**Response Made by Custodian:** January 29, 2020  
**GRC Complaint Received:** February 24, 2020

**Background**<sup>4</sup>

**Request and Response:**

On January 16, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 29, 2020, Stefanie Morales responded on the Custodian’s behalf stating that the Complainant should contact the Morristown Municipal Court (“Municipal Court”) to obtain the summons and complaints.

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

<sup>2</sup> Represented by Joni Noble McDonnell, Esq. of Inglesino, Webster, Wyciskala & Taylor, LLC (Parsippany, NJ).

<sup>3</sup> The Complainant sought additional records that are not at issue in this complaint.

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

Rotimi Owoh, Esq. (On Behalf of African American Data and Research Institute) v. Town of Morristown (Morris), 2020-50 – Findings and Recommendations of the Executive Director

### 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 any court to access the databases containing 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 other police departments have retrieved, printed, and furnished the Complainant with the requested records. The Complainant therefore requested the GRC compel compliance with the OPRA request and to award counsel fees.

### Supplemental Response:

On February 28, 2020, the Custodian e-mailed the Complainant stating that she was reviewing the Town’s initial response with their municipal attorney.

### Statement of Information:

On March 6, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on January 16, 2020. The Custodian certified that Ms. Morales responded on January 29, 2020, stating that the Complainant should contact the Municipal Court to obtain the requested records.

The Custodian asserted that it was the Town’s policy to direct requestors of the records at issue to the Municipal Court. The Custodian asserted that notwithstanding her initial response, the Town continued to attempt to locate the requested records and were ultimately successful. The Custodian asserted that the records were provided to the Complainant on March 3, 2020.

### Additional Submissions:

On March 11, 2020, the Complainant submitted a brief in response to the SOI. The Complainant stated he received the responsive records on March 3, 2020, which was after the filing of the instant complaint. The Complainant therefore stated that the only outstanding issue was the award of counsel fees. Thus, the Complainant argued that the GRC should award counsel fees pursuant to the catalyst theory outlined in Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006).

## Analysis

### Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise



exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

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, GRC 2003-110, 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. 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.

Additionally, the New Jersey Supreme Court has held that retention schedules created in accordance with the Destruction of Public Records Law, N.J.S.A. 47:3-15 to -32, did not satisfy the “required by law” standard under OPRA. See N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 568 (2017), aff’g in relevant part and rev’g in part, 441 N.J. Super. 70, 106-07 (App. Div. 2015). The Court found that if the retention schedules carried the force of law, parts of OPRA would be rendered meaningless due to the retention schedules’ comprehensive list of records. Id. The Court therefore held that “the retention schedules adopted by the State Records Committee [do not] meet the ‘required by law’ standard for purposes of OPRA.” Id.

Furthermore, although decided during the pendency of this complaint, the GRC finds the Court’s holding in Simmons v. Mercado, 247 N.J. 24 (2021) relevant and binding. There, the Complainant requested the same records as those at issue in the instant matter, with the custodian asserting that the records were not maintained by the Millville Police Department (“Millville PD”) once its officers created and submitted the records through eCDR. Simmons, 247 N.J. at 36-37. The Court reversed the Appellate Division and found that the requested records were government records subject to disclosure under OPRA. Id. at 30. The Court found that notwithstanding which government branch created the CDR-1 and -2 forms, it is the information contained within those forms by Millville PD officers that is sought by AADARI. Id. at 40. Thus, the Court held that:

Because [Millville PD] officers create the completed CDR-1s by populating the forms with the information necessary to generate a summons and submit it to the court, there is no question that the CDR-1s are government records subject to disclosure pursuant to OPRA.

[Id.]

Additionally, the Court rejected Millville PD’s argument that they did not maintain the records, holding that OPRA’s definition of a government record is not restricted to records maintained by the agency, but rather includes records it creates, even if not maintained. Id. at 41. Thus, the Court found, “that the Judiciary might maintain on its servers the information that Millville PD made does not absolve Millville PD of its obligation to produce that information pursuant to a proper OPRA request made to Millville PD.” Id. at 42.

In the current matter, Ms. Morales responded to the Complainant stating that he needed to contact the Municipal Court to obtain copies of the requested summonses and complaints. The Complainant asserted that the retention schedules required police departments and municipal prosecutors to possess copies of the requested records for the stated period. Furthermore, the Complainant asserted that MPD had access to the complaints and/or summonses through eCDR.

Initially, the GRC addresses the Complainant's arguments pertaining to retention schedules. Upon review, the Complainant's reliance on Merino, GRC 2003-110 to contend that MPD and the Town's municipal prosecutor are required by law to maintain the requested records based upon the retention schedules ignores the prevailing caselaw. Instead, the retention schedules determine how records that may be in an agency's possession are to be maintained, and are not a legal requirement to make, maintain, or keep on file every identified record. See N. Jersey Media Grp. Inc., 229 N.J. at 568.

However, considering the Court's decision in Simmons, the Custodian maintains the obligation to provide the Complainant with the responsive records available physically or through eCDR. Notwithstanding whether MPD maintained physical copies of same, the Court held that since police departments created the CDR-1s and CDR-2s when inputting information, they were government records even if the records are maintained by the Judiciary's electronic databases. Simmons, 247 N.J. at 42.

Accordingly, the Custodian unlawfully denied access to the Complainant's January 16, 2020 OPRA request. N.J.S.A. 46:1A-6. Specifically, the Custodian had an obligation to conduct a search for responsive records through MPD's access to eCDR. See Simmons, 247 N.J. at 42. However, the Council declines to order disclosure since the evidence of record demonstrates that responsive records were provided to the Complainant on March 3, 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 Custodian unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. However, the Custodian ultimately disclosed responsive records after the instant complaint was filed on March 3, 2020. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Prevailing Party Attorney's Fees**

OPRA provides that:

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

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

In Teeters, 387 N.J. Super. 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. *Id.* at 432. Additionally, the court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

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

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

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

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

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

The Court in Mason, further held that:

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

[Id. at 76.]

Here, the Complainant sought complaints and summonses prepared by MPD pertaining to drug paraphernalia, drug possession, and DUI/DWI offenses. Ms. Morales responded on behalf of the Custodian stating that summonses and complaints should be requested from the Municipal Court. The Complainant filed the instant complaint on February 24, 2020, asserting that the Custodian failed to provide the responsive records. The Custodian thereafter provided responsive records on March 3, 2020.

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. The Custodian initially denied access to the Complainant's request on January 29, 2020. It was not until after the instant complaint was filed on February 24, 2020 that the Custodian elected to review the Town's initial response with counsel as noted in her February 28, 2020 correspondence. Further, the Custodian disclosed the responsive records to the Complainant on March 3, 2020.

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.<sup>5</sup>

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 Custodian unlawfully denied access to the Complainant's January 16, 2020 OPRA request. N.J.S.A. 46:1A-6. Specifically, the Custodian had an obligation to conduct a search for responsive records through Morristown Police Department's access to eCDR. See Simmons v. Mercado, 247 N.J. 24, 42 (2021). However, the Council declines to order disclosure since the evidence of record demonstrates that responsive records were provided to the Complainant on March 3, 2020.
2. The Custodian unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. However, the Custodian ultimately disclosed responsive records after the instant complaint was filed on March 3, 2020. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. The Complainant has 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

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<sup>5</sup> 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).

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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