



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. 2019-239

v.

Audubon Park Borough (Camden)
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 the Council dismiss this complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant’s Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 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 & Research Institute)¹
Complainant**

GRC Complaint No. 2019-239

v.

**Audubon Park Borough (Camden)²
Custodial Agency**

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

1. Drug Recognition Evaluation/Expert (“DRE”) Rolling Log from January 2019 through present.
2. Summonses and complaints that were prepared by the Police Department relating to each of the defendants listed in the DRE Rolling Logs mentioned in item No. 1 above.
3. Driving While Intoxicated/Driving under the Influence (“DWI/DUI”) complaints and summonses prepared and filed by the Police Department from January 2019 through present.
4. Drug possession complaints and summonses prepared and filed by the Police Department from January 2019 through present.
5. Drug paraphernalia complaints and summonses prepared by the Police Department from January 2019 through present.
6. Police Department’s “Arrest Listings” from January 2019 to present.

Custodian of Record: Dawn M. Pennock
Request Received by Custodian: November 25, 2019
Response Made by Custodian: November 25, 2019
GRC Complaint Received: November 27, 2019

Background

December 14, 2021 Council Meeting:

At its December 14, 2021 public meeting, the Council considered the December 7, 2021 Supplemental Findings and Recommendations of the Executive Director and all related

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

² Represented by Stuart A. Platt, Esq., of The Platt Law Group, P.C. (Stratford, NJ). Previously represented by Alen Arnautovic, Esq., of Platt & Riso, P.C. (Stratford, NJ).

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 March 30, 2021 Interim Order because she responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to the Complainant's OPRA request, she complied with the Council's March 30, 2021 Interim Order by locating and providing the Complainant with responsive records. 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 March 30, 2021 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 v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 76 (2008). Specifically, the Custodian was ordered to produce the responsive records maintained by Haddon Township. 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. at 432, and Mason, 196 N.J. at 76. **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 December 15, 2021, the Council distributed its Interim Order to all parties. On December 16, 2021, the Complainant notified the GRC that the parties have resolved the issue of counsel fees per the Interim Order. That same day, Custodian's Counsel e-mailed the GRC confirming that a settlement had been reached between the parties regarding counsel fees.

Analysis

Compliance

At its December 14, 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 December 15, 2021, the Council distributed its Interim Order to all parties; thus, the parties’ response was due by close of business on January 14, 2022. On December 16, 2021, the Complainant notified the GRC that the parties resolved the issue of counsel fees. That same day, Custodian’s Counsel e-mailed the GRC to confirm that the parties have settled the issue of counsel fees.

Accordingly, the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant’s Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Council dismiss this complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant’s Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Prepared By: Samuel A. Rosado
Staff Attorney

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

December 14, 2021 Government Records Council Meeting

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

Complaint No. 2019-239

v.

Audubon Park Borough (Camden)
Custodian of Record

At the December 14, 2021 public meeting, the Government Records Council (“Council”) considered the December 8, 2021 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s March 30, 2021 Interim Order because she responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to the Complainant’s OPRA request, she complied with the Council’s March 30, 2021 Interim Order by locating and providing the Complainant with responsive records. 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 March 30, 2021 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 v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 76 (2008). Specifically, the Custodian was ordered to produce the responsive records maintained by Haddon Township. 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. at 432, and Mason, 196 N.J. at 76. **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 14th Day of December 2021

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: December 15, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 14, 2021 Council Meeting**

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

GRC Complaint No. 2019-239

v.

**Audubon Park Borough (Camden)²
Custodial Agency**

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

1. Drug Recognition Evaluation/Expert (“DRE”) Rolling Log from January 2019 through present.
2. Summonses and complaints that were prepared by the Police Department relating to each of the defendants listed in the DRE Rolling Logs mentioned in item No. 1 above.
3. Driving While Intoxicated/Driving under the Influence (“DWI/DUI”) complaints and summonses prepared and filed by the Police Department from January 2019 through present.
4. Drug possession complaints and summonses prepared and filed by the Police Department from January 2019 through present.
5. Drug paraphernalia complaints and summonses prepared by the Police Department from January 2019 through present.
6. Police Department’s “Arrest Listings” from January 2019 to present.

Custodian of Record: Dawn M. Pennock

Request Received by Custodian: November 25, 2019

Response Made by Custodian: November 25, 2019

GRC Complaint Received: November 27, 2019

Background

March 30, 2021 Council Meeting:

At its March 30, 2021 public meeting, the Council considered the March 23, 2021 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

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

² Represented by Stuart A. Platt, Esq., of The Platt Law Group, P.C. (Stratford, NJ). Previously represented by Alen Arnautovic, Esq., of Platt & Riso, P.C. (Stratford, NJ).

1. The Custodian unlawfully denied access to the requested records on the basis that Haddon Township (“Township”), with which Audubon Park Borough 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 the Township 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 the Township 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 March 31, 2021, the Council distributed its Interim Order to all parties. April 5, 2021, the Custodian responded to the Council’s Interim Order, submitting certified confirmation of compliance to the Executive Director. The Custodian certified that responsive records were delivered to the Complainant that same day via e-mail.

Analysis

Compliance

At its March 30, 2021 meeting, the Council ordered the Custodian to locate and provide access to the requested records. The Council also ordered the Custodian to submit certified

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.

confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On March 31, 2021, 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 close of business on April 8, 2021, accounting for the Good Friday holiday.⁶

On April 2, 2021, the second (2nd) business day after receipt of the Council's Order, the Custodian responded in writing, providing responsive records to the Complainant. The Custodian also provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's March 30, 2021 Interim Order because she responded in the prescribed time frame providing records and simultaneously provided 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)).

Although the Custodian unlawfully denied access to the Complainant's OPRA request, she complied with the Council's March 30, 2021 Interim Order by locating and providing the Complainant with responsive records. 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.

⁶ Good Friday was observed on April 2, 2021.

Prevailing Party Attorney's Fees

OPRA provides that:

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

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

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the 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 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 Audubon Park Borough (“Borough”) had a shared services agreement with Haddon Township (“Township”) to provide police services and therefore did not possess the requested records. The Complainant filed the instant matter to assert that the Borough 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 March 30, 2021 Interim Order, the Custodian was ordered to produce the responsive records maintained by the Township, 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.⁷

Therefore, pursuant to the Council’s March 30, 2021 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

⁷ 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).

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 produce the responsive records maintained by the Township. 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. at 432, and Mason, 196 N.J. at 76. **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 March 30, 2021 Interim Order because she responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to the Complainant's OPRA request, she complied with the Council's March 30, 2021 Interim Order by locating and providing the Complainant with responsive records. 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 March 30, 2021 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 v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 76 (2008). Specifically, the Custodian was ordered to produce the responsive records maintained by Haddon Township. 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. at 432, and Mason, 196 N.J. at 76. **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

December 8, 2021



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LT. GOVERNOR SHEILA Y. OLIVER
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INTERIM ORDER

March 30, 2021 Government Records Council Meeting

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Audubon Park Borough (Camden)
Custodian of Record

At the March 30, 2021 public meeting, the Government Records Council (“Council”) considered the March 23, 2021 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian unlawfully denied access to the requested records on the basis that Haddon Township (“Township”), with which Audubon Park Borough 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 the Township 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 the Township 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 March 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: March 31, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 30, 2021 Council Meeting**

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Data & Research Institute)¹
Complainant**

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**Audubon Park Borough (Camden)²
Custodial Agency**

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

1. Drug Recognition Evaluation/Expert (“DRE”) Rolling Log from January 2019 through present.
2. Summonses and complaints that were prepared by the Police Department relating to each of the defendants listed in the DRE Rolling Logs mentioned in item No. 1 above.
3. Driving While Intoxicated/Driving under the Influence (“DWI/DUI”) complaints and summonses prepared and filed by the Police Department from January 2019 through present.
4. Drug possession complaints and summonses prepared and filed by the Police Department from January 2019 through present.
5. Drug paraphernalia complaints and summonses prepared by the Police Department from January 2019 through present.
6. Police Department’s “Arrest Listings” from January 2019 to present.

Custodian of Record: Dawn M. Pennock

Request Received by Custodian: November 25, 2019

Response Made by Custodian: November 25, 2019

GRC Complaint Received: November 27, 2019

Background³

Request and Response:

On November 25, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. That same day, the

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

² Represented by Alen Arnautovic, Esq., of Platt & Riso, P.C. (Stratford, NJ).

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.

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Custodian responded in writing advising that Audubon Park Borough (“Borough”) did not have a police department, and that the Borough had a shared services agreement with Haddon Township (“Township”) for police services. The Custodian also stated that the Complainant should submit his OPRA request to the Township and included the relevant e-mail address for the Township.

The Complainant replied stating that if the Borough has a shared services agreement, the Custodian could forward the request directly to the Township since they were providing the Borough with services on its behalf. The Complainant added that he expected to receive responsive records from the Borough.

On November 26, 2019, the Custodian’s Counsel e-mailed the Complainant, stating that the Complainant had made a similar OPRA request in November 2019 and was given the same response as the instant request. Counsel stated that the Complainant filed a complaint with the Government Records Council⁴ (“GRC”) pertaining to the November 2019 request, and that the same reasons for denial were being made here. The Complainant responded that same day, stating that the instant request was separate from the request submitted on November 2019, and that if he did not receive responsive records, he would file a new complaint. Counsel replied stating the Custodian fulfilled her obligations under OPRA, and that any complaint filed would be frivolous and the Borough would seek fees as a result.

Denial of Access Complaint:

On November 27, 2019, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant contended that the Custodian failed to disclose the records responsive to the subject OPRA request, as well as failed to get the records from the Township which was maintaining responsive records on the Borough’s behalf. The Complainant thus filed the instant complaint based on Counsel’s position. See Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010); Michalak v. Borough of Helmetta (Middlesex), GRC Complaint No. 2010-220 (Interim Order dated January 31, 2012). The Complainant included the e-mail correspondence between himself, the Custodian, and Counsel. The Custodian also provided a copy of an “OPRA ALERT” issued by the GRC.

Statement of Information:

On December 19, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on November 25, 2019. The Custodian certified that she responded in writing that same day, denying the request because the Borough did not maintain responsive records. The Custodian certified that she also advised the Complainant that the Borough had a shared services agreement with the Township and that he should submit his OPRA request to that agency.

The Custodian, through Counsel, argued that she was not required to disclose records that the Borough did not make or maintain. Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 38 (App. Div. 2005); Na’im v. Union Cnty. Prosecutor’s Office, 2007 N.J. Super. Unpub. LEXIS 1519 (App.

⁴ The complaint referenced is Owoh, Esq. (O.B.O. AADARI & Baffi Simmons) v. Audubon Park Borough, GRC Complaint No. 2018-290.

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Div. 2007). The Custodian argued that even if the requested records existed, she was under no obligation to search for them beyond the Borough's files. Bent, 381 N.J. Super. at 38.

The Custodian further noted that she was obligated to direct the Complainant to proper custodian of record, which she did in her response. N.J.S.A. 47:1A-5(h); see also Galdieri v. The Jersey City Incinerator Auth., GRC Complaint No. 2003-152 (March 2011). The Custodian argued that in this matter, the Township maintained the records at issue "exclusively" and thus lawfully denied the Complainant's OPRA request.

Additionally, the Custodian asserted that the facts in the current matter can be distinguished from Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 516-17 (App. Div. 2010), where the court required the custodian to produce documents not in its possession when created by a third-party on behalf of the agency in the course of its official business. The Custodian asserted that in Carter v. N.J. Dep't of Cmty. Affairs, 2019 N.J. Super. Unpub. LEXIS 2510, at *13 (App. Div. Dec. 10, 2019), the court found that since the records did not originate with the responding agency, the records were not classified separately and thus required the custodian to conduct research to locate them. The Custodian argued that in the current matter, the requested records were created and maintained by the Township in the course of its official business and did not originate from the Borough.

The Custodian also contended that the GRC should revisit its holding in Michalak, GRC 2010-220. The Custodian argued that Michalak conflicted with the court in Carter, which was handed down seven (7) years later. The Custodian asserted that Michalak nullified the cost-saving incentives proffered by entering into shared services agreements. The Custodian argued that adhering to Michalak would force the Borough to expend time and resources it did not have to obtain records the Borough did not possess or maintain, negating the cost-savings realized by the shared services agreement.

The Custodian noted that the GRC previously reversed decisions where it imposed practical difficulties or excessive costs on government agencies. See Rodriguez v. Kean Univ., GRC Complaint No. 2013-69 (March 2014). The Custodian contended that the more efficient process for both parties would be to submit the OPRA request directly to the Township, as it was the agency best suited to handle the request.

Additional Submissions:

On December 20, 2019, the Complainant submitted a brief in response to the Custodian's SOI. The Complainant contended that the Custodian had an obligation to obtain records from the Township or forward to same, because the Borough was engaged in a shared services agreement. Burnett, 415 N.J. Super. 506; Michalak, GRC 2010-220. The Complainant argued that the Custodian's failure to do so resulted in an unlawful denial of access.

The Complainant also asserted that the New Jersey Supreme Court has held that an agency has an obligation to obtain requested records even if it does not have physical possession of same. See Verry v. Franklin Fire Dist. No. 1, 230 N.J. 285 (2017). The Complainant asserted that the key

questions were whether the agency was a “public agency” and whether said agency has “access” to the requested records. Id.

The Complainant requested that the Council compel compliance with OPRA request, and to award attorney’s fees pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006).

On January 3, 2020, Counsel replied to the Complainant’s response brief. Counsel noted that requiring the Borough’s Custodian to obtain government records created and maintained by the Township would not advance the purpose of OPRA. See Owoh, Esq. v. West Windsor-Plainsboro Reg’l Sch. Dist. (Mercer), GRC Complaint No. 2012-130 (Interim Order dated January 29, 2013). Counsel asserted that the Complainant demanded that the Borough retrieve and duplicate copies of the requested records. Counsel argued that doing so would create hardships, redundancies, and undue burdens on the Borough, and would not advance the purpose of OPRA.

On January 4, 2020, the Complainant responded to Counsel’s letter, stating that it would have been cheaper to for the Custodian to forward the OPRA request to the Township rather than engage in litigation. The Complainant noted that he provided the Custodian with an opportunity to reconsider and forward the request to the Township in accordance with Michalak, GRC 2010-220.

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, 381 N.J. Super. at 38-39, 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 entered into a shared services agreement. 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, GRC 2005-127, 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 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 Borough entered into a shared services agreement with the Township to provide law enforcement services within the Borough. Thus, the requested records were created and maintained in the Township on behalf of the Borough. Additionally, the Custodian was obligated to retrieve the records from the Township, as their physical location was immaterial. See Meyers, GRC 2005-127. Although the Custodian wishes the GRC to reconsider its decision in Michalak, there is no evidence in the record demonstrating that the Borough's circumstances warrant a reversal of long-standing precedent.

Accordingly, the Custodian unlawfully denied access to the requested records on the basis that the Township, with which the Borough had a shared services agreement, 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 the Township and provide same to the Complainant. See Meyers, GRC 2005-127. Thus, the Custodian shall obtain the responsive records from the Township 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 Haddon Township ("Township"), with which Audubon Park Borough 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 the Township 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 the Township 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 deliver⁵ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁶ to the Executive Director.⁷**
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

March 23, 2021

⁵ 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.

⁶ "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."

⁷ 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.

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