



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**

**September 29, 2020 Government Records Council Meeting**

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

Complaint No. 2018-314

v.  
City of Bridgeton Police Department (Cumberland)  
Custodian of Record

At the September 29, 2020 public meeting, the Government Records Council (“Council”) considered the September 22, 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 evidence of record supports that Lt. Paul Genovese never received the Complainant’s OPRA request on behalf of the Custodian, and the Complainant’s evidence is insufficient to overcome Lt. Genovese’s certifications. Thus, the Custodian did not unlawfully deny access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. See Martinez v. Morris Cnty. Prosecutor’s Office, GRC Complaint No. 2014-2 (September 2014), and Valdes v. N.J. Dep’t of Educ., GRC Complaint No. 2012-19 (April 2013).
2. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 76 (2008). Specifically, because there was no unlawful denial of access prior to the complaint filing, the Custodian’s actions were in response to receiving the OPRA request rather than the complaint. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 423, and Mason, 196 N.J. 51.

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 29<sup>th</sup> Day of September 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: October 1, 2020**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 29, 2020 Council Meeting**

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

**GRC Complaint No. 2018-314**

v.

**City of Bridgeton Police Department (Cumberland)<sup>2</sup>  
Custodial Agency**

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

1. Records Retention and Disposition Scheduled used by the City of Bridgeton Police Department (“BPD”) during the following time periods:
  - January 2016 through December 2016
  - January 2017 through December 2017
  - January 2018 through November 2018
2. Records Retention and Disposition Police and Directives used by BPD during the period set forth in Item No. 1 above.
3. Standard Operating Procedure (“SOP”) for Records Retention and Disposition used by BPD during the period set forth in Item No. 1 above.
4. Agreement between the City of Bridgeton (“City”) and the storage facility or other record showing the address of the location where the Township stores summonses and complaints for fifteen (15) years as required by the attached Records Retention and Disposition Schedule.
5. SOP, Manual and Directives relating to the use of eCDR by BPD.
6. Name, title, position and date of hire of each individual within BPD who has access to eCDR.
7. “Arrest Card File” from January 2017 through November 2018.
8. “Summonses Log Book” from January 2017 through November 2018.

**Custodian of Record:** Kathleen Keen<sup>3</sup>

**Request Received by Custodian:** N/A

**Response Made by Custodian:** N/A

**GRC Complaint Received:** December 26, 2018

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

<sup>2</sup> Represented by Michele Gibson, Esq., of the City of Bridgeton (Bridgeton, N.J.). Previously represented by Rebecca J. Bertram, Esq., of the Bertram Law Office, LLC (Bridgeton, N.J.).

<sup>3</sup> The current Custodian of Record is Nichole Almanza.

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

### **Request and Response:**

On November 17, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.

### **Denial of Access Complaint:**

On December 26, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he submitted his OPRA request on November 17, 2018. The Complainant asserted that as of December 26, 2018, the Custodian has not provided any records. The Complainant included a copy of the e-mail containing the OPRA request, which was addressed to Lt. Paul Genovese at BPD.

The Complainant requested that the Council find the Custodian in violation of OPRA and to award counsel fees.

### **Statement of Information:**

On January 16, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she did not receive the Complainant’s OPRA request dated November 17, 2019, and therefore no response was provided.

The Custodian further certified that she was the proper records custodian for the instant request. The Custodian certified that the Complainant previously submitted an OPRA request directly to the Custodian in September 2018, but in this instance the Complainant allegedly submitted the request to Lt. Genovese.

The Custodian’s SOI also included a certification from Lt. Genovese. Lt. Genovese certified that he never received an e-mail containing the Complainant’s OPRA request. Both the Custodian and Lt. Genovese certified that upon receipt of the instant complaint, BPD began researching the request and would provide responsive records within ten (10) days or as soon as ascertainable.

### **Additional Submissions:**

On January 19, 2019, the Complainant filed a letter brief in opposition to the Custodian’s SOI. Therein, the Complainant first argued that the provided screenshot of his e-mail demonstrated that the request was sent to the City on November 17, 2018 at 4:26 a.m. The Complainant asserted that if the e-mail was not delivered, then Comcast, his e-mail provider, would automatically send a message stating that the e-mail was “undeliverable.” The Complainant noted that Lt. Genovese responded to an earlier OPRA request dated September 2018, and his e-mail address was also used

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<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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to notify the City of a complaint filing in Superior Court. The Complainant also noted that AADARI prevailed in the ensuing litigation, with Custodian's Counsel representing the City in that matter. The Complainant therefore argued that there was no reasonable question that the OPRA request was sent to the correct e-mail address.

The Complainant argued that it would be improper to dismiss the complaint as the Custodian has not made records available to him within the allotted period. The Complainant restated his request for the Council to compel compliance and award counsel fees pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006).

On January 30, 2019, Counsel submitted correspondence to the GRC and Complainant providing responsive records to the Complainant's OPRA request. Counsel asserted that responsive records were located for Item Nos. 1, 3, 5, and 6. Counsel asserted that no responsive records exist for the remaining items.

That same day, the Complainant e-mailed the GRC, acknowledging receipt of the responsive records and asserted that the only outstanding issue was the award of counsel fees. The Complainant asserted that based upon the "catalyst" theory outlined in Teeters, 387 N.J. Super. at 429-31, a prevailing party must show that the lawsuit was casually related to securing the relief obtained, and that the relief granted had some basis in law. The Complainant argued that under Warrington v. Vill. Supermarkets, Inc., 328 N.J. Super. 410, 420 (App. Div. 2000), a prevailing party succeeds when the relief on the merits materially alters the relationship between the parties.

The Complainant asserted that the chronology of the instant matter demonstrated that the City received the OPRA request in November 2018 and did not provide responsive records until after the complaint was filed December 2018. The Complainant therefore argued that the complaint was the catalyst that prompted the City to disclose responsive records in January 2019, and thus a prevailing party entitled to a fee award. Warrington, 328 N.J. Super. at 420.

On January 31, 2019, Counsel submitted correspondence in response to the Complainant. Counsel maintained that BPD had no record of receiving the request at issue based upon Lt. Genovese's certification, and asserted that the Complainant did not provide any verification of receipt. Counsel also asserted that many of the requested records pertained to outstanding litigation between the Complainant and the City, but the Complainant did not direct the OPRA request to the Custodian or Counsel despite having their respective contact information.

Counsel maintained that Lt. Genovese was not the proper records custodian for either the City or BPD. Counsel argued that simply because Lt. Genovese provided responsive records to a previous request did not deem him the official records custodian for BPD.

On August 27, 2020, the GRC requested additional information from the Custodian. Specifically, the GRC requested detailed information on what search, if any, was conducted to locate the Complainant's November 17, 2018 e-mail containing his OPRA request.

On September 3, 2020, Michele Gibson, Esq. responded on behalf of the current Custodian. Ms. Gibson provided certifications from Lt. Genovese and Miriam Garcia, Deputy Municipal

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Clerk for the City. Ms. Gibson asserted that since the Custodian was no longer with the City, Ms. Garcia provided a certification in her stead as she worked with the Custodian during the relevant period.

Lt. Genovese certified that his search included reviewing his inbox, spam/junk e-mails, and “detected” items and infected items folders during the relevant period. Lt. Genovese certified that the relevant e-mail was not located, nor did he receive follow-up e-mails from AADARI concerning the status of the OPRA request at issue. Lt. Genovese certified that he was unaware of the request until after the instant complaint was filed.

Ms. Garcia certified that she was the City’s Deputy Municipal Clerk during the relevant period concerning the instant matter. Ms. Garcia certified that she assisted the Custodian with efforts to locate the Complainant’s e-mail. Ms. Garcia certified that she and the Custodian searched through their e-mail account’s inboxes, spam/junk e-mails, and “detected” items and infected items folders during the relevant period. Ms. Garcia certified that the Complainant’s e-mail was not located, nor did the Clerk’s office receive any follow-up e-mails from AADARI concerning the November 18, 2018 OPRA request.

### Analysis

#### Unlawful Denial of Access

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

OPRA further provides that, “a request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian.” N.J.S.A. 47:1A-5(g). OPRA further provides that, “the council shall make a determination as to whether the complaint is within its jurisdiction or frivolous or *without any reasonable factual basis*.” N.J.S.A. 47:1A-7(e) (emphasis added).

In Martinez v. Morris Cnty. Prosecutor’s Office, GRC Complaint No. 2014-2 (September 2014), the complainant contended that the custodian should have received his OPRA request and provided a photocopy of the certified mail receipt as evidence. The certified mail receipt identified the date of delivery and confirmed that the address was correct. The Council held that the certified mail receipt was insufficient to show that the custodian received the request.

Furthermore, in Valdes v. N.J. Dep’t of Educ., GRC Complaint No. 2012-19 (April 2013), the complainant filed a complaint after not receiving a response to his OPRA request. As part of his Denial of Access Complaint, the complainant included a certified mail receipt stamped “State of NJ – Capital Post Office.” The Council determined that the custodian did not unlawfully deny access to the complainant’s OPRA request because same was never received. The Council reasoned that “the Custodian did not sign the receipt and there is no indication that [the Department

of Education] received the request, only that the State received it . . . it is entirely possible that the Custodian never received the OPRA request.” Id. See also Bey v. State of New Jersey, Office of Homeland Security & Preparedness, GRC Complainant No. 2013-237 (February 2014) (complainant’s certified mail return receipt sufficient only to show that the State received the request, not the custodian).

In the instant matter, the Complainant contended that he submitted his OPRA request to Lt. Genovese on November 18, 2018 and provided a copy of his e-mail indicating same. The Complainant also argued that if the message was not delivered properly, his e-mail provider would have sent an error message indicating same. Lt. Genovese certified in the SOI that he did not receive the Complainant’s e-mail containing his OPRA request. In response to the GRC’s request for additional information, Lt. Genovese certified that he searched his e-mail account’s folders during the relevant period, specifically including the spam/junk folder as well as the “detected” and infected items folder. Ms. Garcia also certified that she and the Custodian searched their own e-mail account’s folders for the Complainant’s e-mail, including the previously mentioned subfolders highlighted by Lt. Genovese.

The facts in this matter are analogous to those in Martinez, GRC 2014-2 and Valdes, GRC 2012-19. Like the certified mail receipts, the Complainant’s e-mail copy is evidence that the e-mail was sent to the correct address but does not confirm that Lt. Genovese received the e-mail on his server. Furthermore, the contention that the Complainant did not receive an error message is not dispositive evidence of e-mail receipt. Thus, the Complainant’s evidence is insufficient to overcome Lt. Genovese’s certification that he never received the e-mail containing the Complainant’s OPRA request after searching through his e-mail account’s folders.

Therefore, the evidence of record supports that Lt. Genovese never received the Complainant’s OPRA request on behalf of the Custodian, and the Complainant’s evidence is insufficient to overcome Lt. Genovese’s certifications. Thus, the Custodian did not unlawfully deny access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. See Martinez, GRC 2014-2, and Valdes, GRC 2012-19.

### **Prevailing Party Attorney’s Fees**

OPRA provides that:

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

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

In Teeters, 387 N.J. Super. 423, the Appellate Division held that a complainant is a “prevailing party” if he achieves the desired result because the complaint brought about a change

(voluntary or otherwise) in the custodian's conduct. Id. at 432. Additionally, the court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

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

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

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

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

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

The Court in Mason, further held that:

[R]equestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) "a factual causal nexus



between plaintiff's litigation and the relief ultimately achieved"; and (2) "that the relief ultimately secured by plaintiffs had a basis in law." Singer v. State, 95 N.J. 487, 495, cert. denied, New Jersey v. Singer, 469 U.S. 832 (1984).

[Id. at 76.]

In the current matter, the Custodian and Lt. Genovese certified that they were unaware of the Complainant's OPRA request prior to being notified of the Denial of Access Complaint. The Custodian and Lt. Genovese also certified that upon notification, they took steps to search for responsive records and provide a response to the OPRA request. Thus, as there was no unlawful denial of access prior to the complaint filing, the actions taken by the Custodian were in response to receiving the request, rather than the complaint itself. Therefore, the complaint was not the catalyst for the records' release, and that no causal nexus exists.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters, 387 N.J. Super. at 432. Additionally, no 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, because there was no unlawful denial of access prior to the complaint filing, the Custodian's actions were in response to receiving the OPRA request rather than the complaint. Therefore, the Complainant is not 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.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The evidence of record supports that Lt. Paul Genovese never received the Complainant's OPRA request on behalf of the Custodian, and the Complainant's evidence is insufficient to overcome Lt. Genovese's certifications. Thus, the Custodian did not unlawfully deny access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. See Martinez v. Morris Cnty. Prosecutor's Office, GRC Complaint No. 2014-2 (September 2014), and Valdes v. N.J. Dep't of Educ., GRC Complaint No. 2012-19 (April 2013).
2. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 76 (2008). Specifically, because there was no unlawful denial of access prior to the complaint filing, the Custodian's actions were in response to receiving the OPRA request rather than the complaint. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 423, and Mason, 196 N.J. 51.

Prepared By: Samuel A. Rosado  
Staff Attorney

September 22, 2020