



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

November 9, 2021 Government Records Council Meeting

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

Complaint No. 2018-246

v.

Elsinboro Township (Salem)
Custodian of Record

At the November 9, 2021 public meeting, the Government Records Council (“Council”) considered the October 26, 2021 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Council should 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 9th Day of November 2021

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: November 15, 2021



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
November 9, 2021 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of¹
African American Data & Research Institute
and Baffis Simmons)**

GRC Complaint No. 2018-246

v.

**Elsinboro Township (Salem)²
Custodial Agency**

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

1. Driving While Intoxicated/Driving Under the Influence (“DWI/DUI”) complaints prepared and filed by the Police Department from January 2017 through present.
2. Drug possession complaints prepared and filed by the Police Department from January 2017 through present.
3. Police Department’s “Arrest Listings” from January 2017 through present.
4. Drug paraphernalia complaints and summonses prepared by the Police Department from January 2017 through present.

Custodian of Record: Marty Uzdanovics

Request Received by Custodian: October 5, 2018

Response Made by Custodian: October 9, 2018

GRC Complaint Received: October 22, 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 complied with the Council’s June 30, 2020 Interim Order because he responded in the prescribed time frame providing responsive records to the Complainant and simultaneously provided a certified confirmation of compliance to the Executive Director.

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

² Represented by Nikki Arbittier, Esq. of The Vigilante Law Firm, P.C. (Mullica Hill, N.J.)

2. The Custodian unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. However, the Custodian provided responsive records to the Complainant and fully complied with the Council's June 30, 2020 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to the Council's June 30, 2020 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. at 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 76. Specifically, the Custodian was ordered to locate, retrieve, and provide the requested records to the Complainant. 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 3, 2021, the Complainant e-mailed the Government Records Council ("GRC") stating that the parties have settled the issue of counsel fees, which will be formally approved by the Township. The Complainant further stated that he was informed that the meeting was slated for the following week.

On September 9, 2021, the GRC inquired the parties as to whether the settlement had been approved by the Township. Custodian's Counsel responded that same day, stating that the Township approved the settlement and asked whether the GRC required anything formal to confirm the approval. The GRC replied stating that the Complainant may confirm the settlement, or the parties can submit signed declaration confirming that the settlement has been approved.

On September 10, 2021, Counsel asked if Complainant's e-mail was sufficient. The GRC replied stating that an e-mail from the Complainant stating that he received payment may be sufficient evidence that the Township approved the settlement. On September 17, 2021, the GRC again requested confirmation that the Township approved the settlement between the parties. Counsel responded stating that the Township approved the settlement and had forwarded the Complainant's information to the Township's CFO for processing.

On September 20, 2021, the GRC asked the Complainant to confirm whether he received

payment for counsel fees, or that the Township approved the settlement. On September 23, 2021, the Custodian responded to the GRC stating that the check for payment was sent to the Complainant on September 21, 2021. On September 27, 2021, the Complainant e-mailed the GRC, stating that he received a check from the Township for payment of counsel fees, and therefore the fee issue has been resolved.

Analysis

Prevailing Party Attorney's Fees

At its August 24, 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 August 25, 2021, the Council distributed its Interim Order to all parties; thus, the Complainant's response was due by close of business on September 23, 2021. On September 3, 2021, the Complainant e-mailed the GRC, advising that the parties have settled the matter subject to formal approval by the Township the following week. On September 9, 2021, Counsel e-mailed the GRC stating that the Township had approved the settlement agreement between the parties. On September 27, 2021, the Complainant informed the GRC that he received payment stemming from the settlement.

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 that the Council should 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

October 26, 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

August 24, 2021 Government Records Council Meeting

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

Complaint No. 2018-246

v.

Elsinboro Township (Salem)
Custodian of Record

At the August 24, 2021 public meeting, the Government Records Council (“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, finds that:

1. The Custodian complied with the Council’s June 30, 2020 Interim Order because he responded in the prescribed time frame providing responsive records to the Complainant and simultaneously provided a certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. However, the Custodian provided responsive records to the Complainant and fully complied with the Council’s June 30, 2020 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s June 30, 2020 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. at 432. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 76. Specifically, the Custodian was ordered to locate, retrieve, and provide the requested records to the Complainant. 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**

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

**Rotimi Owoh, Esq. (On Behalf of¹
African American Data & Research Institute
and Baffis Simmons)**

GRC Complaint No. 2018-246

v.

**Elsinboro Township (Salem)²
Custodial Agency**

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

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2. Drug possession complaints prepared and filed by the Police Department from January 2017 through present.
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4. Drug paraphernalia complaints and summonses prepared by the Police Department from January 2017 through present.

Custodian of Record: Marty Uzdanovics

Request Received by Custodian: October 5, 2018

Response Made by Custodian: October 9, 2018

GRC Complaint Received: October 22, 2018

Background

June 30, 2020 Council Meeting:

At its June 30, 2020 public meeting, the Council considered the June 23, 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 unlawfully denied access to the requested records on the basis that the Lower Alloways Creek Police Department, with which Elsinboro Township had a shared services agreement, possessed the records. N.J.S.A. 47:1A-6; Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010); and Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31,

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

² Represented by Nikki Arbittier, Esq. of The Vigilante Law Firm, P.C. (Mullica Hill, N.J.)

2012). The Custodian had an obligation to obtain the responsive records from LAC and provide same to the Complainant. See Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005). Thus, the Custodian shall obtain the responsive records from LAC and provide same to the Complainant.

2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director.⁵**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On July 1, 2020, the Council distributed its Interim Order to all parties. On July 7, 2020, the Custodian responded to the Council's Interim Order, providing a certification. The Custodian certified that on July 6, 2020, he provided the Complainant with copies of the requested records via e-mail. The Custodian also argued that because he believed the records had already been provided by Lower Alloways Creek Township, the Township of Elsinboro ("Township") should not be penalized for non-compliance.

Analysis

Compliance

At its June 30, 2020 meeting, the Council ordered the Custodian to locate and produce responsive records from the Lower Alloways Creek Police Department ("LACPD") to the Complainant. The Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On July 1, 2020, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by

³ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁵ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

close of business on July 9, 2020, accounting for the Independence Day holiday.

On July 6, 2020, the second (2nd) business day after receipt of the Council's Order, the Custodian e-mailed the Complainant providing copies of the responsive records as attachments. On July 7, 2020, the third (3rd) business day after receipt, the Custodian provided a certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's June 30, 2020 Interim Order because he responded in the prescribed time frame providing responsive records to the Complainant and simultaneously provided a certified confirmation of compliance to the Executive Director.

Knowing & Willful

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

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

In the matter before the Council, the Custodian unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. However, the Custodian provided responsive records to the Complainant and fully complied with the Council's June 30, 2020 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

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

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

In Teeters v. DYFS, 387 N.J. Super. 423, 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. 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 records of complaints pertaining to drug possession and DUI/DWI offenses, as well as complaints and summonses pertaining to drug paraphernalia. The Complainant also sought arrest listings from the police department. The Custodian argued that the Township had a shared services agreement with the LACPD to provide police services and therefore did not possess the requested records. The Complainant filed the instant matter to assert that the Township had an obligation to retrieve the records.

In determining whether the Complainant is a prevailing party entitled to attorney’s fees, the GRC is satisfied that the evidence of record supports a conclusion in the affirmative. In accordance with the Council’s June 30, 2020 Interim Order, the Custodian was required to locate and obtain the requested records from the LACPD, which was the Complainant’s desired result in filing the instant complaint. Teeters, 387 N.J. Super. at 432. Thus, a causal nexus exists between this complaint and the change in the Custodian’s conduct. Mason 196 N.J. at 76. Accordingly, the Complainant is a prevailing party entitled to attorney’s fees.⁶

Therefore, pursuant to the Council’s June 30, 2020 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. at 432. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 76. Specifically, the Custodian was ordered to locate, retrieve, and provide the requested records to the Complainant. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable

⁶ 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).

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 complied with the Council's June 30, 2020 Interim Order because he responded in the prescribed time frame providing responsive records to the Complainant and simultaneously provided a certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. However, the Custodian provided responsive records to the Complainant and fully complied with the Council's June 30, 2020 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's June 30, 2020 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. at 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 76. Specifically, the Custodian was ordered to locate, retrieve, and provide the requested records to the Complainant. 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

August 17, 2021



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

INTERIM ORDER

June 30, 2020 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o African American
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Complainant

Complaint No. 2018-246

v.

Elsinboro Township (Salem)
Custodian of Record

At the June 30, 2020 public meeting, the Government Records Council ("Council") considered the June 23, 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, finds that:

1. The Custodian unlawfully denied access to the requested records on the basis that the Lower Alloways Creek Police Department, with which Elsinboro Township had a shared services agreement, possessed the records. N.J.S.A. 47:1A-6; Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010); and Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). The Custodian had an obligation to obtain the responsive records from LAC and provide same to the Complainant. See Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005). Thus, the Custodian shall obtain the responsive records from LAC and provide same to the Complainant.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 30th Day of June 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: July 1, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 30, 2020 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of¹
African American Data & Research Institute
and Baffis Simmons)**

GRC Complaint No. 2018-246

v.

**Elsinboro Township (Salem)²
Custodial Agency**

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

1. Driving While Intoxicated/Driving Under the Influence (“DWI/DUI”) complaints prepared and filed by the Police Department from January 2017 through present.
2. Drug possession complaints prepared and filed by the Police Department from January 2017 through present.
3. Police Department’s “Arrest Listings” from January 2017 through present.
4. Drug paraphernalia complaints and summonses prepared by the Police Department from January 2017 through present.

Custodian of Record: Marty Uzdanovics

Request Received by Custodian: October 5, 2018

Response Made by Custodian: October 9, 2018

GRC Complaint Received: October 22, 2018

Background³

Request and Response:

On October 5, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 9, 2018, the Custodian responded in writing stating that Elsinboro Township (“Township”) did not have a police department of its own and instead contracted with the Lower Alloways Creek Township Police Department (“LAC”).

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

² Represented by Nikki A. Trunk, Esq. of The Vigilante Law Firm, P.C. (Mullica Hill, N.J.)

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute and Baffis Simmons) v. Elsinboro Township (Salem), 2018-246 – Findings and Recommendations of the Executive Director

Denial of Access Complaint:

On October 22, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian has not provided any records or requested an extension of time to respond within the allotted period. The Complainant also argued that in Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004), the Council held that summonses were subject to disclosure under OPRA. The Complainant also asserted that other police departments have provided access to similar records requested by the Complainant.

The Complainant requested that the Council find that the Custodian violated OPRA in accordance with Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010); and Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). The Complainant also requested that the Council award him counsel fees.

Statement of Information:

On November 13, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on October 5, 2018. The Custodian certified that the requested records were not with the Township so she could not conduct a search. The Custodian certified that LAC maintained responsive records because the Township has a contract for police services. The Custodian certified that she responded to the Complainant on October 9, 2018.

The Custodian asserted that the Township did not have its own police department, and that LAC possessed all responsive records since they provided police services for the Township under contract. The Custodian asserted that she did not deny the request since the Township did not have the records.

Additional Submissions:

On November 19, 2018, the Complainant submitted a brief in response to the Custodian’s SOI. The Complainant asserted that considering the shared services agreement between the Township and LAC, the Custodian had an obligation to obtain the records from LAC or forward the request to same. See Michalak, GRC 2010-220; and Burnett, 415 N.J. Super. 506. The Complainant asserted that as of November 17, 2018, he has not received the responsive records.

The Complainant requested that the Council compel compliance with the OPRA request. The Complainant also requested that the Council award him counsel fees as a prevailing party. 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.

In Burnett, 415 N.J. Super. 506, the Appellate Division determined that the defendant was required to obtain settlement agreements from its insurance broker. The court’s decision largely rested on the fact that there was no question that the broker was working on behalf of the defendant to execute settlement agreements. The court noted that it previously held that although a third party, such as insurance broker or outside counsel, may execute settlement agreements, “they nonetheless bind the county as principal, and the agreements are made on its behalf.” Id. at 513. In determining that the defendant had an obligation to obtain responsive records from the insurance broker, the court distinguished Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 38-39 (App. Div. 2005) from the facts before it. The court reasoned that:

In Bent, the requester sought records and information regarding a criminal investigation of his credit card activities conducted jointly by the Stafford Township Police Department [(“STPD”)], the United States Attorney for New Jersey and a special agent of the Internal Revenue Service. As part of his request, Bent sought “discrete records of the 1992 criminal investigation conducted by the STPD,” which were fully disclosed. Id. at 38. Additionally, he sought a “[c]opy of contact memos, chain of custody for items removed or turned over to third parties of signed Grand Jury reports and recommendations.” Bent v. Stafford Twp. Police Dept., GRC 2004-78, final decision (October 14, 2004). Affirming the determination of the [GRC], we stated: “to the extent Bent's request was for records that either did not exist or were not in the custodian's possession, there was, of necessity, no denial of access at all.” Bent, *supra*, 381 N.J. Super. at 38 . . . We continued by stating:

“Of course, even if the requested documents did exist, the custodian was under no obligation to search for them beyond the township's files. OPRA applies solely to documents ‘made, maintained or kept on file in the course of [a public agency's] official business,’ as well as any document ‘received in the course of [the agency's] official business.’ N.J.S.A. 47:1A-1.1. Contrary to Bent's assertion, although OPRA mandates that ‘all government records . . . be subject to public access unless exempt,’ the statute itself neither specifies nor directs the type of record that is to be ‘made, maintained or kept on file.’ In fact, in interpreting OPRA's predecessor statute, the Right to Know Law, we found no requirement in the law concerning ‘the making, maintaining or keeping on file the results of an investigation by a law enforcement official or agency into the alleged commission of a criminal offense. . . Thus, even if the requested documents did exist in the files of outside agencies, Bent has made no showing that they were, by law, required to be ‘made, maintained or kept on file’ by the custodian so as to justify any relief or remedy under OPRA. N.J.S.A. 47:1A-1.1.”

[T]he circumstances presented in Bent [are] far removed from those existing in the present matter because, as we have previously concluded, the settlement agreements at issue here were “made” by or on behalf of the Board in the course of its official business. Were we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply delegate their creation to third parties or relinquish possession to such parties, thereby thwarting the policy of transparency that underlies OPRA. N.J.S.A. 47:1A-1.

[Id. at 516-17.]

The Council subsequently expanded the court’s holding in Burnett to agencies entering into shared services agreements. See Michalak, GRC 2010-220. In that case, the complainant sought police dispatch logs from the Borough of Helmetta (“Helmetta”). The custodian asserted that Helmetta did not maintain the records as dispatch calls were routed through the Spotswood Police Department (“SPD”). The Council held that since Helmetta entered into a shared services agreement with the Borough of Spotswood to operate Helmetta’s dispatch log, the custodian was obligated to obtain the requested records from SPD. The Council found that SPD “made, maintained, or kept on file” the dispatch logs on behalf of Helmetta pursuant to the shared services agreement. See Burnett, 415 N.J. Super. at 517.

Moreover, in Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005), the complainant requested e-mails sent to various individuals regarding official business but located on the mayor’s home computer. The custodian alleged that due to the records’ location, they were not government records. The Council found that the definition of a government record was not restricted by its physical location. The Council further found that the requested records should be released in accordance with OPRA, to the extent they fell within the definition of a government record. Thus, the Council held that the location of a document was immaterial to its status as a government record.

Both Burnett and Michalak are directly applicable in the instant matter. The evidence of record demonstrates that the Township entered into a shared services agreement with LAC to provide police services within the Township. Thus, the requested records were created and maintained in LAC on behalf of the Township. Additionally, the Custodian was obligated to retrieve the records from LAC, as their physical location is immaterial. See Meyers, GRC 2005-127.

Accordingly, the Custodian unlawfully denied access to the requested records on the basis that LAC, with which the Township had a shared services agreement to provide police services, possessed the records. N.J.S.A. 47:1A-6; Burnett, 415 N.J. Super. 506; and Michalak, GRC 2010-220. The Custodian had an obligation to obtain the responsive records from LAC and provide same to the Complainant. See Meyers, GRC 2005-127. Thus, the Custodian shall obtain the responsive records from LAC and provide same to the Complainant.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated

OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian unlawfully denied access to the requested records on the basis that the Lower Alloways Creek Police Department, with which Elsinboro Township had a shared services agreement, possessed the records. N.J.S.A. 47:1A-6; Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010); and Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). The Custodian had an obligation to obtain the responsive records from LAC and provide same to the Complainant. See Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (December 2005). Thus, the Custodian shall obtain the responsive records from LAC and provide same to the Complainant.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Executive Director.⁶**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

June 23, 2020

⁴ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute and Baffis Simmons) v. Elsinboro Township (Salem), 2018-246 – Findings and Recommendations of the Executive Director