



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 25, 2022 Government Records Council Meeting

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

Complaint No. 2018-194

v.

Ocean Gate Police Department (Ocean)
Custodian of Record

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

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

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: January 27, 2022



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

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

GRC Complaint No. 2018-194

v.

**Ocean Gate Police Department (Ocean)²
Custodial Agency**

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

1. Driving While Intoxicated (“DWI”)/Driving Under the Influence (“DUI”) complaints and summonses that were prepared by the Ocean Gate Police Department (“OGPD”) from January 2017 through present.
2. Drug possession complaints prepared and filed by the OGPD from January 2017 through present.
3. Drug paraphernalia complaints and summonses prepared by the OGPD from January 2017 through present.

Custodian of Record: Ileana Vazquez-Gallipoli
Request Received by Custodian: August 13, 2018
Response Made by Custodian: August 14, 2018
GRC Complaint Received: August 24, 2018

Background

August 24, 2021 Council Meeting:

At its August 24, 2021 public meeting, the Council considered the August 17, 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’s initial response was legally insufficient because she failed to respond to each item contained in the Complainant’s OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint

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

² Represented by James Gluck, Esq. of Gluck and Allen (Toms River, NJ).

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

No. 2007-272 (May 2008). See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013). However, the Council declines to order disclosure of the outstanding records since the evidence of record demonstrates that same were provided to the Complainant on September 6, 2018.

2. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) resulting in a “deemed” denial of access, the Custodian provided the Complainant with responsive records on September 6, 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 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, 71 (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 August 25, 2021, the Council distributed its Interim Order to all parties. On September 9, 2021, the Complainant’s Counsel e-mailed the Government Records Council (“GRC”), stating that he received an e-mail from the Custodian’s Counsel expressing an interest in settling the matter, and requested an additional two (2) weeks to provide notice. On September 15, 2021, the GRC granted the extension request with a new return date of October 7, 2021.

On October 14, 2021, the GRC advised the parties that the extended period to notify same of a settlement expired. The GRC further advised that Complainant’s Counsel had twenty (20) business days to submit a fee application. On November 10, 2021, Custodian’s Counsel e-mailed the GRC stating that he was unable to locate any documentation regarding the instant matter outside of the August 25, 2021 cover letter and therefore requested a copy of the case file. On November 12, 2021, the GRC provided Custodian’s Counsel a copy of the case file.

On December 3, 2021, the GRC informed the parties that as of that date the parties have not provided notice of a resolution pertaining to counsel fees. The GRC also stated that, presuming that the deadline to provide notice was reset on November 12, 2021, the current deadline was the end of business on December 13, 2021. That same day, Complainant's Counsel e-mailed Custodian's Counsel requesting that he respond to the GRC.

On December 15, 2021, the GRC advised the parties that the period to notify same of a settlement expired. The GRC further advised that Complainant's Counsel had twenty (20) business days to submit a fee application, or until January 12, 2022. The Complainant's Counsel did not submit a fee application within the allotted period.

Analysis

Compliance

At its August 24, 2021 meeting, the Council ordered the parties to “confer in an effort to decide the amount of reasonable attorney’s fees” and notify the GRC of any fee agreement. Further, the Council ordered that, should the parties not reach an agreement, the Complainant’s Counsel “shall submit a fee application . . . in accordance with N.J.A.C. 5:105-2.13.” On August 25, 2021, the Council distributed its Interim Order to all parties, providing the parties twenty (20) business days to reach a fee agreement. Thus, the parties were required to notify the GRC of any agreement by September 23, 2021. However, on September 15, 2021 the GRC granted Complainant’s Counsel’s extension request for a new deadline of October 7, 2021.

On October 14, 2021, following the expiration of the extended time frame to reach a settlement, the GRC advised the parties that Complainant’s Counsel had twenty (20) business days, or until November 8, 2021 to submit a fee application in accordance with N.J.A.C. 5:105-2.13. On November 10, 2021, Custodian’s Counsel requested a copy of the case file for the instant matter. On November 12, 2021, the GRC provided the requested copy. On December 3, 2021, the GRC informed the parties that same has not received an update regarding the instant matter and noted that the deadline to give notice of any settlement had been reset to the end of business on December 13, 2021, or twenty (20) business days from November 12, 2021.

On December 15, 2021, the GRC advised the parties that the extended period to notice the GRC of a settlement expired on December 13, 2021 and provided Complainant’s Counsel twenty (20) business days, or until January 12, 2022, to submit an application for counsel fees. As of January 12, 2022, the Council has received neither a fee agreement between the parties nor an application for an award of attorney’s fees from Complainant’s Counsel.

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

Conclusions and Recommendations

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

Prepared By: Samuel A. Rosado
Staff Attorney

January 18, 2022



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

August 24, 2021 Government Records Council Meeting

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

Complaint No. 2018-194

Complainant

v.

Ocean Gate Police Department (Ocean)
Custodian of Record

At the August 24, 2021 public meeting, the Government Records Council (“Council”) considered the August 17, 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’s initial response was legally insufficient because she failed to respond to each item contained in the Complainant’s OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013). However, the Council declines to order disclosure of the outstanding records since the evidence of record demonstrates that same were provided to the Complainant on September 6, 2018.
2. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) resulting in a “deemed” denial of access, the Custodian provided the Complainant with responsive records on September 6, 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 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, 71 (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 24th Day of August 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: August 25, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 24, 2021 Council Meeting**

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

GRC Complaint No. 2018-194

v.

**Ocean Gate Police Department (Ocean)²
Custodial Agency**

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

1. Driving While Intoxicated (“DWI”)/Driving Under the Influence (“DUI”) complaints and summonses that were prepared by the Ocean Gate Police Department (“OGPD”) from January 2017 through present.
2. Drug possession complaints prepared and filed by the OGPD from January 2017 through present.
3. Drug paraphernalia complaints and summonses prepared by the OGPD from January 2017 through present.

Custodian of Record: Ileana Vazquez-Gallipoli
Request Received by Custodian: August 13, 2018
Response Made by Custodian: August 14, 2018
GRC Complaint Received: August 24, 2018

Background⁴

Request and Response:

On August 13, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 14, 2018, the Custodian to the Complainant in writing providing responsive records. That same day, the Complainant replied to the Custodian stating that while the provided records were responsive to a portion of his request, they were not responsive to the remaining items. The Custodian then asked whether the Custodian intended on provided records responsive to the outstanding items.

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

² Represented by James Gluck, Esq. of Gluck and Allen (Toms River, NJ).

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

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

Rotimi Owoh, Esq. (On Behalf of African American Data and Research Institute) v. Ocean Gate Police Department (Ocean), 2018-194 – Findings and Recommendations of the Executive Director

Denial of Access Complaint:

On August 23, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that the Custodian violated OPRA by not making the request items available and by failing to seek an extension of time to respond. The Complainant contended that other police departments in the State have provided responsive records without issue. The Complainant further argued that prior GRC case law supports the disclosure of summonses and complaints. See Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004). The Complainant requested the GRC find that the Custodian violated OPRA and award counsel fees.

Supplemental Response:

On August 29, 2018, the Custodian e-mailed the Complainant stating that she apologized for the late response and that she was away from the office when she was notified that the Complainant’s OPRA request was not fully satisfied on August 14, 2018. The Custodian also stated that additional time was needed to fully respond to the request. That same day, the Complainant replied to the Custodian stating that a complaint had already been filed with the GRC and he would not withdraw the matter, but that the Custodian could still comply with the request.

On September 6, 2018, the Custodian responded to the Complainant via e-mail, providing records responsive to the Complainant’s OPRA request.

Statement of Information:

On October 5, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s request on August 13, 2018. The Custodian certified that on August 14, 2018, she provided responsive records to the Complainant regarding an unrelated portion of the request but did not mention the request items at issue.

The Custodian asserted that fulfilling the request items at issue needed additional time, but she failed to mention this fact to the Complainant on August 14, 2018. The Custodian stated that because the Borough of Ocean Gate (“Borough”) was a small municipality, she was the only person of her department and was out of the office before she could inform the Complainant that additional time was needed. The Custodian asserted that by the time she returned to her office, the instant complaint had already been filed.

Additional Submissions:

On October 5, 2018, the Complainant filed a brief in response to the Custodian’s SOI. The Complainant asserted that the Custodian did not request an extension of time within the allotted seven (7) business day period, but instead submitted the request four (4) business days after he filed the instant complaint. The Complainant then stated that he received records responsive to his OPRA request on September 6, 2018.

The Complainant asserted that based upon the Custodian’s concession that the responsive

records were provided after his complaint filing, the only outstanding issue was the award of counsel fees. The Complainant argued that but for the instant complaint, the Borough would not have made the records available to him. The Complainant therefore argued that he was a prevailing party under the “catalyst” theory outlined in Teeters v. DYFS, 387 N.J. Super. 423, 429-31 (App. Div. 2006).

Analysis

Sufficiency of Response

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. In Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the Council held that “. . . [t]he Custodian’s response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g).” See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013).

Here, the Custodian initially responded by disclosing records responsive to an unrelated portion of the Complainant’s OPRA request. The Complainant mentioned this to the Custodian and asked whether she intended on providing responsive records to the outstanding items. Although the Custodian later e-mailed the Complainant advising that additional time was needed to provide responsive records, the e-mail requesting additional time was submitted on August 29, 2018, five (5) business days after the end of the allotted period, and four (4) days after the filing of the instant complaint. Furthermore, the supplemental response was not provided until September 6, 2018. Thus, the evidence of record supports that the Custodian’s initial response to this OPRA request was insufficient in accordance with Paff, GRC 2007-272, because she failed to address each request item individually.

As such, the Custodian’s initial response was legally insufficient because she failed to respond to each item contained in the Complainant’s OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff, GRC 2007-272. See also Lenchitz, GRC 2012-265. However, the Council declines to order disclosure of the outstanding records since the evidence of record demonstrates that same were provided to the Complainant on September 6, 2018.

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)).

Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) resulting in a "deemed" denial of access, the Custodian provided the Complainant with responsive records on September 6, 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 do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

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

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

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

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008), the Court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct" (quoting Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the

Supreme Court held that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” Id. at 603 (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . .” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

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

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

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

The Court in Mason, further held that:

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

[Id. at 76.]

Here, the Complainant sought complaints and summonses prepared by the Borough pertaining to drug paraphernalia, drug possession, and DUI/DWI offenses. The Complainant alleged that the Custodian failed to fully respond to his August 13, 2018 OPRA request. Following the Denial of Access Complaint, the Custodian responded to the Complainant on August 29, 2018, stating that she neglected to inform the Complainant that additional time was needed to provide

responsive records for the request items at issue. On September 6, 2018, the Custodian responded to the Complainant providing the responsive records. In the SOI, the Custodian asserted that she was out of the office and did not realize that her August 14, 2018 response was incomplete.

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. Although the Custodian's August 14, 2018 response provided records, it did not state whether they were responsive to some or all request items and was left for the Complainant to decipher. When the Complainant asked whether the Custodian intended on providing responsive records to the items at issue, she failed to indicate her intentions until after the complaint filing. 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.⁵

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's initial response was legally insufficient because she failed to respond to each item contained in the Complainant's OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013). However, the Council declines to order disclosure of the outstanding records since the evidence of record demonstrates that same were provided to the Complainant on September 6, 2018.

⁵ The Council makes this determination with the understanding that the Complainant acted on behalf of a bona fide client at the time of the request. Although the Complainant's status as representing an actual client has been previously challenged, the available evidence on the record is insufficient to address that issue herein. See Owoh, Esq. (O.B.O. AADARI) v. Neptune City Police Dep't (Monmouth), GRC Complaint No. 2018-153 (April 2020) and Owoh, Esq. (O.B.O. AADARI) v. Freehold Twp. Police Dep't (Monmouth), GRC Complaint No. 2018-155 (Interim Order dated September 29, 2020).

Rotimi Owoh, Esq. (On Behalf of African American Data and Research Institute) v. Ocean Gate Police Department (Ocean), 2018-194 – Findings and Recommendations of the Executive Director

2. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) resulting in a “deemed” denial of access, the Custodian provided the Complainant with responsive records on September 6, 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 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, 71 (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

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