



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**

**July 27, 2021 Government Records Council Meeting**

Mitchell Kotler  
Complainant

Complaint No. 2019-99

v.

Town of Morristown (Morris)  
Custodian of Record

At the July 27, 2021 public meeting, the Government Records Council (“Council”) considered the July 20, 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. Because the parties failed to reach a fee agreement, and because the Complainant’s Counsel subsequently submitted a timely fee application, the Council should determine the reasonable amount of attorney’s fees to which the Complainant is entitled.
2. The Council finds that four (4) hours at \$450.00 per hour is reasonable for the work performed in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Complainant’s Counsel in the corrected amount of \$1,800.00, representing four (4) hours of service at \$450.00 per hour and the decreased amount of \$3.80 in costs associated with expenses for this complaint. Thus, the total amount of fees awarded to Complainant’s Counsel is \$1,803.80.**

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 27<sup>th</sup> Day of July 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: July 29, 2021**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Prevailing Party Attorney's Fees*  
**Supplemental Findings and Recommendations of the Executive Director  
July 27, 2021 Council Meeting**

**Mitchell Kotler<sup>1</sup>  
Complainant**

**GRC Complaint No. 2019-99**

v.

**Town of Morristown (Morris)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of municipal court summonses written by Code Enforcement inspectors from October 1, 2018 through March 8, 2019.<sup>3</sup>

**Custodian of Record:** Margot G. Kaye  
**Request Received by Custodian:** March 19, 2019  
**Response Made by Custodian:** March 19, 2019  
**GRC Complaint Received:** May 28, 2019

**Background**

**December 15, 2020 Council Meeting:**

At its December 15, 2020 public meeting, the Council considered the December 8, 2020 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with the Council's November 10, 2020 Interim Order because she responded in the prescribed time frame disclosing to the Complainant the responsive Code summonses and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to the responsive summonses, she timely complied with the Council's Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do

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<sup>1</sup> Represented by Walter M. Luers, Esq., of Cohn, Lifland, Pearlman, Herrmann & Knopf, LLP. (Saddle Brook, NJ) (previously of Law Offices of Walter M. Luers, LLC (Annandale, NJ)). Mr. Luers entered his appearance on September 20, 2019.

<sup>2</sup> Represented by Joni Noble McDonnell, Esq., of Inglesino, Webster, Wyciskala & Taylor, LLC. (Parsippany, NJ).

<sup>3</sup> The Complainant sought additional records that are not at issue in this complaint.

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 November 10, 2020 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters 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 Custodian complied with the Council's Order thus resulting in a change in her conduct. 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 December 16, 2020, the Council distributed its Interim Order to all parties. On January 26, 2021 Complainant's Counsel e-mailed the Government Records Council ("GRC") stating that he did not receive the Interim Order until January 8, 2021. Counsel sought an additional twenty (20) business days to negotiate the fee issue.<sup>4</sup> On January 27, 2021, the GRC responded granting the parties an extension of time until February 25, 2021 to negotiate the fee issue based on the circumstances presented by Counsel.

On February 25, 2021, Complainant's Counsel e-mailed the GRC advising that the parties failed to settle the fee issue and submitting a fee application. The fee application and Certification of Services ("Certification") set forth the following:

1. The complaint name and number: Kotler v. Town of Morristown (Morris), GRC Complaint No. 2019-99.
2. Counsel's law firm affiliation: Counsel is a partner at Cohn, Lifland, Pearlman, Herrmann & Knopf, LLP.

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<sup>4</sup> Complainant's Counsel also submitted a letter brief requesting that the GRC decide whether redactions made to the disclosed records were appropriate under N.J.S.A. 47:1A-1. Counsel argued that said redactions were not proper because defendant addresses are not criminal investigatory, the Judiciary routinely makes them available, and the Town of Morristown previously disclosed the records without redactions. However, the GRC declines to address this issue because it was not raised prior to the Council's December 15, 2020 decision and no formal request for reconsideration has been submitted.

3. A statement of client representation: Counsel certified to his services, including communications with the Complainant, reviewing submissions, and Council decisions, preparing submissions and correspondence for the GRC, and preparing his portion of the fee application.
4. The hourly rate of all attorneys and support staff involved in the complaint: Counsel certified that he charged \$450.00 per hour.
5. Copies of time sheets for each professional involved in the complaint: Counsel supplied a copy of his time sheets from September 20, 2019 through January 26, 2021. During the Fee Period, Counsel billed a total of 4.0 hours rounded to the nearest tenth of an hour (minimum charge of 0.1) for a total fee of \$1,850.00.
6. Evidence that the rates charged are in accordance with prevailing rates in the relevant community, including years of experience, skill level and reputation: Counsel certified that he charged \$450.00 based on extensive experience litigating OPRA complaints before the GRC and in Superior Court. *See i.e. Paff v. Galloway Twp.*, 444 N.J. Super. 495 (App. Div. 2016) (*reversed* 229 N.J. 340 (2017)). Counsel further affirmed that he has appeared in Supreme Court of New Jersey six (6) times. *See i.e. Verry v. Franklin Fire Dist. No. 1*, 230 N.J. 285 (2017). Counsel further noted that he was “counsel of record” in several OPRA matters before the Superior Court that resulted in published opinions. *See i.e. Scheeler v. Atlantic Cnty. Muni. Joint Ins. Fund*, 454 N.J. Super. 621 (App. Div. 2018). Counsel also certified to his educational and teaching experience, as well as his time as President of the New Jersey Foundation for Open Government and extensive activities with the New Jersey State Bar Foundation. *Luers Cert.* ¶ 3(7). Counsel averred that the requested fee is reasonable and comparable to other attorneys representing clients in OPRA litigation, such as Thomas Cafferty, Esq; Richard Gutman, Esq. or the law firm Pashman, Stein. *Luers Cert.* ¶ 7, 13-14.
7. Detailed documentation of expenses: Counsel sought \$338.80 in reimbursements for expenses, including “\$300.00 to file the complaint and order to show cause, \$35.00 to file our substitution of counsel, and copying and scanning costs.”

### Analysis

#### Compliance

At its December 15, 2020 meeting, the Council ordered the parties to “confer in an effort to decide the amount of reasonable attorney’s fees” and notify the GRC of any fee agreement. Further, the Council ordered that, should the parties not reach an agreement, the Complainant’s Counsel “shall submit a fee application . . . in accordance with N.J.A.C. 5:105-2.13.” On December 16, 2020, the Council distributed its Interim Order to all parties, providing the parties twenty (20) business days to reach a fee agreement. Thus, the parties were required to notify the GRC of any agreement by January 19, 2021.

On January 26, 2021, Complainant's Counsel provided circumstances as to the delay in response and sought additional time to negotiate the fee issue. On January 27, 2021, the GRC granted an extension through February 25, 2021 based on the circumstances presented by Counsel. On February 25, 2021, Complainant's Counsel advised the GRC that a settlement was not reached and that he was submitting his fee application for consideration.

Therefore, because the parties failed to reach a fee agreement, and because the Complainant's Counsel subsequently submitted a timely fee application, the Council should determine the reasonable amount of attorney's fees to which the Complainant is entitled.

### **Prevailing Party Attorney Fee Award**

“Under the American Rule, adhered to by the . . . courts of this state, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser.” Rendine v. Pantzer, 141 N.J. 292, 322 (1995) (internal quotation marks omitted). However, this principle is not without exception. New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't of Corrections, (“NJMDP”) 185 N.J. 137, 152 (2005). Some statutes, such as OPRA, incorporate a “fee-shifting measure: to ensure ‘that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in cases involving statutory rights, . . . and to ensure justice for all citizens.’” Id. at 153 (quoting Coleman v. Fiore Bros., 113 N.J. 594, 598, (1989)).

OPRA provides that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State.” Id. at 152 (citing N.J.S.A. 47:1A-1). OPRA further 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. See generally NJDPM, 185 N.J. at 137 (“By making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the Legislature intended to even the fight.” Id. at 153. (quoting Courier News v. Hunterdon Cnty. Prosecutor's Office, 378 N.J. Super. 539, 546 (App. Div. 2005)).

In the instant matter, the Council found the Complainant achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the [C]ustodian's conduct.” Teeters, 387 N.J. Super. at 432. Further, the Council found a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 73. Accordingly, the Council ruled that the Complainant was a prevailing party, who is entitled to an award of a reasonable attorney's fee, and ordered the parties to cooperate in an effort to reach an agreement on fees. Absent the parties' ability to reach an agreement, the Council provided the Complainant's Counsel an opportunity to file an application for fees.

### **A. Standards for Fee Award**

The starting “‘point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate,’ a calculation known as the lodestar.” Rendine, 141 N.J. at 324 (quoting Hensley v. Eckerhart, 461 U.S. 424, 434 (1983)). Hours, however, are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. Hensley, 461 U.S. at 434. When determining the reasonableness of the hourly rate charged, the GRC should consider rates for similar services by lawyers of reasonably comparable experience, skill, and reputation in the same geographical area. Walker v. Giuffre, 415 N.J. Super. 597, 606 (App. Div. 2010) (quoting Rendine, 141 N.J. at 337). However, the fee-shifting statutes do not contemplate payment for the learning experience of attorneys for the prevailing party. HIP (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc., 291 N.J. Super. 144, 160 (citing Council Entm’t, Inc. v. Atlantic City, 200 N.J. Super. 431, 441-42 (Law Div. 1984)).

Additionally, the NJDPM Court cautioned that “unusual circumstances may occasionally justify an upward adjustment of the lodestar” but further cautioned that “[o]rdinarily[] the facts of an OPRA case will not warrant an enhancement of the lodestar amount because the economic risk in securing access to a particular government record will be minimal. For example, in a ‘garden variety’ OPRA matter . . . enhancement will likely be inappropriate.” Id. at 157. OPRA neither mandates nor prohibits enhancements. NJDPM, 185 N.J. at 157. However, “[b]ecause enhancements are not preordained . . . [they] should not be made as a matter of course.” Ibid. The lodestar enhancement may be adjusted, either upward or downward, depending on the degree of success achieved. Id. at 153-55. “[T]he critical factor in adjusting the lodestar is the degree of success obtained.” Id. at 154 (quoting Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 556 (App. Div. 1993) (quoting Hensley, 461 U.S. at 435)). If “a plaintiff has achieved only partial or limited success . . . the product of hours reasonably expended on the litigation . . . times a reasonable hourly rate may be an excessive amount.” NJDPM, 185 N.J. at 153 (quoting Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (internal quotation marks omitted)). Conversely, “[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.” NJDPM, 185 N.J. at 154 (quoting Hensley, 461 U.S. at 435).

Moreover, in all cases, an attorney’s fee must be reasonable when interpreted in light of the Rules of Professional Conduct. For instance, in Rivera v. Bergen Cnty. Prosecutor’s Office, 2012 N.J. Super. Unpub. LEXIS 2752 (December 11, 2012) (citing Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21-22 (2004)), the trial court stated that:

To verify the reasonableness of a fee, courts must address: 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and 8) whether the fee is fixed or contingent.

[Rivera, 2012 N.J. Super. Unpub. LEXIS 2752, at 11 (applying R.P.C. 1.5(a)).]

In addition, N.J.A.C. 5:105-2.13 sets forth the information that counsel must provide in his or her application seeking fees in an OPRA matter. Providing the requisite information required by its regulations permits the Council to analyze the reasonableness of the requested fee.

Finally, the Court has noted that “[i]n fixing fees against a governmental entity, the judge must appreciate . . . that ‘the cost is ultimately borne by the public’ and that ‘the Legislature . . . intended that the fees awarded serve the public interest as it pertains to those individuals who require redress in the context of a recognition that limited public funds are available for such purposes.’” HIP, 291 N.J. Super. at 167 (quoting Furey v. Cnty. of Ocean, 287 N.J. Super. 42, 46 (App. Div. 1996)).

## **B. Evaluation of Fee Application**

### **1. Lodestar Analysis**

#### **a. Hourly Rate**

In the instant matter, Counsel is seeking a fee award of \$1,850.00, representing four (4) hours at \$450.00 per hour. In support of this hourly rate, Counsel certified that this rate is supported by hourly rates approved by the Superior for similarly experienced attorneys. Luers Cert. ¶ 3, 7, 13-14. Counsel also highlighted his vast experience in cases before the Supreme Court, Superior Court, and GRC. The GRC also has intimate knowledge of the extent to which Counsel has presented clients in the Denial of Access Complaint process and additional litigation associated therewith. The GRC also notes that it has previously awarded Counsel his proposed hourly rate of \$300.00 (see e.g. Carter v. Franklin Fire Dist. No. 2 (Somerset), GRC Complaint No. 2011-382 (December 2014)). However, Counsel has amassed significant experience and proven that an increase is commensurate with said experience, as well as on level with hourly rates being awarded to attorneys with comparable OPRA litigation experience.

Based on the foregoing, the rate of \$450.00 is reasonable for a practitioner with Counsel’s experience and skill level in this geographical area.

#### **b. Time Expended**

In support of his request for fees, Counsel submitted a log of his time. For the period from September 20, 2019 and January 26, 2021, Counsel billed a total of three (3) hours for work on the file. This included communications with the Complainant, reviewing correspondence and submissions associated with this complaint, and composing submissions to the GRC. Counsel further affirmed that he billed one (1) hour to prepare the fee application. Counsel noted that his time was rounded to the nearest tenth of an hour starting at a minimum of 0.1 hours.

In accordance with the mandates of N.J.A.C. 105-2.13(b), Counsel’s time sheet provided detailed descriptions of the exact work performed in the required tenths of an hour. N.J.A.C. 105-2.13(b)(5). The entries reasonably describe the work conducted and the amount of time necessary



to complete those tasks. The entries also correlate to the actions of the parties, including the GRC, throughout this adjudication process.

The review of an application for fees, by necessity, must be conducted on a case-by-case basis. The Council finds that Counsel's fee application conforms to the requirements of N.J.A.C. 1:105-2.13(b) and provides the Council with enough detailed information from which to conduct its analysis.

The GRC finds that the accounting of charges is acceptable. Specifically, Counsel has demonstrated that he narrowly construed his fee application to essential tasks associated with representing the Complainant in this action. However, in multiplying the hourly rate by the hours expended, the total proposed fee calculation of \$1,850.00 is in excess by \$50.00. Thus, the total amount should be corrected to accurately represent that the total fee for four (4) hours of time at a rate of \$450.00 per hour totals \$1,800.00.

Further, Counsel sought costs in the amount of \$338.80 associated with a complaint filing fee (\$300.00), substitution of counsel filing (\$35.00), and copying/scanning costs (\$3.80). However, \$335.00 of the requested cost appears to be associated with the Superior Court process: the GRC's Denial of Access Complaint process does not include either an initial filing fee or any fees associated with substitution of counsel. See N.J.S.A. 47:1A-7(f). While it is possible that the forgoing was entered into the fee application in error, the GRC cannot award \$335.00 for costs not applicable to this complaint process. Thus, the GRC finds that the only additional identified fee reasonably associated with "costs" is \$3.80 for copying/scanning.

Therefore, the Council finds that four (4) hours at \$450.00 per hour is reasonable for the work performed in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Complainant's Counsel in the corrected amount of \$1,800.00, representing four (4) hours of service at \$450.00 per hour and the decreased amount of \$3.80 in costs associated with expenses for this complaint. Thus, the total amount of fees awarded to Complainant's Counsel is \$1,803.80.**

## **2. Enhancement Analysis**

Counsel declined a lodestar adjustment; thus, no enhancement should be awarded.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the parties failed to reach a fee agreement, and because the Complainant's Counsel subsequently submitted a timely fee application, the Council should determine the reasonable amount of attorney's fees to which the Complainant is entitled.
2. The Council finds that four (4) hours at \$450.00 per hour is reasonable for the work performed in the instant matter. **Accordingly, the Executive Director recommends that the Council award fees to Complainant's Counsel in the corrected amount of \$1,800.00, representing four (4) hours of service at \$450.00 per hour and the**

**decreased amount of \$3.80 in costs associated with expenses for this complaint. Thus, the total amount of fees awarded to Complainant's Counsel is \$1,803.80.**

3. Counsel declined a lodestar adjustment; thus, no enhancement should be awarded.

Prepared By: Frank F. Caruso  
Executive Director

July 20, 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

December 15, 2020 Government Records Council Meeting

Mitchell Kotler  
Complainant

Complaint No. 2019-99

v.

Town of Morristown (Morris)  
Custodian of Record

At the December 15, 2020 public meeting, the Government Records Council (“Council”) considered the December 8, 2020 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 November 10, 2020 Interim Order because she responded in the prescribed time frame disclosing to the Complainant the responsive Code summonses and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to the responsive summonses, she timely complied with the Council’s Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s November 10, 2020 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters 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 Custodian complied with the Council’s Order thus resulting in a change in her conduct. 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 15<sup>th</sup> Day of December 2020

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: December 16, 2020**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
December 15, 2020 Council Meeting**

**Mitchell Kotler<sup>1</sup>  
Complainant**

**GRC Complaint No. 2019-99**

v.

**Town of Morristown (Morris)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of municipal court summonses written by Code Enforcement inspectors from October 1, 2018 through March 8, 2019.<sup>3</sup>

**Custodian of Record:** Margot G. Kaye

**Request Received by Custodian:** March 19, 2019

**Response Made by Custodian:** March 19, 2019

**GRC Complaint Received:** May 28, 2019

**Background**

**November 10, 2020 Council Meeting:**

At its November 10, 2020 public meeting, the Council considered the October 27, 2020 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian unlawfully denied access to the Complainant's OPRA request under the basis that it was invalid. N.J.S.A. 47:1A-6, Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007). Specifically, the OPRA request identifies a specific record and time period that would only require a search to locate and disclose responsive records. See also Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010). Based on this, the Custodian shall perform a search to locate responsive records and either 1) disclose them to the Complainant; or 2) certify if no records exist. Should the Custodian believe a special service charge is warranted, she must complete a 14-point analysis and provide the Complainant with the estimated cost to provide the responsive records.

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<sup>1</sup> Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Annandale, NJ). Mr. Luers entered his appearance on September 20, 2019.

<sup>2</sup> Represented by Joni Noble McDonnell, Esq., of Inglesino, Webster, Wyciskala & Taylor, LLC. (Parsippany, NJ).

<sup>3</sup> The Complainant sought additional records that are not at issue in this complaint.

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 deliver<sup>4</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>5</sup> to the Executive Director.<sup>6</sup>**
3. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC's 14-point analysis<sup>7</sup> and calculate the appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall deliver to the Executive Director certified confirmation of compliance as first provided above. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director within that twenty (20) business days a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification in accordance with R. 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.**
4. 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.

#### Procedural History:

On November 12, 2020, the Council distributed its Interim Order to all parties. On November 18, 2020, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that she obtained the responsive municipal courts summonses sought by the

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<sup>4</sup> 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.

<sup>5</sup> "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."

<sup>6</sup> 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.

<sup>7</sup> See <https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf>.

Complainant. The Custodian certified that she was disclosing same without the imposing a special service charge. The Custodian noted that she redacted defendant addresses in accordance with N.J.S.A. 47:1A-1.

## Analysis

### Compliance

At its November 10, 2020 meeting, the Council ordered the Custodian to disclose the requested code summonses, with the imposition of a special service charge where applicable, or certify if none exist. The Council further ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules R. 1:4-4, to the Executive Director. On November 12, 2020, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on November 19, 2020.

On November 18, 2020, the fourth (4<sup>th</sup>) business day after receipt of the Council's Order, the Custodian. Therein, the Custodian certified that she obtained and was disclosing to the Complainant the responsive Code summonses with redactions for defendant addresses. The Custodian noted that she did not impose a special service charge.

Therefore, the Custodian complied with the Council's November 10, 2020 Interim Order because she responded in the prescribed time frame disclosing to the Complainant the responsive Code summonses 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 responsive summonses, she timely complied with the Council's Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Prevailing Party Attorney's Fees**

OPRA provides that:

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

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

In Teeters v. DYFS, 387 N.J. Super. 423 (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 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . ." Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, citing Teeters, 387 N.J. Super. at 429;



see, e.g., Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), certif. denied, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

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

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

[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.]

In the matter before the Council, the Complainant filed the instant complaint contending that he was unlawfully denied access to the requested summonses. Following submission of the complaint, Complainant's Counsel entered his appearance. In the SOI, the Custodian maintained the position that she lawfully denied access to the subject OPRA request because it was invalid. The Council disagreed, holding that the Custodian unlawfully denied access to the OPRA request and ordering her to disclose those records that exist or to certify otherwise. On November 18, 2020, the Custodian complied with the Order by disclosing the requested summonses. Thus, the evidence of record supports a finding that the Complainant is a prevailing party subject to attorney's fees commensurate with Complainant's Counsel work on this complaint.

Therefore, pursuant to the Council's November 10, 2020 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct.” Teeters, 387 N.J. Super. 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 Custodian complied with the Council's

Order thus resulting in a change in her conduct. 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 complied with the Council's November 10, 2020 Interim Order because she responded in the prescribed time frame disclosing to the Complainant the responsive Code summonses and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to the responsive summonses, she timely complied with the Council's Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's November 10, 2020 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters 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 Custodian complied with the Council's Order thus resulting in a change in her conduct. 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

December 8, 2020



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

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**INTERIM ORDER**

**November 10, 2020 Government Records Council Meeting**

Mitchell Kotler  
Complainant

Complaint No. 2019-99

v.

Town of Morristown (Morristown)  
Custodian of Record

At the November 10, 2020 public meeting, the Government Records Council (“Council”) considered the October 27, 2020 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian unlawfully denied access to the Complainant’s OPRA request under the basis that it was invalid. N.J.S.A. 47:1A-6, Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007). Specifically, the OPRA request identifies a specific record and time period that would only require a search to locate and disclose responsive records. See also Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010). Based on this, the Custodian shall perform a search to locate responsive records and either 1) disclose them to the Complainant; or 2) certify if no records exist. Should the Custodian believe a special service charge is warranted, she must complete a 14-point analysis and provide the Complainant with the estimated cost to provide the 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 deliver<sup>1</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>2</sup> to the Executive Director.<sup>3</sup>**

<sup>1</sup> 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.

<sup>2</sup> "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."

<sup>3</sup> 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. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC's 14-point analysis<sup>4</sup> and calculate the appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall deliver to the Executive Director certified confirmation of compliance as first provided above. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director within that twenty (20) business days a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification in accordance with R. 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.**
4. 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.

Interim Order Rendered by the  
Government Records Council  
On The 10<sup>th</sup> Day of November 2020

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: November 12, 2020**

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<sup>4</sup> See <https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf>.

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
November 10, 2020 Council Meeting**

**Mitchell Kotler<sup>1</sup>  
Complainant**

**GRC Complaint No. 2019-99**

v.

**Town of Morristown (Morris)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of municipal court summonses written by Code Enforcement inspectors from October 1, 2018 through March 8, 2019.<sup>3</sup>

**Custodian of Record:** Margot G. Kaye  
**Request Received by Custodian:** March 19, 2019  
**Response Made by Custodian:** March 19, 2019  
**GRC Complaint Received:** May 28, 2019

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

**Request and Response:**

On March 15, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 19, 2019, Office of the Clerk staff member Steffanie Morales responded in writing on behalf of the Custodian denying the subject OPRA request as invalid because it failed to identify specific records and would require research. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Shipyard Assoc’s v. City of Hoboken, 2015 N.J. Super. Unpub. LEXIS 2117 (App. Div. 2015).

On the same day, the Complainant asked that records responsive to the subject OPRA request be disclosed, noting that he made a similar request in the past and it was “fulfilled easily.” Ms. Morales responded stating that she needed an address as no log exists and a search of every property file would be required. The Complainant responded advising that he previously received over 100 summonses within a certain date range. The Complainant stated that he would try and locate the prior OPRA request for support of the forgoing. The Complainant noted that he could not provide an address until he saw actual summonses. The Complainant further noted that a

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<sup>1</sup> Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Annandale, NJ). Mr. Luers entered his appearance on September 20, 2019.

<sup>2</sup> Represented by Joni Noble McDonnell, Esq., of Inglesino, Webster, Wyciskala & Taylor, LLC. (Parsippany, NJ).

<sup>3</sup> The Complainant sought additional records that are not at issue in this complaint.

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

Mitchell Kotler v. Town of Morristown (Morris), 2019-99 – Findings and Recommendations of the Executive Director

request is not invalid because records are “difficult to find.” Ms. Morales responded stating that the Complainant should contact Andre King in Property Maintenance, who proffered the denial. Ms. Morales also noted that Mr. King advised that the request was invalid because they could not narrow it down to a specific address and OPRA “cannot be used as a research tool.”

On March 20, 2019, the Custodian responded in writing to the Complainant’s OPRA request denying same. The Custodian stated that the subject OPRA request is invalid. The Custodian stated that issued summonses are placed in the corresponding property file and the Town did not keep an individual Code Enforcement summonses folder. The Custodian noted that if the Complainant was still interested in obtaining all court summonses, he may consider contacting Morristown Municipal Court (“Court”) and submitting a Judiciary Records Request.

#### Denial of Access Complaint:

On May 28, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian unlawfully denied access to the subject OPRA request. The Complainant initially argued that he submitted a similar request on July 28, 2016 and received over 100 pages of records within a few days at the cost of approximately \$8.00. The Complainant thus argued that it is easy to see that the current denial “has no legal justification.”

The Complainant next argued that Shipyard, 2015 N.J. Super. Unpub. LEXIS 2117, did not apply here. The Complainant noted that there, plaintiff sought generic “records” requiring defendant to “exercise human judgement.” The Complainant argued instead, the Custodian was simply required to locate and disclose property maintenance summonses within a specified date range. The Complainant contended that the Custodian was not required to exercise judgement or perform research. The Complainant noted that similarly, MAG, 375 N.J. Super. 534 does not apply for the reasons discussed above.

The Complainant finally asserted that the Custodian’s indication that records would be “difficult to find” due to the Town’s filing methods is of no moment here. The Complainant asserted that the Town should consider changing its filing system; notwithstanding, the Town’s self-imposed hardship is not a valid defense. The Complainant argued that the custodians could not avoid disclosure “by selecting an obscure, difficult filing system.”

#### Statement of Information:<sup>5</sup>

On October 23, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on March 19, 2019. The Custodian certified that although no search was performed, the Department of Code Enforcement (“Department”) estimated that they would have to review between 3,000 and 4,000 files. The Custodian certified that Ms. Morales and she responded in writing on March 19, and 20, 2019<sup>6</sup>

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<sup>5</sup> On June 12, 2019, this complaint was referred to mediation. On October 9, 2019, this complaint was referred back to the GRC for adjudication.

<sup>6</sup> The Custodian stated that she also responded on May 14, 2019. However, a copy of that response was not included in either the Denial of Access Complaint or SOI. Additionally, neither party addresses any responses beyond those occurring on March 19, and 20, 2019.

respectively denying the subject request as invalid. MAG, 375 N.J. Super. 534; Shipyard, 2015 N.J. Super. Unpub. LEXIS 2117.

The Custodian contended that she lawfully denied access to the Complainant's OPRA request because it was invalid. The Custodian asserted that the Department advised that it did not maintain a master list of summonses. The Custodian reiterated that the Department advised that would have to search through an estimated 3,000 to 4,000 property files to locate responsive records. The Custodian argued that she directed the Complainant to the Court because it would present a quicker process. The Custodian noted that she also advised the Complainant that the previous response to his July 28, 2016 was due to a prior Department head obtaining the 100 pages directly from the Court; this practice is no longer in place because the Court requires everyone to file a Judiciary Records Request. The Custodian argued that this is the reason she advised the Complainant that she was treating the subject OPRA request different from July 28, 2016 OPRA request.

### Analysis

#### Validity of Request

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records "readily accessible for inspection, copying, or examination."* N.J.S.A. 47:1A-1.

[MAG, 375 N.J. Super. at 546 (emphasis added).]

The court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

[Id. at 549 (emphasis added).]

The court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files." Id. (emphasis added). Bent v. Stafford Police Dep't,

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381 N.J. Super. 30, 37 (App. Div. 2005);<sup>7</sup> N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

The validity of an OPRA request typically falls into three (3) categories. The first is a request that is overly broad (“any and all” requests seeking “records” generically, *etc.*) and requires a custodian to conduct research. MAG, 375 N.J. Super. 534; Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007). The second is those requests seeking information or asking questions. *See e.g.* Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012). The final category is a request that is either not on an official OPRA request form or does not invoke OPRA. *See e.g.* Naples v. N.J. Motor Vehicle Comm’n, GRC Complaint No. 2008-97 (December 2008).

In Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), the plaintiff appealed from an order of summary judgment entered against him in his suit to compel production by the County of Gloucester of documents requested pursuant to OPRA, consisting of “[a]ny and all settlements, releases or similar documents entered into, approved or accepted from 1/1/2006 to present.” *Id.* at 508. (Emphasis added). The Appellate Division determined that the request sought a specific type of document, although it did not specify a particular case to which such document pertained and was therefore not overly broad. *Id.* at 515-16.

Additionally, the Council addressed the search/research question in Donato, GRC 2005-182. There, the Council held that pursuant to MAG, a custodian is obligated to search his or her files to find identifiable government records listed in a requestor’s OPRA request. The complainant in Donato requested all motor vehicle accident reports from September 5, 2005 to September 15, 2005. The custodian sought clarification of said request on the basis that it was not specific enough. The Council stated that:

Pursuant to [MAG], the Custodian is obligated to search her files to find the identifiable government records listed in the Complainant’s OPRA request (all motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005). However, the Custodian is not required to research her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. The word search is defined as “to go or look through carefully in order to find something missing or lost.” The word research, on the other hand, means “a close and careful study to find new facts or information.” (Footnotes omitted.)

[Id.]

In the matter before the Council, the Complainant’s OPRA request sought code enforcement summonses issued by the Town from October 1, 2018 through March 8, 2019. The Custodian denied the request as invalid because it would require “research” among 3,000 to 4,000 files (*citing* Shipyard, 2015 N.J. Super. Unpub. LEXIS 2117). The Custodian noted that the Town did not maintain a master list of Code summonses nor were they filed in one place. In the Denial of Access Complaint, the Complainant contended that his request was valid and only required the

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<sup>7</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004). Mitchell Kotler v. Town of Morristown (Morris), 2019-99 – Findings and Recommendations of the Executive Director



Custodian to perform a search. The Complainant argued that Shipyard was not applicable here and that the Town could not avoid disclosure because its filing system was not conducive to producing the requested records. In the SOI, the Custodian reiterated her original denial and argued that the request was “too broad.” The Custodian further argued that she was not required to conduct an open-ended search per MAG and Shipyard.

In reviewing the Complainant’s OPRA request, the GRC is persuaded that same is valid and only required a search, as opposed to research. Of note, the subject OPRA request is similar to the request at issue in Burnett and Donato because the Complainant is seeking a certain type of record over a defined time period. The OPRA request requires the Custodian to perform a search for summonses within those files where same may be contained. The time frame adds additional accuracy to this search in that the Custodian can easily identify whether a particular file includes summonses falling therein. That an OPRA request may require an extensive search or result in a voluminous amount of records does not mean that same is overly broad and thus invalid. Indeed, OPRA addresses these situations by allowing for extensions, special service charges, and the substantial disruption exemption. N.J.S.A. 47:1A-5, et seq.

Further, the GRC agrees with the Complainant that Shipyard, 2015 N.J. Super. Unpub. LEXIS 2117 is not relevant to the instant complaint. The Shipyard court was explicit in its finding that appellant’s requests failed to identify “the records sought with reasonable clarity . . .” Id. at 11. Conversely, the Complainant’s OPRA request here does not require research, an open-ended search, or a judgement call as to the responsiveness of an individual record. Instead, it is similar to the Burnett request that the Shipyard court presented in contrast to the requests at issue therein. Id. at 10. Based on this, the subject OPRA request is valid and the Custodian should have endeavored to locate responsive records.

Accordingly, the Custodian unlawfully denied access to the Complainant’s OPRA request under the basis that it was invalid. N.J.S.A. 47:1A-6, Donato, GRC 2005-182. Specifically, the OPRA request identifies a specific record and time period that would only require a search to locate and disclose responsive records. See also Burnett, 415 N.J. Super. 506. Based on this, the Custodian shall perform a search to locate responsive records and either 1) disclose them to the Complainant; or 2) certify if no records exist. Should the Custodian believe a special service charge is warranted, she must complete a 14-point analysis and provide the Complainant with the estimated cost to provide the 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.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian unlawfully denied access to the Complainant’s OPRA request under the basis that it was invalid. N.J.S.A. 47:1A-6, Donato v. Twp. of Union, GRC Complaint

No. 2005-182 (January 2007). Specifically, the OPRA request identifies a specific record and time period that would only require a search to locate and disclose responsive records. See also Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010). Based on this, the Custodian shall perform a search to locate responsive records and either 1) disclose them to the Complainant; or 2) certify if no records exist. Should the Custodian believe a special service charge is warranted, she must complete a 14-point analysis and provide the Complainant with the estimated cost to provide the 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 deliver<sup>8</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>9</sup> to the Executive Director.<sup>10</sup>**
3. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC's 14-point analysis<sup>11</sup> and calculate the appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall deliver to the Executive Director certified confirmation of compliance as first provided above. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director within that twenty (20) business days a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification in accordance with R. 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.**

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<sup>8</sup> 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.

<sup>9</sup> "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."

<sup>10</sup> 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.

<sup>11</sup> See <https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf>.

Mitchell Kotler v. Town of Morristown (Morris), 2019-99 – Findings and Recommendations of the Executive Director

4. 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.

Prepared By: Frank F. Caruso  
Executive Director

October 27, 2020