



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

May 31, 2022 Government Records Council Meeting

Rotimi Owoh, Esq.
(o/b/o Baffi Simmons)
Complainant

Complaint No. 2020-137

v.

Clayton Police Department (Gloucester)
Custodian of Record

At the May 31, 2022 public meeting, the Government Records Council (“Council”) considered the May 24, 2022 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Council dismiss this complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant’s Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 31st Day of May 2022

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: June 2, 2022



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
May 31, 2022 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of
Baffi Simmons)¹
Complainant**

GRC Complaint No. 2020-137

v.

**Clayton Police Department (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:³

1. Driving Under the Influence (“DUI”) and Driving While Intoxicated (“DWI”) summonses and complaints that were prepared by the Police Department from January 2019 through present.
2. Drug possession complaints and summonses prepared and filed by the Police Department from January 2019 through present.
3. Drug paraphernalia complaints and summonses prepared and filed by the Police Department from January 2019 through present.
4. Records, reports, and notifications showing and tracking the number of police officers who triggered the [Early Warning System (“EW System”)] performance indicators, the conduct that triggered the EW System, and the remedial actions and disciplinary actions that were taken by the police department against police officers from 2019 to the present. Please feel free to redact the names and personal identifying information about specific police officers.

Custodian of Record: Chief Andrew Davis
Request Received by Custodian: April 28, 2020
Response Made by Custodian: June 15, 2020
GRC Complaint Received: July 22, 2020

Background

March 29, 2022 Council Meeting:

At its March 29, 2022 public meeting, the Council considered the March 22, 2022 Supplemental Findings and Recommendations of the Executive Director and all related

¹ The Complainant represents Baffi Simmons.

² Represented by Timothy D. Scaffidi, Esq., of the Law Office of Timothy D. Scaffidi, Esq. (Woodbury, NJ).

³ The Complainant sought additional records that are not at issue in this complaint.

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 February 22, 2022 Interim Order because he responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to the Complainant's OPRA request. However, the Custodian complied with the Council's February 22, 2022 Interim Order by locating and providing the Complainant with the requested records. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's February 22, 2022 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 76 (2008). Specifically, the Custodian was ordered to produce the responsive records from the Clayton Police Department. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 76. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Procedural History:

On March 30, 2022, the Council distributed its Interim Order to all parties. On April 22, 2022, the GRC notified the parties that the deadline to notice a settlement on counsel fees expired on April 21, 2022. The GRC also stated that Complainant's Counsel had until the end of business on May 20, 2022 to submit a fee application. That same day, Complainant's Counsel responded to the GRC, stating that the matter had been settled. Complainant's Counsel also stated that the settlement had been approved by the municipality and had signed the purchase order. Complainant's Counsel also stated that he was waiting for the check to arrive.

Analysis

Compliance

At its March 29, 2022 meeting, 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 March 29, 2022, the Council distributed its Interim Order to all parties; thus, the parties' response was due by close of business on April 21, 2022. On April 22, 2022, the GRC informed the parties that the deadline to notice a settlement on the issue of counsel fees. That same day, Complainant's Counsel responded to the GRC via e-mail, stating that the matter had been settled and approved by the municipality.

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

Conclusions and Recommendations

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

Prepared By: Samuel A. Rosado
Staff Attorney

May 24, 2022



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PO BOX 819
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

March 29, 2022 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o Baffi Simmons)
Complainant

Complaint No. 2020-137

v.

Clayton Police Department (Gloucester)
Custodian of Record

At the March 29, 2022 public meeting, the Government Records Council (“Council”) considered the March 22, 2022 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s February 22, 2022 Interim Order because he responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to the Complainant’s OPRA request. However, the Custodian complied with the Council’s February 22, 2022 Interim Order by locating and providing the Complainant with the requested records. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s February 22, 2022 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 76 (2008). Specifically, the Custodian was ordered to produce the responsive records from the Clayton Police Department. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 76. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on**

the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

Interim Order Rendered by the
Government Records Council
On The 29th Day of March 2022

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: March 30, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
March 29, 2022 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of
Baffi Simmons)¹
Complainant**

GRC Complaint No. 2020-137

v.

**Clayton Police Department (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:³

1. Driving Under the Influence (“DUI”) and Driving While Intoxicated (“DWI”) summonses and complaints that were prepared by the Police Department from January 2019 through present.
2. Drug possession complaints and summonses prepared and filed by the Police Department from January 2019 through present.
3. Drug paraphernalia complaints and summonses prepared and filed by the Police Department from January 2019 through present.
4. Records, reports, and notifications showing and tracking the number of police officers who triggered the [Early Warning System (“EW System”)] performance indicators, the conduct that triggered the EW System, and the remedial actions and disciplinary actions that were taken by the police department against police officers from 2019 to the present. Please feel free to redact the names and personal identifying information about specific police officers.

Custodian of Record: Chief Andrew Davis
Request Received by Custodian: April 28, 2020
Response Made by Custodian: June 15, 2020
GRC Complaint Received: July 22, 2020

Background

February 22, 2022 Council Meeting:

At its February 22, 2022 public meeting, the Council considered the February 15, 2022 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

¹ The Complainant represents Baffi Simmons.

² Represented by Timothy D. Scaffidi, Esq., of the Law Office of Timothy D. Scaffidi, Esq. (Woodbury, NJ).

³ The Complainant sought additional records that are not at issue in this complaint.

1. The Custodian may have unlawfully denied access to the requested complaints and summonses responsive to the Complainant's OPRA request item Nos. 1-3. N.J.S.A. 47:1A-6. Specifically, the Custodian had an obligation to conduct a search for responsive records through Clayton Police Department's ("CPD") access to eCDR. Simmons v. Mercado, 247 N.J. 24 (2021). Thus, the Custodian shall perform a search for the responsive complaints and summonses through eCDR or maintained physically by CPD. Should the Custodian not locate such records, she must certify to this fact. Also, should the Custodian determine that a special service charge is warranted thereafter, she must provide the Complainant with the amount of the special service charge required to purchase the requested summonses and complaints.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order by disclosing the responsive records with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director.⁵**
3. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC's 14-point analysis⁶ 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 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 "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.

⁶ See <https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf>.

4. The Custodian lawfully denied access to the Complainant's OPRA request item No. 4 seeking records, reports, and notifications generated from Clayton Police Department's Early Warning System, as same are exempt from disclosure pursuant to the Attorney General Law Enforcement Directive No. 2018-3. N.J.S.A. 47:12A-6; O'Shea v. Twp. of West Milford, 410 N.J. Super. 371, 382 (App. Div. 2009). Additionally, to the extent the Complainant seeks disciplinary records, same are exempt under OPRA's personnel records exemption. N.J.S.A. 47:1A-10; Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 2004).
5. 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.
6. 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 February 23, 2022, the Council distributed its Interim Order to all parties. On March 2, 2022, the Custodian responded to the Council's Interim Order, providing the Complainant with responsive records via e-mail.

Analysis

Compliance

At its February 22, 2022 meeting, the Council ordered the Custodian to locate and provide the Complainant with the requested records, or in the alternative provide an estimated special service charge. The Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On February 23, 2022, 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 March 2, 2022.

On March 2, 2022, the fifth (5th) business day after receipt of the Council's Order, the Custodian provided the Complainant with the requested records. The Custodian also provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's February 22, 2022 Interim Order because he responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.

Knowing & Willful

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of

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

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

In the instant matter, the Custodian unlawfully denied access to the Complainant’s OPRA request. However, the Custodian complied with the Council’s February 22, 2022 Interim Order by locating and providing the Complainant with the requested records. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney’s Fees

OPRA provides that:

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

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

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Appellate Division held that a complainant is a “prevailing party” if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. *Id.* at 432. Additionally, the court held that attorney’s fees may be awarded when the requestor is successful

(or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

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

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

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

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

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

The Court in Mason, further held that:

[R]equestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) “a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved”; and (2) “that the

relief ultimately secured by plaintiffs had a basis in law.” Singer v. State, 95 N.J. 487, 495, cert. denied, New Jersey v. Singer, 469 U.S. 832 (1984).

[Id. at 76.]

Here, the Complainant sought complaints and summonses prepared by the Clayton Police Department (“CPD”) pertaining to drug paraphernalia, drug possession, and DUI/DWI offenses. The Complainant also sought records pertaining to CPD’s EW System. The Custodian asserted that CPD utilized eCDR, and therefore did not maintain the responsive records. The Complainant then filed the instant complaint asserting that CPD had direct access to eCDR and did not need the assistance or permission from the Judiciary to retrieve the requested records.

In determining whether the Complainant is a prevailing party entitled to attorney’s fees, the GRC is satisfied that the evidence of record supports a conclusion in the affirmative. Although the Custodian relied upon the Appellate Division in Simmons v. Mercado, 464 N.J. Super. 77 (App. Div. 2020), rev’d, 247 N.J. 24 (2021), in denying access, the Custodian did not provide the records after the New Jersey Supreme Court reversed. Rather, the Custodian provided the responsive records only after the Council issued its February 22, 2022 Interim Order. Teeters, 387 N.J. Super. at 432. Thus, a causal nexus exists between this complaint and the change in the Custodian’s conduct. Mason 196 N.J. at 76. Accordingly, the Complainant is a prevailing party entitled to attorney’s fees.⁷

Therefore, pursuant to the Council’s February 22, 2022 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. at 432. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 76. Specifically, the Custodian was ordered to produce the responsive records from the CPD. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 76. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney’s fees, Complainant’s Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

⁷ The Council makes this determination with the understanding that the Complainant acted on behalf of a bona fide client at the time of the request. Although the Complainant’s status as representing an actual client has been previously challenged, the available evidence on the record is insufficient to address that issue herein. See Owoh, Esq. (O.B.O. AADARI) v. Neptune City Police Dep’t (Monmouth), GRC Complaint No. 2018-153 (April 2020) and Owoh, Esq. (O.B.O. AADARI) v. Freehold Twp. Police Dep’t (Monmouth), GRC Complaint No. 2018-155 (Interim Order dated September 29, 2020).

1. The Custodian complied with the Council's February 22, 2022 Interim Order because he responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to the Complainant's OPRA request. However, the Custodian complied with the Council's February 22, 2022 Interim Order by locating and providing the Complainant with the requested records. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's February 22, 2022 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 76 (2008). Specifically, the Custodian was ordered to produce the responsive records from the Clayton Police Department. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 76. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Prepared By: Samuel A. Rosado
Staff Attorney

March 22, 2022



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
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PHILIP D. MURPHY
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INTERIM ORDER

February 22, 2022 Government Records Council Meeting

Rotimi Owoh, Esq. (o/b/o Baffi Simmons)
Complainant

Complaint No. 2020-137

v.

Clayton Police Department (Gloucester)
Custodian of Record

At the February 22, 2022 public meeting, the Government Records Council (“Council”) considered the February 15, 2022 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 complaints and summonses responsive to the Complainant’s OPRA request item Nos. 1-3. N.J.S.A. 47:1A-6. Specifically, the Custodian had an obligation to conduct a search for responsive records through Clayton Police Department’s (“CPD”) access to eCDR. Simmons v. Mercado, 247 N.J. 24 (2021). Thus, the Custodian shall perform a search for the responsive complaints and summonses through eCDR or maintained physically by CPD. Should the Custodian not locate such records, she must certify to this fact. Also, should the Custodian determine that a special service charge is warranted thereafter, she must provide the Complainant with the amount of the special service charge required to purchase the requested summonses and complaints.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council’s Interim Order by disclosing the responsive records with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,¹ to the Executive Director.²**
3. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC’s 14-point analysis³ 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**

¹ "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."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium.

³ See <https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf>.

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 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 Custodian lawfully denied access to the Complainant's OPRA request item No. 4 seeking records, reports, and notifications generated from Clayton Police Department's Early Warning System, as same are exempt from disclosure pursuant to the Attorney General Law Enforcement Directive No. 2018-3. N.J.S.A. 47:12A-6; O'Shea v. Twp. of West Milford, 410 N.J. Super. 371, 382 (App. Div. 2009). Additionally, to the extent the Complainant seeks disciplinary records, same are exempt under OPRA's personnel records exemption. N.J.S.A. 47:1A-10; Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004).
5. 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.
6. 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 22nd Day of February 2022

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: February 23, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 22, 2022 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of
Baffi Simmons)¹
Complainant**

GRC Complaint No. 2020-137

v.

**Clayton Police Department (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:³

1. Driving Under the Influence (“DUI”) and Driving While Intoxicated (“DWI”) summonses and complaints that were prepared by the Police Department from January 2019 through present.
2. Drug possession complaints and summonses prepared and filed by the Police Department from January 2019 through present.
3. Drug paraphernalia complaints and summonses prepared and filed by the Police Department from January 2019 through present.
4. Records, reports, and notifications showing and tracking the number of police officers who triggered the [Early Warning System (“EW System”)] performance indicators, the conduct that triggered the EW System, and the remedial actions and disciplinary actions that were taken by the police department against police officers from 2019 to the present. Please feel free to redact the names and personal identifying information about specific police officers.

Custodian of Record: Chief Andrew Davis
Request Received by Custodian: April 28, 2020
Response Made by Custodian: June 15, 2020
GRC Complaint Received: July 22, 2020

Background⁴

Request and Response:

On April 28, 2020, the Complainant submitted an Open Public Records Act (“OPRA”)

¹ The Complainant represents Baffi Simmons.

² Represented by Timothy D. Scaffidi, Esq., of the Law Office of Timothy D. Scaffidi, Esq. (Woodbury, NJ).

³ The Complainant sought additional records that are not at issue in this complaint.

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

Rotimi Owoh, Esq. (On Behalf of Baffi Simmons) v. Clayton Police Department (Gloucester), 2020-137 – Findings and Recommendations of the Executive Director

request to the Custodian seeking the above-mentioned records. On June 15, 2020, the Custodian responded in writing stating that for item Nos. 1-3, the Clayton Police Department (“CPD”) utilizes eCDR and therefore did not maintain responsive records. Simmons v. Mercado, 464 N.J. Super. 77 (App. Div. 2020), rev’d, 247 N.J. 24 (2021). Regarding item No. 4, the Custodian stated that the records constituted confidential records not subject to disclosure under OPRA, citing the Attorney General Internal Affairs Police & Procedures § 9.6 (Dec. 2019) (“IAPP”); and Attorney General Directive No. 2018-3 (March 20, 2018) (“Directive”). Additionally, then Custodian stated that the records constituted personnel records and not subject to disclosure under OPRA. Kovalcik v. Somerset Cnty. Prosecutor’s Office, 206 N.J. 581, 588 (2011); N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor’s Office, 405 N.J. Super. 386 (App. Div. 2009).

Denial of Access Complaint:

On July 22, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that New Jersey police departments have direct access to eCDR as well as the ATS/ACS database. The Complainant argued that CPD did not need the assistance or permission of the municipal court to access the databases containing the responsive records.

The Complainant argued that police departments within the State were required to retain summonses and complaints until thirty (30) days after disposition of same, and municipal prosecutors also retained copies for discovery purposes during the pendency of the cases. The Complainant noted that copies were retained while testing was done by the New Jersey State Police to confirm whether the substance was in fact an illegal drug. The Complainant further asserted that municipalities were required to retain these records for at least fifteen (15) years.⁵

The Complainant further asserted that he was unlawfully denied access to item No. 4 by not providing copies of the requested records with redactions made to confidential information, and the time to comply with the OPRA request has been expired. The Complainant therefore requested the GRC compel compliance with the OPRA request and to award counsel fees.

Statement of Information:⁶

On December 28, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on April 28, 2020. The Custodian certified that on June 15, 2020, he responded to the Complainant in writing stating that records responsive to item Nos. 1-3 were maintained by the Judiciary under the eCDR system and records responsive to item No. 4 were confidential and personnel records not subject to disclosure.

⁵ The Complainant noted that he should have been given access to the records under the “common law.” However, the GRC does not have the authority to address a requestor’s common law right to access records. N.J.S.A. 47:1A-7(b); Rowan, Jr. v. Warren Hills Reg’l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013); Kelly v. N.J. Dep’t of Transp., GRC Complaint No. 2010-215 (November 2011) at 2. Thus, the GRC cannot address any common law right of access to the requested records.

⁶ On September 17, 2020, the Complaint was transferred to mediation. On November 25, 2020, the matter was sent back to the GRC for adjudication.

Rotimi Owoh, Esq. (On Behalf of Baffi Simmons) v. Clayton Police Department (Gloucester), 2020-137 – Findings and Recommendations of the Executive Director

Regarding item Nos. 1-3, the Custodian asserted that CPD relied on the on the Appellate Division in Simmons, which superseded the superior court decisions referenced by the Complainant. Additionally, the Custodian argued that the Complainant's complaint suggested that the Custodian expand scope of the search to include records that may have been received and maintained by prosecutors and records clerks. The Custodian argued that fulfilling the request to this extent would require her to either review every case file at the agency since January 2020 or conduct research to determine which case file may contain a responsive complaint or summons. The Custodian asserted that she was not obligated to conduct research to fulfill an OPRA request. Simmons, 464 N.J. Super. at 83.

Regarding item No. 4, the Custodian maintained that the request item sought records they fell under the category of confidential internal affairs records and/or personnel records. The Custodian asserted that IAPP §3.4.1 states that the outlined triggers of the EW System may result in an internal affairs investigation. The Custodian also asserted that IAPP §9.6.1 noted that the "nature and source" of internal allegations, as well as "the progress" and "resulting materials" stemming from the investigations were confidential information. The Custodian argued that if the EW System was the "nature and source" of an internal affairs investigation, then it would be exempt from disclosure under the IAPP. The Custodian also argued that any records of remedial or disciplinary action would also fall within the scope of confidential internal affairs records. IAPP §9.6; see Rivera v. Union Cnty. Prosecutor's Office, 2020 N.J. Super. Unpub. LEXIS 1192 (App. Div. 2020).

The Custodian also asserted that OPRA's personnel records exemption applied to records responsive to item No. 4 as well. Kovalcik, 206 N.J. at 588. The Custodian argued that the exemption included documents that may not be explicitly personnel records but bear the indicia of personnel records.

Additional Submissions:

On December 28, 2020, the Complainant filed a letter brief in opposition to the Custodian's SOI. Therein, the Complainant argued that even in the Simmons decision, the municipality provided summonses responsive to item No. 1. The Complainant argued that DUI/DWI summonses were stored separately from CDR-1 complaints for drug related offenses and should be available for production.

The Complainant also stated that the Simmons decision was being actively reviewed by the New Jersey Supreme Court. The Complainant also argued that the Custodian did not deny that hard copies of the records may be available in case files and held as required pursuant to the Records Retention Schedule for both Municipal Police Departments and Municipal Prosecutors.

Regarding item No. 4, the Complainant argued that redacted copies of responsive records were subject to disclosure under the Directive. The Complainant maintained that the GRC should require the Custodian to make the records available to the Complainant and award counsel fees.

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.

Item Nos. 1-3

OPRA also provides that the GRC “shall not have jurisdiction over the Judicial or Legislative Branches of State Government or any agency, officer, or employee of those branches. N.J.S.A. 47:1A-7(g). In Pitts v. N.J. Dep’t of Corr., GRC Complaint No. 2013-299 (September 2014), the custodian argued in part that because the requested presentence report was a court record created by the Judiciary, it was not a government record under N.J.S.A. 47:1A-1.1, and not within the GRC’s jurisdiction under N.J.S.A. 47:1A-7(g). However, the Council disagreed holding that because the agency received and kept on file a copy of the record, it still met the definition of a government record. N.J.S.A. 47:1A-1.1.

Additionally, in Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004), the custodian argued that the requested complaints and summonses were not subject to access since they were dated beyond the required retention period via the State’s retention schedule. The Council held that if the agency in fact possessed the responsive records, they were subject to access under OPRA even if they were supposed to have been destroyed in accordance with the retention schedule. See also Mawhinney v. Egg Harbor City Police Dep’t (Atlantic), GRC Complaint No. 2015-85 (January 2016).

Furthermore, although decided during the pendency of this complaint, the GRC finds the Court’s holding in Simmons v. Mercado, 247 N.J. 24 (2021) relevant and binding. There, the Complainant requested the same records as those at issue in the instant matter, with the custodian asserting that the records were not maintained by the Millville Police Department (“MPD”) once its officers created and submitted the records through eCDR. Simmons, 247 N.J. at 24. The Court reversed the Appellate Division and found that the requested records were government records subject to disclosure under OPRA. Id. The Court found that notwithstanding which government branch created the CDR-1 and -2 forms, it is the information contained within those forms by MPD officers that is sought by AADARI. Id. at 26. Thus, the Court held that:

Because MPD officers create the completed CDR-1s by populating the forms with the information necessary to generate a summons and submit it to the court, there is no question that the CDR-1s are government records subject to disclosure pursuant to OPRA.

[Id. at 27.]

Additionally, the Court rejected MPD's argument that they did not maintain the records, holding that OPRA's definition of a government record is not restricted to records maintained by the agency, but rather includes records it creates, even if not maintained. Id. at 26. Thus, the Court found, "that the Judiciary might maintain on its servers the information that MPD made does not absolve MPD of its obligation to produce that information pursuant to a proper OPRA request made to MPD." Id. at 29.

In the current matter, the Custodian asserted that CPD did not maintain responsive records, relying upon the Appellate Division's holding in Simmons, 464 N.J. Super. 77. The Complainant asserted that the decision was under review by the Supreme Court at the time of the request, and that records were provided for item No. 1 by the defendant municipality.

Initially, the GRC addresses the Complainant's arguments pertaining to retention schedules. Upon review, the Complainant's reliance on Merino, GRC 2003-110 to contend that NBPD and the City's Municipal Prosecutor are required by law to maintain the requested records based upon the retention schedules ignores the prevailing caselaw. Instead, the retention schedules determine how records that may be in an agency's possession are to be maintained, and are not a legal requirement to make, maintain, or keep on file every identified record. See N. Jersey Media Grp. Inc., 229 N.J. at 568.

However, considering the Court's decision in Simmons, the Custodian maintains the obligation to provide the Complainant with the responsive records available through eCDR. Notwithstanding whether the CPD maintained physical copies of same, the Court held that since police departments created the CDR-1s and CDR-2s when inputting information, they were government records even if the records are maintained by the Judiciary's electronic databases. Simmons, 247 N.J. at 29.

Accordingly, the Custodian may have unlawfully denied access to the requested complaints and summonses responsive to the Complainant's OPRA request item Nos. 1-3. N.J.S.A. 47:1A-6. Specifically, the Custodian had an obligation to conduct a search for responsive records through CPD's access to eCDR. Simmons, 247 N.J. at 29. Thus, the Custodian shall perform a search for the responsive complaints and summonses through eCDR or maintained physically by CPD. Should the Custodian not locate such records, she must certify to this fact. Also, should the Custodian determine that a special service charge is warranted thereafter, she must provide the Complainant with the amount of the special service charge required to purchase the requested summonses and complaints.

Item No. 4

OPRA provides that "[n]otwithstanding the provisions [OPRA] or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency . . . shall not be considered a government record . . ." N.J.S.A. 47:1A-10. OPRA begins with a presumption against disclosure and "proceeds with a few narrow exceptions that . . . need to be considered." Kovalcik, 206 N.J. at 589. In Merino, GRC 2003-110, the Council held that:

[t]he Complainant’s request to review the records of complaints filed against Officer Tuttle were properly denied by the Custodian. N.J.S.A. 47:1A-10 provides in pertinent [part] that “the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a public record and shall not be made available for public access” [emphasis omitted]. As a result, records of complaints filed against Officer Tuttle and/or reprimands he has received are not subject to public access.

[Id.]

In Rodriguez v. Kean Univ., GRC Complaint No. 2013-296 (June 2014), the Council held that “disciplinary actions are not specifically identified as personnel information subject to disclosure under OPRA.” Id. at 5. Furthermore, the Appellate Division has held that the personnel records exemption may apply to records that “. . . bear many of the indicia of personnel files.” North Jersey Media Grp. v. Bergen Cnty. Prosecutor’s Office, 405 N.J. Super. 386, 390 (App. Div. 2009). See also McGee, 416 N.J. Super. at 616 (noting that OPRA’s personnel records exemption “is not limited to the items included in a personnel file”).

In O’Shea v. Twp. of West Milford, 410 N.J. Super. 371, 382 (App. Div. 2009), the Appellate Division held that Attorney General directives, like guidelines, “cannot be ignored” and are “binding and enforceable on local law enforcement agencies. . . .” Like the IAPP, the Directive derives its authority from Attorney General’s status as the chief law enforcement officer of the State and tasked with the general supervision of criminal justice. See N.J.S.A. 52:17B-97 to -117. Thus, the Directive has the force of law for police entities.

The purpose of the Directive was to require implementation of the EW System to all law enforcement agencies in New Jersey.⁷ The EW System is a management tool intended to detect trends in police conduct and help identify and remediate a potentially problematic officer before conduct escalates to becoming a substantial risk to public safety.⁸ The Directive provides a minimal set of “performance indicators” monitored by the EW System.⁹ The Directive also provides guidelines on a tracking system, how an incident may trigger one of the performance indicators, and the types of remedial action taken when an officer triggers the EW System review process.¹⁰ Notably, the Directive states that the EW System “should be administered by the agency’s internal affairs unit.”¹¹

Furthermore, the Directive provides in part:

All EW System policies adopted by law enforcement agencies shall be made available to the public upon request and shall be posted on the agency’s website. Annual reports from the County Prosecutors to the Attorney General (as required

⁷ Directive at 1.

⁸ Id.

⁹ Id. at 2.

¹⁰ Id. at 3-4.

¹¹ Id. at 3.

by Section II.I above) also shall be made available to the public upon request and shall be posted on the agency's website.

All written reports created or submitted pursuant to this Directive that identify specific officers are confidential and not subject to public disclosure.¹²

In the instant matter, the Complainant asserted that the Directive permits the disclosure of "records, reports, and notifications showing and tracking the number of police officers who triggered the [EW System] performance indicators, the conduct that triggered the EW System, and the remedial actions . . . that were taken by [CPD]," so long as the names of specific officers are redacted. The Custodian asserted that the records were exempt under the Directive's internal affairs confidentiality exemption and/or OPRA's personnel records exemption.

Upon review, any underlying records produced under the Directive are integrally related to the internal personnel management of police officers. The Directive's confidentiality section should therefore be read through the lens of personnel records, which favor a presumption against disclosure. See Kolvalcik, 206 N.J. 581. Thus, the Directive's plain language indicates that the requested records and reports are deemed confidential and not subject to public disclosure other than the expressly identified "EW System polices" and the "annual report" provided to the Attorney General from the County Prosecutor. Just as internal affairs records are deemed confidential in their entirety under the IAPP, so too are the underlying records generated from the EW System pursuant to the Directive. Furthermore, to the extent that the Complainant seeks reports and records detailing any disciplinary actions taken against police officers flagged via the EW System, such records are exempt from disclosure via Merino, GRC 2003-110.

Accordingly, the Custodian lawfully denied access to the Complainant's OPRA request item No. 4 seeking records, reports, and notifications generated from CPD's EW System, as same are exempt from disclosure pursuant to the Directive. N.J.S.A. 47:12A-6; O'Shea, 410 N.J. Super. at 382. Additionally, to the extent the Complainant seeks disciplinary records, same are exempt under OPRA's personnel records exemption. N.J.S.A. 47:1A-10; Merino, GRC 2003-110.

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.

¹² Id. at 4-5.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian may have unlawfully denied access to the requested complaints and summonses responsive to the Complainant's OPRA request item Nos. 1-3. N.J.S.A. 47:1A-6. Specifically, the Custodian had an obligation to conduct a search for responsive records through Clayton Police Department's ("CPD") access to eCDR. Simmons v. Mercado, 247 N.J. 24 (2021). Thus, the Custodian shall perform a search for the responsive complaints and summonses through eCDR or maintained physically by CPD. Should the Custodian not locate such records, she must certify to this fact. Also, should the Custodian determine that a special service charge is warranted thereafter, she must provide the Complainant with the amount of the special service charge required to purchase the requested summonses and complaints.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order by disclosing the responsive records with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,¹³ to the Executive Director.**¹⁴
3. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC's 14-point analysis¹⁵ 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 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-**

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¹⁴ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium.

¹⁵ See <https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf>.

Rotimi Owoh, Esq. (On Behalf of Baffi Simmons) v. Clayton Police Department (Gloucester), 2020-137 – Findings and Recommendations of the Executive Director

point analysis shall be attached to the certification and incorporated therein by reference.

4. The Custodian lawfully denied access to the Complainant's OPRA request item No. 4 seeking records, reports, and notifications generated from Clayton Police Department's Early Warning System, as same are exempt from disclosure pursuant to the Attorney General Law Enforcement Directive No. 2018-3. N.J.S.A. 47:12A-6; O'Shea v. Twp. of West Milford, 410 N.J. Super. 371, 382 (App. Div. 2009). Additionally, to the extent the Complainant seeks disciplinary records, same are exempt under OPRA's personnel records exemption. N.J.S.A. 47:1A-10; Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004).
5. 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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

February 15, 2022