



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

August 24, 2021 Government Records Council Meeting

Brittany Olt
Complainant

Complaint No. 2019-88

v.

City of Camden (Camden)
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 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.

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 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**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
August 24, 2021 Council Meeting**

**Brittany Olt¹
Complainant**

GRC Complaint No. 2019-88

v.

**City of Camden (Camden)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail or facsimile:

1. “[A]ny documentation concerning any work done” by the City of Camden (“City”) employees or contractors at 1576 Mt. Ephraim Avenue from 1980 to present.
2. “[A]ny documentation establishing who or what is responsible for the upkeep” of storm drains in the area of 1576 Mt. Ephraim Avenue.

Custodian of Record: Luis Pastoriza
Request Received by Custodian: April 24, 2019
Response Made by Custodian: April 24, 2019
GRC Complaint Received: May 8, 2019

Background

June 29, 2021 Council Meeting:

At its June 29, 2021 public meeting, the Council considered the June 22, 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 did not fully comply with the Council’s April 27, 2021 Interim Order. Specifically, Custodian’s Counsel stated that one (1) responsive record was being simultaneously sent to the Complainant. Further, Counsel submitted additional certifications sufficiently addressing each individual’s search and whether they located responsive records. However, the Custodian failed to disclose an additional responsive record and did not simultaneously provide certified confirmation of compliance to the Executive Director.

¹ Represented by John Kearney, Esq. (Haddon Heights, NJ).

² Represented by Tim Galanaugh, Esq., Assistant City Attorney (Camden, NJ).

2. The Custodian unlawfully denied access to two (2) records responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6. However, and although the Custodian did not fully comply with the Council's April 27, 2021 Interim Order, the responsive record was disclosed to the Complainant on May 5, 2021. 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 April 27, 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 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the City was able to locate and disclose responsive records because of the Council's Order. 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 June 30, 2021, the Council distributed its Interim Order to all parties. On August 2, 2021, prior to the Government Records Council ("GRC") advising the parties that the settlement time frame expired, Custodian's Counsel confirmed via letter that the parties agreed to settle the fee issue and the matter should be considered closed. On the same day, the GRC e-mailed the parties confirming receipt of the letter and seeking confirmation of the settlement from Complainant's Counsel. Complainant's Counsel responded via e-mail confirming that the fee issue was amicably resolved.

Analysis

Prevailing Party Attorney's Fees

At its June 29, 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 June 30, 2021, the Council distributed its Interim Order to all parties; thus, the Custodian's response was due by close of business on July 29, 2021. On August 2, 2021, the parties confirmed that the fee issue was settled, and that this complaint should be considered closed.

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 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.

Prepared By: Frank F. Caruso
Executive Director

August 17, 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

June 29, 2021 Government Records Council Meeting

Brittany Olt
Complainant

Complaint No. 2019-88

v.

City of Camden (Camden)
Custodian of Record

At the June 29, 2021 public meeting, the Government Records Council (“Council”) considered the June 22, 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 did not fully comply with the Council’s April 27, 2021 Interim Order. Specifically, Custodian’s Counsel stated that one (1) responsive record was being simultaneously sent to the Complainant. Further, Counsel submitted additional certifications sufficiently addressing each individual’s search and whether they located responsive records. However, the Custodian failed to disclose an additional responsive record and did not simultaneously provide certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to two (2) records responsive to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. However, and although the Custodian did not fully comply with the Council’s April 27, 2021 Interim Order, the responsive record was disclosed to the Complainant on May 5, 2021. 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 April 27, 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 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the City was able to locate and disclose responsive records because of the Council’s Order. 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 29th Day of June 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: June 30, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
June 29, 2021 Council Meeting**

**Brittany Olt¹
Complainant**

GRC Complaint No. 2019-88

v.

**City of Camden (Camden)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail or facsimile:

1. “[A]ny documentation concerning any work done” by the City of Camden (“City”) employees or contractors at 1576 Mt. Ephraim Avenue from 1980 to present.
2. “[A]ny documentation establishing who or what is responsible for the upkeep” of storm drains in the area of 1576 Mt. Ephraim Avenue.

Custodian of Record: Luis Pastoriza

Request Received by Custodian: April 24, 2019

Response Made by Custodian: April 24, 2019

GRC Complaint Received: May 8, 2019

Background

April 27, 2021 Council Meeting:

At its April 27, 2021 public meeting, the Council considered the April 20, 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 Custodian may have unlawfully denied access to the requested storm drain records responsive to the Complainant’s clarified OPRA request. N.J.S.A. 47:1A-6. Specifically, the evidence of record indicates that the Custodian misinterpreted the OPRA request to seek records pertaining to 1576 Mt. Ephraim Avenue and “properties adjacent” thereto. Thus, the Custodian must conduct a new search for responsive records and disclose those records located or provide a lawful basis for denying access to them. Should the Custodian and/or other City of Camden officials not locate any responsive records, the Custodian and those officials shall certify to this fact, inclusive of a detailed explanation of how each searched for responsive records.

¹ Represented by John Kearney, Esq. (Haddon Heights, NJ).

² Represented by Tim Galanaugh, Esq., Assistant City Attorney (Camden, NJ).

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 April 28, 2021, the Council distributed its Interim Order to all parties.

On May 5, 2021, the Custodian's Counsel responded to the Council's Interim Order attaching certifications from General Manager Brian Cianfrani, Director Keith Walker, and Clerk Elena Guzman. Counsel stated that the City was disclosing to the Complainant one (1) record responsive to the subject OPRA request, as well as a "Services Agreement" between the City and American Water Operations and Maintenance, Inc. ("AWO&M"), and the City Resolution approving the agreement. Counsel asserted that the time frame and property identification in the Complainant's OPRA request appeared to cause some confusion; noting that the City was not required to maintain records "for a forty-year period."

Counsel stated that notwithstanding that confusion, the City conducted another search and was able to locate a work order dated March 23, 2018, which was being disclosed to the Complainant simultaneously with the Order response. See Cianfrani Cert. ¶ 8-11. Counsel further stated that both Mr. Walker and Ms. Guzman detailed their searches and indicated that no responsive records were located. See Walker Cert.; Guzman Cert.

Additional Submissions:

On May 6, 2021, Custodian's Counsel sent a letter to the Government Records Council ("GRC"). Therein, Counsel contended that the subject OPRA request "adequately described" the records sought and even included a photograph. Counsel argued that the City's failure to provide

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.

responsive records until more than two (2) years after the submission of the subject OPRA request represented a knowing and willful violation. Counsel contended that the City's Statement of Information was "demonstratively false" because the Custodian did not make a reasonable attempt to locate responsive records. Counsel contended that this complaint exposed an issue with the City's OPRA process that would be cured by a knowing and willful finding.

Counsel further stated that the Complainant here prevailed; thus, the GRC should award attorney's fees. Counsel thus requested that the GRC award fees in the amount of \$1,495.00 representing 4.6 hours at a rate of \$325.00 per hour.

On May 11, 2021, City attorney Michelle Banks-Spearman sent a letter to the GRC in response to Complainant Counsel's May 6, 2021 letter. Therein, Ms. Banks-Spearman argued that the evidence of record here did not support that a "knowing and willful" violation occurred. Ms. Banks-Spearman noted that the evidence of record indicated the City's good faith attempts to respond to the OPRA request and subsequent Interim Order during the public health emergency. Ms. Banks-Spearman also noted the difficulty in identifying responsive records based on confusion as to who managed and was responsible for storm drain maintenance. Ms. Banks-Spearman argued that the GRC should look to Barth v. Rutgers Univ. (Somerset), GRC Complaint No. 2017-121 (June 2019) in finding that no knowing and willful violation occurred here.

Ms. Banks-Spearman further noted that the Custodian's process for addressing OPRA requests requires him to contact various departments depending on the records identified in a specific request. Ms. Banks-Spearman averred that such a process is logical given the size of the City. Ms. Banks-Spearman contended that the Custodian was thus in no position to personally conduct searches; rather, he must rely on others to address OPRA requests. Ms. Banks-Spearman argued that alleging the Custodian knowingly and willfully violated OPRA is erroneous: the City's OPRA process should absolve him of the high standard necessary to find such a violation.

On the same day, Ms. Banks-Spearman sent another letter to the GRC attaching a certification from Howard McCoach, Esq., the City's "Compliance and Monitoring" Officer. Therein, Ms. Banks-Spearman advised that an additional AWO&M record that did not identify 1576 Mt. Ephraim Avenue, but did identify the intersection of Mt. Ephraim Avenue and Chase Street. McCoach Cert. ¶ 4-5. Ms. Banks-Spearman noted that the record was one of several reviewed on that day and all were attached regardless of their responsiveness to the subject OPRA request. McCoach Cert. ¶ 6. Ms. Banks-Spearman noted that names and telephone numbers were redacted in two (2) records per N.J.S.A. 47:1A-1.

Analysis

Compliance

At its April 27, 2021 meeting, the Council ordered the Custodian to perform additional searches for potentially responsive records and disclose those that existed. The Council also ordered that should the renewed searches not yield any records, the Custodian and/or those City officials performing a search were required to submit a certification inclusive of a detailed explanation. Finally, the Council ordered the Custodian to submit certified confirmation of

compliance, in accordance with R. 1:4-4, to the Executive Director. On April 28, 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 May 5, 2021.

On May 5, 2021, the fifth (5th) business day after receipt of the Council's Order, the Custodian's Counsel responded. Therein, Counsel stated that Mr. Cianfrani located one responsive work order, which was being simultaneously disclosed to the Complainant. Counsel also included certifications from Mr. Cianfrani, Mr. Walker, and Ms. Guzman detailing their searches and whether same yielded any responsive records. Based on a review of these certifications, the GRC is satisfied that the City satisfied a portion of the Order. However, Counsel did not include the Custodian's certified confirmation of compliance as part of the City's submission.

Further, on May 11, 2021, the City disclosed an additional record that related to the intersection of Mt. Ephraim Avenue and Chase Street. A review of that record indicates that it may have been responsive to the subject OPRA request to the extent that the job described therein related to the storm drain in question. Thus, it is reasonable to suggest that this record should have been provided in the City's response on May 5, 2021. Based on all of the forgoing, the Custodian did not fully comply with the Order.

Therefore, the Custodian did not fully comply with the Council's April 27, 2021 Interim Order. Specifically, Custodian's Counsel stated that one (1) responsive record was being simultaneously sent to the Complainant. Further, Counsel submitted additional certifications sufficiently addressing each individual's search and whether they located responsive records. However, the Custodian failed to disclose an additional responsive record and did not simultaneously provide 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)).

Here, the Custodian unlawfully denied access to two (2) records responsive to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. However, and although the Custodian did not fully comply with the Council’s April 27, 2021 Interim Order, the responsive record was disclosed to the Complainant on May 5, and 11, 2021 respectively. 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 (App. Div. 2006), the court held that a complainant is a “prevailing party” if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. *Id.* at 432. Additionally, the court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (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.

[Mason at 73-76 (2008).]

The Court in Mason, further held that:

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

[Id. at 76.]

The Complainant submitted this complaint contending that the City failed to disclose records that were responsive to the subject OPRA request. The Complainant requested that the GRC find that an unlawful denial of access occurred; order disclosure of the actual responsive records; and determine that she was a prevailing party. In the SOI, the Custodian argued that although the request was overly broad, the City attempted to fulfill it by disclosing multiple permits for 1576 Mt. Ephraim Avenue. The Custodian also argued that no additional responsive records existed. However, the Council disagreed and reasoned that the evidence of record did not sufficiently prove that no responsive records existed. Thus, the Council ordered the Custodian and others within the City to perform a new search. In response to that Order, the City was able to

locate and disclose to the Complainant responsive work orders. The foregoing thus supports that the Complainant was a prevailing party entitled to an award of reasonable attorney's fees.⁶

Therefore, pursuant to the Council's April 27, 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. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the City was able to locate and disclose responsive records because of the Council's Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not fully comply with the Council's April 27, 2021 Interim Order. Specifically, Custodian's Counsel stated that one (1) responsive record was being simultaneously sent to the Complainant. Further, Counsel submitted additional certifications sufficiently addressing each individual's search and whether they located responsive records. However, the Custodian failed to disclose an additional responsive record and did not simultaneously provide certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to two (2) records responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6. However, and although the Custodian did not fully comply with the Council's April 27, 2021 Interim Order, the responsive record was disclosed to the Complainant on May 5, 2021. 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 April 27, 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 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's

⁶ The GRC notes that although Complainant's Counsel sought a specific fee amount in his May 6, 2021 letter, the Council had yet decided on said issue. Further, the Council did not request submission of a fee application from Complainant's Counsel. Thus, the Council will follow its current process for addressing fee issues and allow the parties an opportunity to reach a settlement prior to requiring a filing consistent with N.J.A.C. 5:105-2.13.

filing of a Denial of Access Complaint and the relief ultimately achieved Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the City was able to locate and disclose responsive records because of the Council's Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Prepared By: Frank F. Caruso
Executive Director

June 22, 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

April 27, 2021 Government Records Council Meeting

Brittany Olt
Complainant

Complaint No. 2019-88

v.

City of Camden (Camden)
Custodian of Record

At the April 27, 2021 public meeting, the Government Records Council (“Council”) considered the April 20, 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 may have unlawfully denied access to the requested storm drain records responsive to the Complainant’s clarified OPRA request. N.J.S.A. 47:1A-6. Specifically, the evidence of record indicates that the Custodian misinterpreted the OPRA request to seek records pertaining to 1576 Mt. Ephraim Avenue and “properties adjacent” thereto. Thus, the Custodian must conduct a new search for responsive records and disclose those records located or provide a lawful basis for denying access to them. Should the Custodian and/or other City of Camden officials not locate any responsive records, the Custodian and those officials shall certify to this fact, inclusive of a detailed explanation of how each searched for responsive records.
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 27th Day of April 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: April 28, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 27, 2021 Council Meeting**

**Brittany Olt¹
Complainant**

GRC Complaint No. 2019-88

v.

**City of Camden (Camden)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail or facsimile:

1. “[A]ny documentation concerning any work done” by the City of Camden (“City”) employees or contractors at 1576 Mt. Ephraim Avenue from 1980 to present.
2. “[A]ny documentation establishing who or what is responsible for the upkeep” of storm drains in the area of 1576 Mt. Ephraim Avenue.

Custodian of Record: Luis Pastoriza

Request Received by Custodian: April 24, 2019

Response Made by Custodian: April 24, 2019

GRC Complaint Received: May 8, 2019

Background³

Request and Response:

On April 24, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On the same day, the Custodian responded in writing seeking clarification of the Complainant’s OPRA request. The Custodian asked the Complainant to “identify the specific document” sought. The Complainant responded clarifying that she sought “[a]ny document that deals with the work” such as “work order[s], contract[s], *etc.*” The Custodian responded again seeking clarification to include the “type of document” the Complainant sought. The Custodian also asked the Complainant to provide the name of a company or project for which she sought contracts. The Complainant responded clarifying her OPRA request to seek:

Any written or digital items, including but not limited to, work orders, contracts,

¹ Represented by John Kearney, Esq. (Haddon Heights, NJ).

² Represented by Tim Galanaugh, Esq., Assistant City Attorney (Camden, 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.

maintenance reports, incident reports, work logs, photographs, and videos concerning the upkeep, installation, and/or maintenance of the storm drain located adjacent to the property at 1576 Mt. Ephraim Avenue.

The Custodian forwarded the Complainant's clarified OPRA request to multiple departments within the City for review and response. Building Bureau employee Diana Rivera responded to the Custodian asking him to obtain an exact address.

On April 25, 2019, the Custodian e-mailed the Complainant stating that the Building Bureau asked for a specific address to narrow the search. On the same day, the Complainant responded to the Custodian, informing him that she already provided the street address; notwithstanding, she provided the address again and attached a photograph of the storm drain in question. The Custodian forwarded the Complainant's response to Ms. Rivera and she sent all permits for that address to the Custodian later in the day.

On May 6, 2019, the Complainant e-mailed the Custodian seeking a status update on her OPRA request. On the same day, the Custodian forwarded the Complainant's e-mail and original OPRA request to several City departments seeking an immediate response, noting that the City's statutory response time frame expired on May 3, 2019. Inspector Benjamin Cardi of the Engineer's Department responded stating that no records were located. Clerk Yvette Torres-Velazquez of the Department of Public Works also responded stating that no records existed. On the same day, the Custodian responded in writing to the Complainant disclosing all permits relevant to the property located at 1576 Mt. Ephraim Avenue.

Denial of Access Complaint:

On May 8, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant contended that the Custodian disclosed records that were not responsive to the OPRA request. The Complainant requested that the Council: 1) determine that the Custodian unlawfully denied access under OPRA; 2) order disclosure of records responsive to the subject OPRA request; and 3) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.

Statement of Information:

On May 22, 2019, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on April 24, 2019. The Custodian certified that upon obtaining clarification from the Complainant, his search included disseminating the request to the relevant City departments for review and response. The Custodian certified that he responded in writing on May 6, 2019 disclosing ten (10) pages of permits on file for 1576 Mt. Ephraim Avenue.

The Custodian argued that despite the overly broad nature of the original OPRA request, the City tried to assist the Complainant in order to fulfill it. The Custodian argued that he made all reasonable efforts to clarify the OPRA request and relied on the various departments to identify responsive records. The Custodian argued that the Complainant appeared to be seeking records

associated with “properties adjacent to 1576 Mt. Ephraim Avenue.” The Custodian further contended that the Complainant provided no additional identifiers for either of those properties or the relevant storm drain.

Finally, the Custodian contended that although the Complainant identified a Superior Court action in the Denial of Access Complaint, she did not provide a docket number. The Custodian also argued that the Complainant failed to verify the complaint, which was instead signed by Complainant’s Counsel.

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.

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Further, in Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the Council held that a custodian did not unlawfully deny access to a request where they certified, and the record reflected, that they provided all records responsive to a request.

In this matter, the Custodian sought clarification on two (2) occasions to try and narrow the Complainant’s OPRA request. Ultimately, the clarified OPRA request sought certain specific records referring to a storm drain located in front of 1576 Mt. Ephraim Avenue. The Custodian received multiple permits for that address, as well as responses from both Mr. Cardi and Ms. Torres-Velazquez that no records existed. The Custodian disclosed the permits and the Complainant filed this complaint arguing that the permits were not responsive to her OPRA request. In the SOI, the Custodian asserted that the Complainant sought records associated with “properties adjacent to 1576 Mt. Ephraim Avenue” and provided no additional addresses or storm drain identifiers. The Custodian certified that he provided the permits he obtained from Ms. Rivera.

Having reviewed the submissions of the parties, the GRC is not satisfied that the evidence of record supports a finding as it relates to the e-mail requests that is consistent with Pusterhofer and Burns. Specifically, the Custodian alleged that the Complainant sought records regarding properties adjacent to 1576 Mt. Ephraim Avenue. However, the Complainant’s OPRA request clearly identifies the actual storm drain, of which she provided a picture, and not the actual property. Notwithstanding the Custodian’s efforts to seek clarification of the request twice (the second time to ask for the property address which was provided in the original OPRA request), and Mr. Cardi’s and Ms. Torres-Velazquez’s statements that they did not maintain responsive records, the Custodian appears to have misconstrued the subject OPRA request, and improperly denied it. The Custodian has also failed explain why, as part of his request for clarification, he did

not ask the Complainant for additional “storm drain” identifiers that he argued in the SOI were not included in the original OPRA request.

Accordingly, the Custodian may have unlawfully denied access to the requested storm drain records responsive to the Complainant’s clarified OPRA request. N.J.S.A. 47:1A-6. Specifically, the evidence of record indicates that the Custodian misinterpreted the OPRA request to seek records pertaining to 1576 Mt. Ephraim Avenue and “properties adjacent” thereto. Thus, the Custodian must conduct a new search for responsive records and disclose those records located or provide a lawful basis for denying access to them. Should the Custodian and/or other City officials not locate any responsive records, the Custodian and those officials shall certify to this fact, inclusive of a detailed explanation of how each searched for responsive records.

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 may have unlawfully denied access to the requested storm drain records responsive to the Complainant’s clarified OPRA request. N.J.S.A. 47:1A-6. Specifically, the evidence of record indicates that the Custodian misinterpreted the OPRA request to seek records pertaining to 1576 Mt. Ephraim Avenue and “properties adjacent” thereto. Thus, the Custodian must conduct a new search for responsive records and disclose those records located or provide a lawful basis for denying access to them. Should the Custodian and/or other City of Camden officials not locate any responsive records, the Custodian and those officials shall certify to this fact, inclusive of a detailed explanation of how each searched for responsive records.
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**

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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: Frank F. Caruso
Executive Director

April 20, 2021

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."

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