



**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**

**April 28, 2020 Government Records Council Meeting**

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

Complaint No. 2018-153

v.

Neptune City Police Department (Monmouth)  
Custodian of Record

At the April 28, 2020 public meeting, the Government Records Council (“Council”) considered the April 3, 2020 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 this complaint should be dismissed because the Complainant withdrew same in writing via e-mail on March 12, 2020. Thus, 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 28<sup>th</sup> Day of April 2020

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 30, 2020**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Prevailing Party Attorney's Fees*  
**Supplemental Findings and Recommendations of the Executive Director  
April 28, 2020 Council Meeting**

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

**GRC Complaint No. 2018-153**

v.

**Neptune City Police Department (Monmouth)<sup>2</sup>  
Custodial Agency**

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

1. Copies of Driving While Intoxicated/Driving under the Influence (“DWI/DUI”) complaints, summonses, and tickets prepared and filed by the Neptune City Police Department (“NCPD”) from January 2016 through present.
2. Drug possession complaints, summonses, and tickets prepared and filed by the NCPD from January 2016 through present.
3. Drug paraphernalia complaints, summonses and tickets prepared and filed by the NCPD from January 2016 through present.

**Custodian of Record:** Susan Hewitson  
**Request Received by Custodian:** July 24, 2018  
**Response Made by Custodian:** July 24, 2018  
**GRC Complaint Received:** July 30, 2018

**Background**

February 26, 2020 Council Meeting:

At its February 26, 2020 public meeting, the Council considered the January 21, 2020 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’s failure to provide a completed Statement of Information to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond additionally impeded the GRC’s efforts

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

<sup>2</sup> Represented by Mark R. Aikins, Esq., of Mark R. Aikins, LLC. (Wall, NJ).

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

to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b).

2. The Custodian unlawfully denied access to the responsive records at issue in this complaint. N.J.S.A. 47:1A-6. Also, the Custodian failed to submit a Statement of Information, which resulted in a violation of the Council’s regulations. N.J.A.C. 5:105-2.4(a). Specifically, the Custodian failed to prove that directing the Complainant to the Neptune City Court was reasonable here. Further, the Neptune City Police Department was ultimately able to locate and disclose records responsive to the subject OPRA request. However, the GRC declines to order any further disclosures because the Complainant received the responsive records on September 10, 2018.
3. The Custodian unlawfully denied access to the requested records. N.J.S.A. 47:1A-6. However, the Custodian ultimately disclosed the responsive records to the Complainant, which he received on September 10, 2018. 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 did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. Pursuant to the Custodian’s disclosure after the filing of the instant complaint, 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 (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 (2008). Specifically, the Complainant was able to obtain access to the records at issue as a direct result of this complaint filing. 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 February 28, 2020, the Council distributed its Interim Order to all parties.

On March 12, 2020, Custodian’s Counsel filed a request for reconsideration of the Council’s Interim Order based on a mistake, fraud, new evidence, and illegality. Counsel attached to his reconsideration a legal certification and several exhibits.

Counsel contended that the Council erred in finding that the Complainant was a prevailing party because he was self-representing himself. Counsel averred that New Jersey's courts and the Government Records Council ("GRC") have already held that an attorney representing himself cannot collect fees and costs. Segal v. Lynch, 211 N.J. 230 (2012); Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn, 410 N.J. Super. 510, 545 (App. Div. 2010) (certify. denied, 203 N.J. 93 (2010)); Boggia v. Borough of Oakland, GRC Complaint No. 2005-36 (Interim Order dated October 28, 2005).

Counsel initially argued that the African American Data and Research Institute ("AADARI") did not exist "as a matter of law" at the time of the subject OPRA request. Counsel contended that only a corporation licensed to do business in the state has the ability "to sue and be sued, complain and defend and participate as a party or otherwise in any judicial, administrative, arbitrate or other proceeding, in its corporate name." N.J.S.A. 14A:3-1(b). Counsel argued that because AADARI did not exist at the time, the Complainant should be deemed the actual requestor. Counsel noted that AADARI did eventually receive a Certificate of Formation on October 17, 2018, months after the filing of this complaint. See Sena Cert. Exhibit A. Counsel contended that Neptune City ("City") previously advised the GRC of this fact, but it nonetheless held that the Complainant was a prevailing party.<sup>4</sup>

Counsel next argued that AADARI was "a sham entity that [the Complainant] has admitted in multiple court filings that he created for himself for his own purposes." Counsel averred that the courts have previously disregarded a business entity when it was "being used as an alter ego of an individual seeking to obtain an improper advantage." See Sean Wood, LLC v. Hegarty Grp., Inc., 422 N.J. Super. 500, 517 (App. Div. 2011). Counsel argued that here, AADARI is registered to the Complainant's home address. Sena Cert. Exhibits B and C. Counsel further argued that both registered members of AADARI, the Complainant's mother and son, have the same address. Sena Cert. Exhibits F and G. Counsel further averred that according to the Complainant's own bankruptcy filings, neither is employed or receives "any payments from any source." Sena Cert. Exhibit D and F. Counsel thus contended that it was highly unlikely that either individual managed or operated AADARI in any capacity.

Counsel further contended that the Complainant's own bankruptcy filing supports the conclusion that AADARI is the Complainant's "alter-ego." Counsel noted that therein, the Complainant admitted that AADARI never earned any income, filed tax return, or had a bank account. Counsel stated that instead, the Complainant described AADARI as ". . . a legal entity created and used by the undersigned . . . to gain access, research, compare and analyze government records . . ." Sena Cert. Exhibit G. Counsel contends that this admission proves that AADARI is a "straw company being utilized by [the Complainant] for his personal benefit." Counsel noted that the Complainant has filed in excess of twenty (20) lawsuits against other municipalities under AADARI with some likely initiated prior to AADARI's existence. Counsel argued that because the Complainant knew he could not alone recover fees under OPRA, he "created a fictional company to advance his personal interests . . ."

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<sup>4</sup> The City's Business Administrator sent an e-mail to the GRC on January 31, 2020 asserting "if [AADARI] did not exist until August than(sic) he is trying to recover his own attorney's fees . . ."

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Counsel thus argued that in the face of ample evidence supporting that the Complainant and AADARI were one and the same, he should not be considered a prevailing party. Counsel further argued that the Council should “prevent an injustice of requiring a public entity that relies upon the tax-payer dollars to pay any fees or costs where it is not permitted or warranted.” Counsel also argued that because AADARI did not incur any costs or obligation to pay fees associated with this litigation, no prevailing party fees should be awarded here.

On the same day, the Complainant withdrew his complaint on the basis that AADARI received the responsive records and “not much time was spent on the case.”

### **Analysis**

No analysis required.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that this complaint should be dismissed because the Complainant withdrew same in writing via e-mail on March 12, 2020. Thus, no further adjudication is required.

Prepared By: Frank F. Caruso  
Executive Director

April 3, 2020



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**

**February 26, 2020 Government Records Council Meeting**

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

Complaint No. 2018-153

v.

Neptune City Police Department (Monmouth)  
Custodian of Record

At the February 26, 2020 public meeting, the Government Records Council (“Council”) considered the January 21, 2020 Findings and Recommendations of the Council Staff 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’s failure to provide a completed Statement of Information to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond additionally impeded the GRC’s efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b).
2. The Custodian unlawfully denied access to the responsive records at issue in this complaint. N.J.S.A. 47:1A-6. Also, the Custodian failed to submit a Statement of Information, which resulted in a violation of the Council’s regulations. N.J.A.C. 5:105-2.4(a). Specifically, the Custodian failed to prove that directing the Complainant to the Neptune City Court was reasonable here. Further, the Neptune City Police Department was ultimately able to locate and disclose records responsive to the subject OPRA request. However, the GRC declines to order any further disclosures because the Complainant received the responsive records on September 10, 2018.
3. The Custodian unlawfully denied access to the requested records. N.J.S.A. 47:1A-6. However, the Custodian ultimately disclosed the responsive records to the Complainant, which he received on September 10, 2018. 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 did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. Pursuant to the Custodian’s disclosure after the filing of the instant complaint, 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 (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 (2008). Specifically, the Complainant was able to obtain access to the records at issue as a direct result of this complaint filing. 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 26<sup>th</sup> Day of February 2020

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: February 28, 2020**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 26, 2020 Council Meeting**

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

**GRC Complaint No. 2018-153**

v.

**Neptune City Police Department (Monmouth)<sup>2</sup>  
Custodial Agency**

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

1. Copies of Driving While Intoxicated/Driving under the Influence (“DWI/DUP”) complaints, summonses, and tickets prepared and filed by the Neptune City Police Department (“NCPD”) from January 2016 through present.
2. Drug possession complaints, summonses, and tickets prepared and filed by the NCPD from January 2016 through present.
3. Drug paraphernalia complaints, summonses and tickets prepared and filed by the NCPD from January 2016 through present.

**Custodian of Record:** Susan Hewitson  
**Request Received by Custodian:** July 24, 2018  
**Response Made by Custodian:** July 24, 2018  
**GRC Complaint Received:** July 30, 2018

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

**Request and Response:**

On July 24, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On the same day, the Custodian responded in writing advising that she forwarded the Complainant’s OPRA request to the Neptune City Court (“Court”) “for all items regarding their office.” The Custodian further stated that Monmouth County Sheriff’s Office was currently working on a program that would allow NCPD to obtain additional responsive records.

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

<sup>2</sup> Represented by Mark R. Aikins, Esq., of Mark R. Aikins, LLC. (Wall, 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.

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Later in the day on July 24, 2018, the Court Administrator e-mailed the Complainant a copy of the Judiciary's public records request form. The Complainant responded advising that he submitted his OPRA request to the NCPD and not the Court. The Custodian thus advised that the Court should inform the Custodian that he will not complete the Judiciary form and that he expected her to comply with his OPRA request. The Complainant subsequently e-mailed the Custodian asking her to advise whether the NCPD would require him to obtain records from the Court. On July 25, 2018, the Custodian responded in writing advising that the Complainant should obtain responsive records from the Court.

#### Denial of Access Complaint:

On July 30, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant contended that the NCPD unlawfully required him to obtain responsive records from the Court. The Complainant argued that prior court and GRC case law support that summonses and complaints are disclosable under OPRA. See O.R. v. Plainsboro Twp., Docket No. MID-L-5752-16; Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004). The Complainant also noted that the State's "Records Retention and Disposition Schedule" requires an agency to maintain copies of the requested records.

#### Statement of Information:

On August 8, 2018, the GRC requested a completed Statement of Information ("SOI") from the Custodian. On August 15, 2018, Custodian's Counsel sent a letter to the GRC stating that the Custodian originally required the Complainant to request responsive records from the Judiciary in accordance with N.J. Court Rules, R. 1:38. Counsel stated however that should the Complainant submit the Judiciary request form to the Custodian, she would process same to the extent that records were not exempt pursuant to R. 1:38-3 and R. 1:38-5. On the same day, the Complainant e-mailed the GRC noting that his position remained unchanged. On August 17, 2018, Custodian's Counsel e-mailed the GRC providing a copy of the Custodian's July 25, 2018 e-mail to the Complainant.

#### Additional Submissions:

On August 20, 2018, the Complainant filed a letter brief in opposition to the Custodian's alleged denial of access (and in the absence of an SOI). Therein, the Complainant argued that police departments in the State were required to retain summonses and complaints until thirty (30) days after disposition of same.<sup>5</sup> The Complainant further asserted that municipalities were required to retain these records for at least fifteen (15) years if they are part of a "Municipal Prosecutor's Case File." The Complainant argued that because Neptune City's police officers and prosecutors were City employees, their records were subject to access under OPRA and should have been disclosed accordingly. The Complainant asserted that to the contrary, the Custodian failed to disclose any records as of the date of his letter brief. The Complainant noted that if the responsive

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<sup>5</sup> 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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records were in storage or otherwise unavailable, the Custodian had an obligation to extend the response time frame but failed to do so. N.J.S.A. 47:1A-5(i).

The Complainant next reiterated his Denial of Access Complaint argument that the Council already decided that summonses and complaints were subject to disclosure. The Complainant stated that in Merino, GRC 2003-110, the Council held that the custodian was required to disclose responsive summonses that existed regardless of whether they exceeded their retention period. The Complainant contended that the Council's decision supported his position that NCPD should have disclosed all responsive summonses and complaints it retained. The Complainant further contended that Merino, GRC 2003-110 was consistent with court decisions where defendants argued that a requestor was required to obtain records from the courts. O.R., Docket No. MID-L-5752-16; AADARI v. Woodbridge Twp., Docket No. MID-L-2052-18. The Complainant further noted that many other municipalities throughout the State have complied recently with similar requests.<sup>6</sup>

The Complainant further argued that NCPD's obligation to disclose responsive records was not diminished simply because 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 NCPD should be required to disclose the responsive records.

The Complainant finally contended that based on the forgoing, the GRC should order NCPD to disclose to him the responsive records. The Complainant further asserted that the GRC should award him prevailing party attorney's fees. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006).

#### Statement of Information (Cont'd):

On August 23, 2018, the GRC sent a "No Defense" letter to the Custodian, requesting a completed SOI within three (3) business days of receipt. The GRC did not receive an SOI from the Custodian thereafter.

#### Additional Submissions (Cont'd):

On September 13, 2018, the Borough Administrator e-mailed the GRC advising that the City assigned two (2) employees to obtain and review records potentially responsive to the Complainant's OPRA request. The Borough Administrator noted that it took nearly two (2) full working days to amass the records. The Borough Administrator stated that the City sent those records to the Complainant via certified mail, and received the executed receipt back indicating that he received them on September 10, 2018. The Borough Administrator asserted that the City "never intended to deny access" and that it hoped the Complainant would withdraw this complaint.

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<sup>6</sup> The Complainant identified twenty-nine (29) municipalities that complied with similar requests submitted by the Complainant on behalf of AADARI.

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On February 8, 2019, the GRC sent an e-mail to the Borough Administrator and Custodian requesting an update on whether the instant complaint was settled. The Custodian responded reiterating that the City disclosed records and that the Complainant received them. On the same day, the Complainant responded via letter acknowledging that the only outstanding issue in this complaint was the prevailing party fee issue. The Complainant argued that he was entitled to such an award.

### Analysis

#### Failure to Submit SOI

OPRA also provides that “Custodians shall submit a completed and signed statement of information (SOI) form to the Council and the complainant simultaneously that details the custodians' position for each complaint filed with the Council[.]” N.J.A.C. 5:105-2.4(a).

OPRA further provides that:

Custodians shall submit a completed and signed SOI for each complaint to the Council's staff and the complainant not later than five business days from the date of receipt of the SOI form from the Council's staff . . . Failure to comply with this time period may result in the complaint being adjudicated based solely on the submissions of the complainant.

[N.J.A.C. 5:105-2.4(f).]

Finally, OPRA provides that “[a] custodian’s failure to submit a completed and signed SOI . . . may result in the Council’s issuing a decision in favor of the complainant.” N.J.A.C. 5:105-2.4(g). In Alterman, Esq. v. Sussex Cnty. Sheriff’s Office, GRC Complaint No. 2013-353 (September 2014), the custodian failed to provide a completed SOI to the GRC within the allotted deadline. Thus the Council noted the custodian’s failure to adhere to N.J.A.C. 5:1052.4(a). See also Kovacs v. Irvington Police Dep’t (Essex), GRC Complaint No. 2014-196 (January 2015); Howell v. Twp. of Greenwich (Warren), GRC Complaint No. 2015-249 (November 2016).

In the instant matter, the Custodian did not comply with the GRC’s initial request for an SOI. After the expiration of the five (5) business day deadline, the GRC again attempted to obtain a completed SOI from the Custodian by sending a “No Defense” letter and requesting a completed SOI within three (3) business days of receipt. This transmission also included a copy of the original SOI letter providing detailed instructions on how to properly submit an SOI. On the next day, the Custodian sent a letter “in connection with the [SOI],” but did not submit a completed SOI form.

Accordingly, the Custodian’s failure to provide a completed SOI to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond additionally impeded the GRC’s efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b).

### **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.

Here, the Complainant submitted an OPRA request to the NCPD and was advised to obtain requested records from the Court. The Complainant disagreed with this response and advised that the Custodian was responsible for disclosing the requested records. After again being told to contact the Court, the Complainant filed this Denial of Access Complaint. Therein, the Complainant argued that the NCPD had an obligation to disclose records in its possession. The Complainant also noted that the courts and GRC both determined that the requested records were disclosable (citing O.R., Docket No. MID-L-5752-16 and Merino, GRC 2003-110). The Custodian failed to file an SOI inclusive of certifications, arguments, and evidence to support their position.

Following the GRC’s multiple attempts to obtain an SOI, the Borough Administrator alerted the GRC to the fact that the City disclosed responsive records via certified mail. The Borough Administrator also stated that the Complainant signed for those records on September 10, 2018. The Complainant confirmed this in a letter to the GRC on February 8, 2019.

The GRC initially notes that due to the Custodian’s failure to submit an SOI, this adjudication proceeds based solely on the submissions before it. N.J.A.C. 5:105-2.4(f). In the absence of said SOI, the GRC finds no support for the Custodian’s initial response that the Complainant had to go to the Court to obtain the responsive records. Instead, the evidence of record supports the Complainant’s position that the NCPD maintained and was able to disclose the responsive records. That is, the City staff was able to obtain and disclose the responsive records to the Complainant after the filing of the instant complaint. For this reason, and absent any evidence to the contrary, the Custodian unlawfully denied access to said records.

Therefore, the Custodian unlawfully denied access to the responsive records at issue in this complaint. N.J.S.A. 47:1A-6. Specifically, the Custodian failed to prove that directing the Complainant to the Court was reasonable here. Further, the NCPD was ultimately able to locate and disclose records responsive to the subject OPRA request. However, the GRC declines to order any further disclosures because the Complainant received the responsive records on September 10, 2018.

The GRC finally notes that the instant decision should not be construed to allow for unmitigated access to every type of record at issue here. Indeed, there may be circumstances present in other complaints that could affect the Council’s ruling. Further, this decision could be distinguishable from future complaints as the facts may dictate.

### **Knowing & Willful**

OPRA states that “[a] public official, officer, employee or custodian who knowingly or

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

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

In the instant complaint, the Custodian unlawfully denied access to the requested records. N.J.S.A. 47:1A-6. Also, the Custodian failed to submit an SOI, which resulted in a violation of the Council’s regulations. N.J.A.C. 5:105-2.4(a). However, the Custodian ultimately disclosed the responsive records to the Complainant, which he received on September 10, 2018. 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 did 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 Court 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 (2008), the Supreme 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." Mason, 196 N.J. at 71, (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 stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (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.

[Mason at 73-76 (2008).]

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* (1984).

[Id. at 76.]

In the matter before the Council, the Complainant alleged that the Custodian failed to disclose the requested records to him. The Complainant argued that the Custodian acted improperly by directing him to the Court. Following the Denial of Access Complaint and two (2) attempts by the GRC to obtain an SOI, the City amassed the responsive records and disclosed them to the Complainant. On September 13, 2018, the Borough Administrator e-mailed the GRC advising of the disclosure and arguing that the City “never intended to deny access.” In subsequent correspondence with the parties, the Complainant confirmed receipt of the records and argued that he was a prevailing party.

In weighing 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’s disclosure of responsive records after the Complainant filed the instant complaint represents a voluntary change in her pre-complaint position. Teeters, 387 N.J. Super. 432 Further, while the City may not have “intended to deny access,” there is no evidence in the record to support the Custodian’s position that the Court was the only agency able to disclose the responsive records. Based on this, there exists a causal nexus between this complaint and change in the Custodian’s conduct. Mason, 196 N.J. 51. Thus, the Complainant is a prevailing party entitled to attorney’s fees.

Accordingly, pursuant to the Custodian’s disclosure after the filing of the instant complaint, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Complainant was able to obtain access to the records at issue as a direct result of this complaint filing. 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’s failure to provide a completed Statement of Information to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond additionally impeded the GRC’s efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a

denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b).

2. The Custodian unlawfully denied access to the responsive records at issue in this complaint. N.J.S.A. 47:1A-6. Also, the Custodian failed to submit a Statement of Information, which resulted in a violation of the Council’s regulations. N.J.A.C. 5:105-2.4(a). Specifically, the Custodian failed to prove that directing the Complainant to the Neptune City Court was reasonable here. Further, the Neptune City Police Department was ultimately able to locate and disclose records responsive to the subject OPRA request. However, the GRC declines to order any further disclosures because the Complainant received the responsive records on September 10, 2018.
3. The Custodian unlawfully denied access to the requested records. N.J.S.A. 47:1A-6. However, the Custodian ultimately disclosed the responsive records to the Complainant, which he received on September 10, 2018. 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 did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. Pursuant to the Custodian’s disclosure after the filing of the instant complaint, 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 (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 (2008). Specifically, the Complainant was able to obtain access to the records at issue as a direct result of this complaint filing. 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: Frank F. Caruso  
Executive Director

January 21, 2020<sup>7</sup>

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<sup>7</sup> This complaint was prepared for adjudication at the Council’s January 28, 2020 meeting, but could not be adjudicated due to lack of quorum.

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institution) v. Neptune City Police Department (Monmouth), 2018-153 – Findings and Recommendations of the Executive Director