



## State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS  
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TRENTON, NJ 08625-0819

PHILIP D. MURPHY  
*Governor*

TAHESHA L. WAY  
*Lieutenant Governor*

JACQUELYN A. SUÁREZ  
*Acting Commissioner*

### FINAL DECISION

#### October 3, 2023 Government Records Council Meeting

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

Complaint No. 2020-162

v.

Hopaccong Police Department (Sussex)  
Custodian of Record

At the October 3, 2023 public meeting, the Government Records Council (“Council”) considered the September 26, 2023 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. Complainant’s Counsel complied with the Council’s September 29, 2022 Interim Order because he responded in the prescribed time frame providing an Amended Application and Amended Time Log and provided certified conformation of compliance to the Executive Director.
2. The Council finds that Complainant Counsel’s fee application confirms to the requirements of N.J.A.C. 1:105-2.13(b). However, for the reasons set forth above and with the table, the Council finds that the time expended was not reasonable. The Council finds that 4.4 hours at \$300 per hour is reasonable for the work performed by Complainant’s Counsel instant matter. Teeters v. DYFS, 387 N.J. Super. 432 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). **Accordingly, the Executive Director recommends that the Council award fees to the Complainant, representing AADARI, for the amount of \$1,320.00, representing 4.4 hours of service at \$300 per hour.**
3. As was the case with the Council’s initial adjudication on fees, no enhancement should be awarded.

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 3<sup>rd</sup> Day of October 2023

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: October 10, 2023**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Prevailing Party Attorney's Fees*  
**Supplemental Findings and Recommendations of the Executive Director  
October 3, 2023 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of Baffi Simmons)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2020-162**

v.

**Hopatcong Police Department (Sussex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of: records showing use of force incidents involving your police officer(s) from 2018 to the present. Please include the name(s) of the specific officer(s) involved in the incidents.<sup>3</sup>

**Custodian of Record:** Lt. Michael O'Shea

**Request Received by Custodian:** May 14, 2020

**Response Made by Custodian:** August 21, 2020

**GRC Complaint Received:** August 24, 2020

**Background**

**September 29, 2022 Council Meeting:**

At its September 29, 2022 public meeting, the Council considered the September 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, found 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 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 does not fully conform to the requirements of N.J.A.C. 1:105-2.13(b)(5). Specifically, although the Council finds that the requested hourly rate of \$300.00 is reasonable, the provided bill for services fails to log each entry in increments of tenths of an hour. Therefore, the bill for services must be amended so that the Council is able to determine the reasonableness of the

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

<sup>2</sup> Represented by Robert B. McBriar, Esq. of Schenck, Price, Smith & King, LLP (Sparta, NJ).

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

hours expended. See Carter v. Franklin Fire District No. 2 (Somerset), GRC Complaint No. 2011-228 (Interim Order dated August 27, 2013). **Accordingly, because the Council does not award fees to Complainant’s Counsel on this incomplete record, the Complainant or its attorney be permitted to submit an amended time log to the Council in support of Counsel’s application for fee award within five (5) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b)(5). The Custodian shall have five (5) business days from the date of service of the amended time log in support of application for attorney’s fees to object to the amended time logs. N.J.A.C. 5:105-2.13(d).**

3. Counsel did not request a lodestar adjustment; thus, no enhancement should be awarded.

#### Procedural History:

On October 4, 2022, the Council distributed its Interim Order to all parties. On October 7, 2022, Complainant’s Counsel (“Complainant’s Counsel”) responded to the Order filing a supplemental fee certification (“Supplemental Certification”) in support of his amended application (“Amended Application”) for fees. In his Supplemental Certification, Complainant’s Counsel provided an amended time log (“Amended Time Log”) with increments in tenths of an hour. Complainant’s Counsel certified that he has now expended 27.5 hours on this matter, which therefore increased his fee request from \$5,235.00 at 17.45 hours to \$8,250.00. Complainant’s Counsel included within the Amended Application the time he expended complying with the Council’s September 29, 2022 Interim Order.

On October 24, 2022, the Custodian’s Counsel, filed an opposition to Complainant’s Counsel’s Amended Application (“Opposition”). Custodian’s Counsel asserted that the Amended Application demonstrated a focus on OPRA’s penalty for an unlawful denial over OPRA’s purpose to provide public access to government records. Custodian’s Counsel also asserted that Complainant’s Counsel submitted an entirely new application with additional charges rather than re-submit the already existing application (“Original Application”) with the appropriate time logs.

Custodian’s Counsel initially argued that Complainant’s Counsel billed several hours to prepare and submit an OPRA request to the Borough of Hopatcong (“Borough”) seeking billing records for all GRC cases involving the African American Data & Research Institute (“AADARI”). Custodian’s Counsel contended that the OPRA request was irrelevant to the instant matter and those entries should not be considered.

Custodian’s Counsel next argued that Complainant’s Counsel’s 0.9-hour entry for researching and reviewing relevant laws and request items denied by the Custodian is undermined by the fact that the Denial of Access Complaint was devoid of specific citations to case law nor supported by a legal brief or memorandum. Custodian’s Counsel also noted that drafting and submitting the complaint should not have taken 1.0 hour given the lack of substance contained therein. Custodian’s Counsel further argued that billing 1.8 hours to review the provided unredacted records was excessive.

Custodian's Counsel next asserted that Complainant's Counsel included a charge of 0.9 hours for "[r]esearching the regulations and cases cited in the Interim order in order to properly Comply with the Interim Order." Custodian's Counsel contended that the Borough should not have to pay for Complainant's Counsel's failure to comply with N.J.A.C. 1:105-2.13(b)(5).

Custodian's Counsel next asserted that on July 26, 2022, Complainant's Counsel charged 0.5 hours gathering Appellate Division cases approving counsel fees in favor of AADARI. Custodian's Counsel argued that on that same date, Complainant's Counsel charged the Borough of Glassboro ("Glassboro") the same amount for the same task. See Owoh, Esq. (O.B.O. Baffi Simmons) v. Glassboro Police Dep't (Gloucester), GRC Complaint No. 2020-157 (Interim Order dated September 29, 2022). Custodian's Counsel asserted that the entry was an identical entry from another fee application and should not be considered. Custodian's Counsel noted that other entries from the Amended Application were identical to those within the application submitted to Glassboro.

Custodian's Counsel asserted that the GRC conduct a full review of the Complainant's Counsel's fee application considering the identical entries contained in the Amended Application and the application submitted to Glassboro. Custodian's Counsel argued that the Amended Application should be dismissed entirely, but in the alternative should be reduced to no more than 2.1 hours, reduced by half to account for the limited success, for a total of \$315.00.

On October 24, 2022, Complainant's Counsel submitted a reply to Custodian Counsel's Opposition to the Amended Application. Complainant's Counsel asserted that his Amended Application was reasonable and noted that Custodian's Counsel has billed the Borough 24.6 hours as of May 13, 2022. Complainant's Counsel questioned how a firm who lost could make more money than the firm who won. Complainant's Counsel asserted that he stands by the assessed charges as well as the request for a lodestar adjustment.

### Analysis

#### Compliance

At its September 29, 2022 meeting, the Council permitted the "Complainant or his attorney . . . to submit an amended time log to the Council in support of Counsel's application for fee award." In addition, the Council ordered that "[t]he Custodian [may] object to the amended time logs[] N.J.A.C. 5:105-2.13(d)." On October 4, 2022, the Council distributed its Interim Order to all parties, providing the Complainant five (5) business days to comply with the terms of said Order. Thus, the Complainant's Amended Application was due by close of business on October 12, 2022, accounting for the Columbus Day holiday.

On October 7, 2022, the third (3<sup>rd</sup>) business day after receipt of the Council's Order, Complainant's Counsel filed an Amended Application. On October 24, 2022, the tenth (10<sup>th</sup>) business day after receipt of Complainant Counsel's Amended Application, Custodian's Counsel filed an Opposition.

Therefore, Complainant's Counsel complied with the Council's September 29, 2022 Interim Order because he responded in the prescribed time frame providing an Amended Application and Amended Time Log and provided certified conformation of compliance to the Executive Director.

### **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 v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). 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 v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). 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, 461 U.S. at 434). 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, Complainant’s Counsel is seeking a fee award of \$8,250.00, representing 27.5 hours at \$300.00 per hour. In support of this hourly rate, Complainant’s Counsel submits exhibits containing judicial orders awarding him prevailing parties fees at the requested hourly rate in litigation representing the same client pertaining to the same or similar issues.

Although the GRC is not required to adhere to court determinations on a practitioner’s experience, it is persuasive when combined with prior GRC decisions which permitted awards of \$300.00 per hour. See Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (June 2015); Paff v. Cnty. Of Salem, GRC Complaint No. 2015-342 (June 2017). It should be noted that although Custodian’s Counsel filed objections to the fee application, same did not dispute the requested hourly rate.

Based on the foregoing, the rate of \$300.00 per hour is reasonable for a practitioner with Complainant’s Counsel’s experience and skill level.

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

To be compensable, hours expended must not be excessive, redundant, or otherwise unnecessary. See Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). The New Jersey District Court, in PIRG v. Powell Duffryn Terminals, 1991 U.S. Dist. LEXIS 21199 (D.N.J. 1991), reduced plaintiff’s trial preparation fee request by 50%. The PIRG court, noting that plaintiff’s counsel had tried numerous similar cases, found the work performed to be both redundant and unnecessary.

In support of his original request for a fee award, Complainant’s Counsel submitted a certification (“Original Certification”). Therein, Complainant’s Counsel attached a five (5) page list itemizing his hours and expenses (“Original Time Log”). The Original Time Log contained time entries for the period from July 28, 2020, through July 27, 2022 (“Fee Period”). Complainant’s Counsel billed a total of 17.5 hours for a fee of \$5,250.00 for services during the Fee Period. Time entry descriptions included: reviewing the complaint; researching OPRA

provisions other relevant law; reviewing and filing a letter brief; preparing correspondence and filing other documents with the GRC; and submitting an OPRA request for billing statements of opposing counsel related to the instant matter.

In response to the Council's September 29, 2022 Interim Order, Complainant's Counsel submitted a Supplemental Certification and Amended Time Log to the GRC. However, Complainant's Counsel did not directly explain the additional charges or the basis for an upward lodestar adjustment. Including the fees assessed to comply with the Council's Order, Complainant's Counsel billed an additional 10.05 hours.

Initially, the GRC notes that N.J.A.C. 1:1-15.2(a) and (b) state that official notice may be taken of judicially noticeable facts (as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence), as well as of generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. The Appellate Division has held that it was appropriate for an administrative agency to take notice of an appellant's record of convictions because judicial notice could have been taken of the records of any court in New Jersey, and appellant's record of convictions were exclusively in New Jersey. See Sanders v. Div. of Motor Vehicles, 131 N.J. Super. 95 (App. Div. 1974).

Here, the GRC takes judicial notice of the filings submitted in Owoh, Esq. (O.B.O. Baffi Simmons) v. Glassboro Police Dep't (Gloucester), GRC Complaint No. 2020-157 (July 2023), and especially the original and amended fee applications ("Glassboro Applications") that was reviewed and assessed by the Council. In that case, the Complainant's Counsel also sought UFRs like the instant matter, however the central issue pertained to the imposition of a special service charge for redacting the UFRs. The GRC held that the Complainant's Counsel was a prevailing party, and he submitted a fee application. Also like the instant matter, the Council ordered Complainant's Counsel to resubmit his fee application because it was deficient, which he did on October 10, 2022. In their opposition, custodian's counsel asserted that many of the entries within the Glassboro Applications were the same or substantially like those in the Amended Application submitted herein, and even attached a copy of it to their letter brief. Ultimately, the Council found that many of the entries were improper and stricken from the fee total. Thus, due to the entry similarities between the Glassboro Applications and the Amended Application, as well as the substantially duplicative or templated nature of Complainant Counsel's submissions in both complaints, the GRC takes judicial notice of the Council's findings regarding certain entries from the Glassboro Application.

Regarding the entry similarities, the Amended Application included entries dated between June 4, 2022 to June 20, 2022 pertaining to an OPRA request to the Borough seeking billing statements pertaining to the instant matter along with other matters involving AADARI, totaling 5.9 hours. The Amended Application also included entries dated between August 8, 2022 and September 19, 2022 in connection with reviewing and responding to Custodian's Counsel's original opposition, totaling 3.7 hours. Further, the Amended Application included entries dated between October 4, 2022 to October 7, 2022, to prepare and file the Amended Application. Each group of entries are substantially similar in nature to the entries outlined in the Glassboro Application, inclusive of the same descriptions and even the dates in one instance. As the Council

has already determined that these entries are improper in Glassboro, GRC 2020-157, the GRC reaches the same conclusion here and strikes them from the fee total.

The review of an application for fees, by necessity, must be conducted on a case-by-case basis. Although the GRC finds that Complainant Counsel’s Amended Application and Amended Time Log conforms to the requirements of N.J.A.C. 1:105-2.13(b)(5), the total time is excessive. Each entry was reviewed and considered and evaluated considering the work performed and the benefit to the Complainant, if any, and to determine whether it was reasonable when considered by the standards set forth in R.P.C. 1.5(a).

The GRC shall now conduct a complete review of the Amended Time Log and Amended Application in comparison with the Glassboro Application to determine whether duplicative or templated submissions require adjustments. Those substantive submissions which were nearly or totally comparable entries contained in both applications will be identified in the appropriate column, and adjusted accordingly. However, the GRC notes that the table does not include expenditures already determined above as improper:

Date of entry	Description of Service	Time Expended (in tenths of an hour)/ and Amount Billed at \$300/hour in dollars		Findings from Fee Application Review	Adjusted Entry: Time allowed and total Amount at \$300.00/hour	
8/21/2020	Informed by client that OPRA request was denied. Also discussed the options of filing in court or with GRC.	0.3	\$90.00		0.3	\$90.00
8/24/2020	Client forwarded all correspondence with Custodian for legal review and filing of complaint. Reviewed items that were sent by Custodian in response to the OPRA request. Focused on denied item numbers and reasons for the denials.	0.4	\$120.00		0.4	\$120.00
8/24/2020	Researched and reviewed relevant laws and relevant items that were denied by the Custodian.	0.9	\$270.00	Review of 16 records where the only redacted field was the subject name does not warrant the time expended.	0.5	\$150.00
8/24/2020	Drafted/wrote/edited OPRA complaint, gathered exhibits and related cases and responses from other police departments in	0.6	\$180.00	Although the basis for filing the complaint differs from the Glassboro Application, the complaint was	0.2	\$60.00

	anticipation of opposition by the custodian's Attorney.			similarly devoid of substantive arguments in the space reserved for a statement of facts, contained no other correspondence between the parties, nor other related cases and police responses. Therefore GRC does not find the time expended should be the equivalent of the entry from the Glassboro Application.		
8/24/2020	Prepared form rejecting mediation.	0.1	\$30.00	A mediation form is included with the Denial of Access Complaint, along with boxes to check to indicate whether the Complainant requests to participate in mediation. Thus, the time expended is unwarranted.	0.0	\$0.00
8/24/2020	Reviewed, edited and electronically filed complaint.	0.3	\$90.00	The GRC finds that the within time entry denotes administrative work—filing of the complaint. The GRC is cognizant that with the advent of advanced electronics, computers and e-filing, attorneys often work alone and/or perform tasks traditionally executed by support staff. Notwithstanding, an attorney may not be compensated at his or her standard hourly rate for counsel for tasks which could be performed by administrative and para-professional staff. The GRC finds that this task should be billed at a paraprofessional or administrative rate.	0.0	\$0.00

				Because the record lacks any evidence of the rates Counsel routinely bills for administrative of paraprofessional time, no award can be made.		
9/8/2020	Received and reviewed letter from GRC to the Custodian asking for Statement of Information (“SOI”).	0.1	\$30.00	The letter from the GRC is a standardized letter of which Complainant’s Counsel is familiar given his experience before the GRC.	0.0	\$0.00
9/23/2020	Received and reviewed SOI and supporting documents the Custodian filed with the GRC.	0.9	\$270.00		0.9	\$270.00
9/30/2020	Researched issues raised in the SOI by the Custodian in order to file a reply to the Custodian’s SOI.	0.6	\$180.00	No reply to the SOI was ever submitted by the Complainant. Therefore, this time expended should not be transferred to the Custodian.	0.0	\$0.00
3/29/2022	Received and reviewed Interim Order issued by the GRC.	0.3	\$90.00		0.1	\$30.00
4/6/2022	Received and reviewed e-mail from Custodian with attached records. Reviewed for proper redactions, completeness, and full compliance.	1.8	\$540.00	The Custodian provided 8 of the 16 pages of responsive records without the singular redaction in each. The GRC does not find that 1.8 hours to review these 8 pages containing an unredacted name is reasonable.	0.1	\$30.00
4/6/2022	Also received and reviewed certification that was filed by Custodian with the GRC.	0.3	\$90.00	The certification was (3) pages in length, and therefore does not warrant the time expended to review for an attorney of Complainant’s Counsel’s experience.	0.1	\$30.00
4/27/2022	Received and reviewed GRC’s Supplemental Findings that declared Complainant as prevailing party and asked the parties to try and resolve counsel fees.	0.5	\$150.00	The letter from the GRC is a standardized letter of which Complainant’s Counsel is familiar given his experience before the GRC.	0.2	\$60.00

4/27/2022	Sent an e-mail to Custodian and opposing counsel to see if matter can be resolved.	0.1	\$30.00		0.1	\$30.00
4/28/2022	Received and reviewed e-mail from opposing counsel asking for itemized billing with support so he can discuss it with the municipality	0.3	\$90.00		0.3	\$90.00
4/29/2022	As directed by opposing counsel, finalized itemized list of services and gather supporting documents to show hour rate of \$300 per hour that was/were approved by different courts to include the Appellate Division and Superior Court Judges.	0.8	\$240.00	An experienced practitioner should have an itemized list of services already prepared and readily available upon request. Thus, the expended time is unwarranted.	0.0	\$0.00
4/29/2022	Edited and e-mailed the billing for counsel fees to opposing counsel with the supporting Exhibits as part of the negotiation to resolve counsel fees.	0.2	\$60.00			
6/18/2022	Sent e-mail requesting extension of time to file application for counsel fees.	0.2	\$60.00	The time expended requesting an extension of time is not chargeable to the Custodian. <u>See Carter v. Franklin fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-228 (Interim Order dated March 25, 2014).</u>	0.0	\$0.00
6/20/2022	Received and reviewed e-mail by opposing counsel opposing the extension of time to file for counsel fees.	0.3	\$90.00			
6/20/2022	Sent a response to Mr. Rosado regarding opposing counsel's objection to the extension of the time to file the application for counsel fees. Draft and edit the e-mail response.	0.2	\$60.00			
6/27/2022	Received and reviewed e-mail from Mr. Rosado (GRC) granting the request to extend time to file counsel fees application until 7/28/2022.	0.1	\$30.00			
6/27/2022	Sent an e-mail response thanking Mr. Rosado (GRC).	0.1	\$30.00			

7/27/2022	Obtained a certification from AADARI by Grace Woko dated 7/22/2022. It became necessary since the parties could not resolve counsel fees.	0.6	\$180.00		0.6	\$180.00
7/26/2022	Gathered supporting prior court orders to include decisions by the Appellate Division approving counsel fees in favor of AADARI's attorney.	0.5	\$150.00	The court orders and decisions gathered and filed with the Original Application and the original Glassboro Application are the same. Therefore, the GRC does not find that copying and attaching the same collection of cases warrants the time charged for the initial collection.	0.1	\$30.00
7/27/2022	Drafted and edited attorney certification in support of application for counsel fees to the GRC. It became necessary since the parties could not resolve counsel fees.	1.2	\$360.00	A review of the Original Application and the original Glassboro Application reveals the same or substantially similar certifications and time logs, with most of the distinctions being the party names, dates, and hours charged in some of the entries. Therefore, the GRC does not find that drafting and editing a templated submission warrants the same expenditure of time.	0.6	\$180.00
7/27/2022	Updated, reviewed the itemized services and e-mail records for accuracy. The focus of the review and update was/were items relating to the OPRA request of 6/4/2022 for opposing counsel's billing records and items that were outstanding.	0.5	\$150.00	As noted previously above and in the Glassboro Applications, Counsel cannot charge for time expended on or pertaining to an OPRA request that is irrelevant to the calculation of a reasonable attorney's fee. Therefore, the Complainant cannot bill for this time.	0.0	\$0.00
9/29/2022	Sent an e-mail to Mr. Rosado stating that counsel had not received	0.1	\$30.00		0.1	\$30.00

	a copy of the GRC's decision.					
<b>Total:</b>		12.4	\$3,720.00		<b>4.4</b>	<b>\$1,320.00</b>

In sum, the GRC conducted a review of the Amended Time Log and Amended Application and found that the time spent on the file exceeds what would be reasonable for an OPRA practitioner of his experience. For example, some of the entries reflect administrative work not reasonably performed at a rate of \$300.00 per hour. Furthermore, Complainant's Counsel included several hours billed for actions that were irrelevant and/or unwarranted, such as an OPRA request submitted to Custodian's Counsel for billing statements pertaining to the instant matter. Moreover, some of the actual filings provided by Complainant's Counsel were duplicative or substantially like those of the Glassboro Applications, warranting an adjustment.

For the reasons set forth above and within the table, the Council finds that the time expended was not reasonable. The Council finds that 4.4 hours at \$300 per hour is reasonable for the work performed by Complainant's Counsel instant matter. Teeters, 387 N.J. Super. 423; Mason, 196 N.J. 51. **Accordingly, the Executive Director recommends that the Council award fees to the Complainant, representing AADARI, for the amount of \$1,320.00, representing 4.4 hours of service at \$300 per hour.**

## 2. Enhancement Analysis

The GRC notes that in his Original Application, Complainant's Counsel did not request a lodestar enhancement, and the Council therefore held that no such enhancement should be awarded in its September 29, 2022 Interim Order. Abruptly, in his Amended Application Complainant's Counsel now requests a lodestar enhancement. However, in neither his Supplemental Certification nor anywhere else in the Amended Application does Complainant's Counsel provide arguments in favor of awarding such an enhancement. Therefore, in keeping with the Council's September 29, 2022 Interim Order, no enhancement should be awarded.

### Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Complainant's Counsel complied with the Council's September 29, 2022 Interim Order because he responded in the prescribed time frame providing an Amended Application and Amended Time Log and provided certified conformation of compliance to the Executive Director.
2. The Council finds that Complainant Counsel's fee application confirms to the requirements of N.J.A.C. 1:105-2.13(b). However, for the reasons set forth above and with the table, the Council finds that the time expended was not reasonable. The Council finds that 4.4 hours at \$300 per hour is reasonable for the work performed by Complainant's Counsel instant matter. Teeters v. DYFS, 387 N.J. Super. 432 (App. Div. 2006); Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). **Accordingly, the Executive Director recommends that the Council**

**award fees to the Complainant, representing AADARI, for the amount of \$1,320.00, representing 4.4 hours of service at \$300 per hour.**

3. As was the case with the Council's initial adjudication on fees, no enhancement should be awarded.

Prepared By: Samuel A. Rosado  
Staff Attorney

September 26, 2023



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**

**September 29, 2022 Government Records Council Meeting**

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

Complaint No. 2020-162

v.

Hopatcong Police Department (Sussex)  
Custodian of Record

At the September 29, 2022 public meeting, the Government Records Council (“Council”) considered the September 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. Because the parties failed to reach a fee agreement, and because the Complainant’s Counsel subsequently timely submitted a fee application, the Council should determine the reasonable amount of attorney’s fees to which the Complainant is entitled.
2. 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 does not fully conform to the requirements of N.J.A.C. 1:105-2.13(b)(5). Specifically, although the Council finds that the requested hourly rate of \$300.00 is reasonable, the provided bill for services fails to log each entry in increments of tenths of an hour. Therefore, the bill for services must be amended so that the Council is able to determine the reasonableness of the hours expended. See Carter v. Franklin Fire District No. 2 (Somerset), GRC Complaint No. 2011-228 (Interim Order dated August 27, 2013). **Accordingly, because the Council does not award fees to Complainant’s Counsel on this incomplete record, the Complainant or its attorney be permitted to submit an amended time log to the Council in support of Counsel’s application for fee award within five (5) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b)(5). The Custodian shall have five (5) business days from the date of service of the amended time log in support of application for attorney’s fees to object to the amended time logs. N.J.A.C. 5:105-2.13(d).**
3. Counsel did not request a lodestar adjustment; thus, no enhancement should be awarded.

Interim Order Rendered by the  
Government Records Council  
On The 29<sup>th</sup> Day of September 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: October 4, 2022**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Prevailing Party Attorney's Fees*  
**Supplemental Findings and Recommendations of the Executive Director  
September 29, 2022 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of Baffi Simmons)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2020-162**

v.

**Hopatcong Police Department (Sussex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of: records showing use of force incidents involving your police officer(s) from 2018 to the present. Please include the name(s) of the specific officer(s) involved in the incidents.<sup>3</sup>

**Custodian of Record:** Lt. Michael O'Shea  
**Request Received by Custodian:** May 14, 2020  
**Response Made by Custodian:** August 21, 2020  
**GRC Complaint Received:** August 24, 2020

**Background**

**April 26, 2022 Council Meeting:**

At its April 26, 2022 public meeting, the Council considered the April 19, 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, found that:

1. The Custodian complied with the Council's March 29, 2022 Interim Order because he responded in the prescribed time frame providing records and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian improperly redacted a portion of the records responsive to the Complainant's May 14, 2022 OPRA request. N.J.S.A. 47:1A-6. However, the Custodian complied with the Council's March 29, 2022 Interim Order by providing the Complainant with unredacted records upon review. 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

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

<sup>2</sup> Represented by Robert B. McBriar, Esq. of Schenck, Price, Smith & King, LLP (Sparta, NJ).

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

actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to the Council's March 29, 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, 71 (2008). Specifically, the Custodian was ordered provide a portion of the requested use of force reports without redactions upon review. 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 71. **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 April 27, 2022, the Council distributed its Interim Order to all parties. On May 31, 2022, the Government Records Council ("GRC") advised the parties that the fee agreement time frame expired. The GRC further advised that the Complainant's Counsel had twenty (20) business days to submit a fee application, or until June 29, 2022.

On June 18, 2022, Complainant's Counsel requested a thirty (30) day extension to file a fee application. Complainant's Counsel stated that he requested the attorney billing records from the Custodian pertaining to the instant OPRA request but has not received most of the records. On June 20, 2022, Custodian's Counsel e-mailed the parties objecting to the extension, asserting that the costs and fees received by Complainant's Counsel was excessive and that the June 29, 2022 deadline was more than sufficient. Complainant's Counsel responded later that day stating that his extension request remained standing and he was still awaiting a response to his OPRA request for billing records. On June 27, 2022, the GRC granted Complainant's Counsel's extension request until July 28, 2022.

On July 28, 2022, Complainant's Counsel submitted a fee application. The fee application and Certification for Counsel Fees ("Certification") set forth the following:

1. Counsel certified that he is licensed to practice law in the State of New Jersey.
2. A statement of client representation: Counsel certified his representation towards AADARI, and the organization's certificates issued by the State of New Jersey.

3. The hourly rate of all attorneys and support staff involved in the complaint: Counsel certified that he charged \$300.00 per hour.
4. Copies of time sheets for each professional involved in the complaint: Counsel supplied an itemized list of services (“Bill”) from August 21, 2020, through July 27, 2022 (“Fee Period”). During the Fee Period, Counsel billed a total of 17.45 hours, for a total fee of \$5,235.00.
5. Evidence that the rates charges are in accordance with prevailing rates in the relevant community, including years of experience, skill level and reputation: as part of his Bill, Counsel included multiple exhibits demonstrating that courts have approved his hourly rate of \$300.00 in the same or similar litigation. Counsel also noted his victory as counsel of record in the New Jersey Supreme Court case Simmons v. Mercado, 247 N.J. 24 (2021).
6. Detailed documentation of expenses: Counsel did not provide any documentation pertaining to expenses incurred in this matter.

On August 8, 2022, the Custodian’s Counsel requested an extension of time to submit objections to the fee application. On August 9, 2022, the GRC granted the extension, providing a new deadline of August 25, 2022. On August 22, 2022, Custodian’s Counsel requested an additional extension of ten (10) business days, which the GRC granted.

On September 9, 2022, Custodian’s Counsel submitted objections to the fee application. Custodian’s Counsel initially argued that Counsel’s fee application did not comport with N.J.A.C. 5:105-2.13(b), asserting that Counsel’s certification did not contain the language as expressed under R. 1:4-4(b). Custodian’s Counsel further stated that the certification did not include a statement of client representation and failed to log the activities in 0.1-hour increments as required under N.J.A.C. 5:105-2.13(b).

Further, Custodian’s Counsel contended that several of the entries in Counsel’s Bill were excessive, unreasonable, redundant, or otherwise unnecessary. Specifically, Custodian’s Counsel pointed to Counsel’s previous filings with the GRC on behalf of AADARI and its individual members pertaining to the same or similar OPRA requests. Custodian’s Counsel asserted that Counsel’s previous similar complaints bely the allotted times taken for researching and drafting the Denial of Access Complaint. Custodian’s Counsel also argued that the Bill included services that were never performed in the instant matter. Custodian’s Counsel argued that Counsel listed an entry allegedly performing services pertaining to drafting, editing, and submitting an opposition to the Custodian’s Statement of Information (“SOI”). Custodian’s Counsel asserted that no such filing was submitted to the GRC in the instant matter.

Custodian’s Counsel maintained that the Complainant was not entitled to any fee in this matter due to the reasons set forth above. Custodian’s Counsel further argued that if the Complainant was entitled to any fee, the lodestar should be reduced to 5.38 hours at \$300.00/hour, for a total of \$1,614.00. Custodian’s Counsel also asserted that because the Borough complied with the Interim Order and did not intentionally or deliberately deny access to half the redacted names in the records, the lodestar should be further reduced by 50% to a total fee of \$807.00.

On September 17, 2022, Complainant's Counsel submitted a response to the Custodian's objections. Counsel asserted that his total bill of 17.45 hours was reasonable for a matter initiated in 2020 and is still ongoing. Counsel noted that Custodian's Counsel has billed the Borough 24.60 hours as of May 13, 2022, by comparison. Counsel also questioned how a firm who lost should earn more money than the firm who won.

On September 19, 2022, Custodian's Counsel e-mailed the GRC noting his objection to Counsel's response to the fee application objections. Custodian's Counsel maintained that N.J.A.C. 5:105-2.13 permits only a fee application and an objection. Custodian's Counsel requested the GRC disregard Counsel's unauthorized filing.

### Analysis

#### Compliance

At its April 26, 2022 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 April 27, 2022, 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 May 24, 2022.

On May 31, 2022, following the expiration of the time frame to reach a settlement, the GRC advised the parties that Complainant's Counsel had twenty (20) business days to submit a fee application in accordance with N.J.A.C. 5:105-2.13. On June 18, 2022, Complainant's Counsel requested an extension of time to submit a fee application, which the GRC granted until July 28, 2022. On July 28, 2022 the date of the extended deadline, Complainant's Counsel submitted his fee application.

Therefore, because the parties failed to reach a fee agreement, and because the Complainant's Counsel subsequently timely submitted a 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]rordinarily[] 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, Complainant's Counsel is seeking a fee award of \$5,235.00, representing 17.45 hours at \$300.00 per hour. In support of this hourly rate, Complainant's Counsel submits exhibits containing orders awarding Complainant's Counsel prevailing parties fees at the requested hourly rate in litigation representing the same client pertaining to the same or similar issues.

Although the GRC is not required to adhere to court determinations on a practitioner's experience, it is persuasive when combined with prior GRC decisions which permitted awards of \$300.00 per hour. See Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (June 2015); Paff v. Cnty. Of Salem, GRC Complaint No. 2015-342 (June 2017). It should be noted that although Custodian's Counsel filed objections to the fee application, same did not dispute the requested hourly rate.

Based on the foregoing, the rate of \$300.00 per hour is reasonable for a practitioner with Counsel's experience and skill level.

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

N.J.A.C. 5:105-2.13(b)(5) states that as part of the fee application, a complainant's attorney must provide "[c]opies of weekly time sheets for each professional involved in the complaint, which includes detailed descriptions of all activities attributable to the project in 0.1 hour (six-minute) increments."

In Carter v. Franklin Fire District No. 2 (Somerset), GRC Complaint No. 2011-228 (Interim Order dated August 27, 2013), complainant's counsel submitted a prevailing party fee application for review and approval. The Council found that the time log provided by complainant's counsel was overly broad as to time periods and vague regarding the work performed, and therefore did not fully conform with the requirements set forth under N.J.A.C. 5:105-2.13. The Council thus ordered complainant's counsel to submit an amended time log to the Council in support of his application for attorney's fees.

In the instant matter, Complainant's Counsel submitted a Bill in support of his request for fees. For the period from August 21, 2020, through July 27, 2022, Counsel billed a total of 17.45 hours for work on the file. However, Counsel's entries are not logged in increments of tenths of an hour. Rather, the Bill's entries are logged in total minutes and/or hours expended, absconding the GRC's regulations. Further, several of the entries do not adequately describe the work performed. Thus, like time log in Carter, the GRC is unable to adequately determine the reasonableness of the hours expended without a concise accounting of the hours expended on each entry in Counsel's Bill.

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 does not fully conform to the requirements of N.J.A.C. 1:105-2.13(b)(5). Specifically, although the Council finds that the requested hourly rate of \$300.00 is reasonable, the provided Bill fails to log each entry in increments of tenths of an hour. Therefore, the Bill must be amended so that the Council is able to determine the reasonableness of the hours expended. See Carter, GRC 2011-228. **Accordingly, because the**

**Council does not award fees to Complainant's Counsel on this incomplete record, the Complainant or its attorney be permitted to submit an amended time log to the Council in support of Counsel's application for fee award within five (5) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b)(5). The Custodian shall have five (5) business days from the date of service of the amended time log in support of application for attorney's fees to object to the amended time logs. N.J.A.C. 5:105-2.13(d).**

## **2. Enhancement Analysis**

Complainant's Counsel did not request 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 timely submitted a fee application, the Council should determine the reasonable amount of attorney's fees to which the Complainant is entitled.
2. 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 does not fully conform to the requirements of N.J.A.C. 1:105-2.13(b)(5). Specifically, although the Council finds that the requested hourly rate of \$300.00 is reasonable, the provided bill for services fails to log each entry in increments of tenths of an hour. Therefore, the bill for services must be amended so that the Council is able to determine the reasonableness of the hours expended. *See Carter v. Franklin Fire District No. 2 (Somerset)*, GRC Complaint No. 2011-228 (Interim Order dated August 27, 2013). **Accordingly, because the Council does not award fees to Complainant's Counsel on this incomplete record, the Complainant or its attorney be permitted to submit an amended time log to the Council in support of Counsel's application for fee award within five (5) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b)(5). The Custodian shall have five (5) business days from the date of service of the amended time log in support of application for attorney's fees to object to the amended time logs. N.J.A.C. 5:105-2.13(d).**
3. Counsel did not request a lodestar adjustment; thus, no enhancement should be awarded.

Prepared By: Samuel A. Rosado  
Staff Attorney

September 22, 2022



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO Box 819  
TRENTON, NJ 08625-0819

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**INTERIM ORDER**

**April 26, 2022 Government Records Council Meeting**

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

Complaint No. 2020-162

v.

Hopatcong Police Department (Sussex)  
Custodian of Record

At the April 26, 2022 public meeting, the Government Records Council (“Council”) considered the April 19, 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 March 29, 2022 Interim Order because he responded in the prescribed time frame providing records and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian improperly redacted a portion of the records responsive to the Complainant’s May 14, 2022 OPRA request. N.J.S.A. 47:1A-6. However, the Custodian complied with the Council’s March 29, 2022 Interim Order by providing the Complainant with unredacted records upon review. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s March 29, 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, 71 (2008). Specifically, the Custodian was ordered provide a portion of the requested use of force reports without redactions upon review. 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 71. **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 26<sup>th</sup> Day of April 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: April 27, 2022**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
April 26, 2022 Council Meeting**

**Rotimi Owoh, Esq. (On Behalf of Baffi Simmons)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2020-162**

**v.**

**Hopatcong Police Department (Sussex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of: records showing use of force incidents involving your police officer(s) from 2018 to the present. Please include the name(s) of the specific officer(s) involved in the incidents.<sup>3</sup>

**Custodian of Record:** Lt. Michael O’Shea

**Request Received by Custodian:** May 14, 2020

**Response Made by Custodian:** August 21, 2020

**GRC Complaint Received:** August 24, 2020

**Background**

**March 29, 2022 Council Meeting:**

At its March 29, 2022 public meeting, the Council considered the March 22, 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 Custodian may have unlawfully denied access to the requested records. N.J.S.A. 47:1A-6. While the names of subjects in Use of Force Reports (“UFRs”) may be redacted under Executive Order No. 26 (McGreevy, 2002) and N.J.S.A. 47:1A-1 if they indicate the subjects’ mental or medical health, the privacy interest is lost if the subjects were criminally charged. N.J.S.A. 47:1A-3(b). Therefore, the Custodian shall review the redacted UFRs to determine whether criminal charges were filed in connection with the UFR’s creation. If such records exist, the Custodian shall produce same without redactions. If no such records exist, the Custodian shall certify to same.
  
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,**

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

<sup>2</sup> Represented by Robert B. McBriar, Esq. of Schenck, Price, Smith & King, LLP (Sparta, NJ).

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

**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. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

#### Procedural History:

On March 30, 2022, the Council distributed its Interim Order to all parties. On April 6, 2022, the Custodian e-mailed the Complainant, providing copies of UFRs containing or omitting redactions in accordance with the Order. The Custodian certified that eight (8) of the sixteen (16) UFRs pertained to mental or medical health issues and resulting in criminal charges. The Custodian certified that those UFRs were provided to the Complainant without redactions. That same day, the Custodian also provided certified confirmation of compliance to the Executive Director.

#### Analysis

##### Compliance

At its March 29, 2022 meeting, the Council ordered the Custodian to review the redacted UFRs, determine whether any criminal charges were filed in connections with same, and to release those UFRs without redactions. 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 March 30, 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 April 6, 2022.

On April 6, 2022, the fifth (5<sup>th</sup>) business day after receipt of the Council's Order, the Custodian responded in writing, providing the Complainant with copies of the requested UFRs. The Custodian asserted that eight (8) of the sixteen (16) UFRs were provided without redactions to conform with the Council's Order. The Custodian also provided certified confirmation of compliance to the Executive Director that same day.

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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.

Therefore, the Custodian complied with the Council's March 29, 2022 Interim Order because he responded in the prescribed time frame providing records and simultaneously providing 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 improperly redacted a portion of the records responsive to the Complainant's May 14, 2022 OPRA request. N.J.S.A. 47:1A-6. However, the Custodian complied with the Council's March 29, 2022 Interim Order by providing the Complainant with unredacted records upon review. 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, 432 (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 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . .” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney’s fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

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

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

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

The Court in Mason, further held that:

[R]equestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) “a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved”; and (2) “that the relief ultimately secured by plaintiffs had a basis in law.” Singer v. State, 95 N.J. 487, 495, cert. denied, New Jersey v. Singer, 469 U.S. 832 (1984).

[Id. at 76.]

In the instant matter, the Complainant sought copies of UFRs from the Hopatcong Police Department for a set period, to include the names of the police officers. The Custodian provided responsive records but redacted the names of subjects in the UFRs where the incident pertaining to medical or mental health. The Complainant filed the instant matter, asserting that the subjects’ names should not be redacted.

In determining whether the Complainant is a prevailing party entitled to attorney’s fees, the GRC is satisfied that the evidence of record supports a conclusion in the affirmative. In accordance with the Council’s March 29, 2022 Interim Order, the Custodian was ordered to release without redactions UFRs pertaining to a mental or medical health issue when the incident resulted in criminal charges. 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.<sup>7</sup>

Therefore, pursuant to the Council’s March 29, 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 71. Specifically, the Custodian was ordered provide a portion of the requested UFRs without redactions upon review. 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 71. **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.**

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<sup>7</sup> 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).

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's March 29, 2022 Interim Order because he responded in the prescribed time frame providing records and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian improperly redacted a portion of the records responsive to the Complainant's May 14, 2022 OPRA request. N.J.S.A. 47:1A-6. However, the Custodian complied with the Council's March 29, 2022 Interim Order by providing the Complainant with unredacted records upon review. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's March 29, 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, 71 (2008). Specifically, the Custodian was ordered provide a portion of the requested use of force reports without redactions upon review. 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 71. **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

April 19, 2022



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**

**March 29, 2022 Government Records Council Meeting**

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

Complaint No. 2020-162

v.

Hopatcong Police Department (Sussex)  
Custodian of Record

At the March 29, 2022 public meeting, the Government Records Council (“Council”) considered the March 22, 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 records. N.J.S.A. 47:1A-6. While the names of subjects in Use of Force Reports (“UFRs”) may be redacted under Executive Order No. 26 (McGreevy, 2002) and N.J.S.A. 47:1A-1 if they indicate the subjects’ mental or medical health, the privacy interest is lost if the subjects were criminally charged. N.J.S.A. 47:1A-3(b). Therefore, the Custodian shall review the redacted UFRs to determine whether criminal charges were filed in connection with the UFR’s creation. If such records exist, the Custodian shall produce same without redactions. If no such records exist, the Custodian shall certify to same.
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. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 29<sup>th</sup> 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**

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

**Rotimi Owoh, Esq. (On Behalf of Baffi Simmons)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2020-162**

**v.**

**Hopatcong Police Department (Sussex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of: records showing use of force incidents involving your police officer(s) from 2018 to the present. Please include the name(s) of the specific officer(s) involved in the incidents.<sup>3</sup>

**Custodian of Record:** Lt. Michael O’Shea

**Request Received by Custodian:** May 14, 2020

**Response Made by Custodian:** August 21, 2020

**GRC Complaint Received:** August 24, 2020

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

**Request and Response:**

On May 14, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 21, 2020, the Custodian responded in writing providing sixty-five (65) pages of Use of Force Reports (“UFRs”) with redactions. The Custodian stated that the redactions included:

[F]ourteen (14) names of subjects where there was a written indication of mental health of other purported psychological conduct, and/or medical health (i.e. “suicidal”, “mental illness”, etc.) . . . and one (1) name of a subject connected with a medical disease and related medical information.<sup>5</sup>

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

<sup>2</sup> Represented by Robert B. McBriar, Esq. of Schenck, Price, Smith & King, LLP (Sparta, 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.

<sup>5</sup> The Custodian also redacted the name of a juvenile, but that redaction is not disputed by the Complainant.

Rotimi Owoh, Esq. (On Behalf of Baffi Simmons) v. Hopatcong Police Department (Sussex), 2020-162 – Findings and Recommendations of the Executive Director

### Denial of Access Complaint:

On August 24, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian was allowed to redact the portions of the UFRs showing medical conditions, juvenile information/names and mental illness. The Complainant contended that it was not proper to redact the names of adults.

The Complainant asserted that the GRC should compel the Custodian to not redact the names of adults, but instead the fields showing medical information or mental illness. The Complainant also requested the GRC award counsel fees.

### Statement of Information:

On September 23, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on May 14, 2020. The Custodian certified that his search included compiling UFRs for the requested timeframe. The Custodian certified that the Hopatcong Police Department (“HPD”) reviewed the documents with the assistance of counsel for information that may be exempt from disclosure. The Custodian certified that he responded in writing on August 21, 2020, providing sixty-five (65) pages of records containing the aforementioned redactions.

The Custodian initially argued that the request at issue was overly broad since it did not reasonably identify any specific government records. The Custodian contended that instead of seeking specific records such as UFRs or arrest records, but rather sought information that may be contained in BPD records showing incidents where police force was used, along with the names of the officers. The Custodian noted that the request did not seek the names of the subjects upon whom use of force was used. The Custodian argued that a requestor may not prevail on a denial of access claim when the basis for denial rests solely upon information that was never requested in the first place.

The Custodian next argued that even if the Complainant explicitly sought the names of the subjects within the UFRs, their names were properly redacted under OPRA. The Custodian asserted that a public agency has a responsibility to “safeguard from public access a citizen’s personal information with which it has been entrusted when disclosure thereof would violate the citizen’s reasonable expectation of privacy . . . .” N.J.S.A. 47:1A-1; Burnett v. Cnty of Bergen v. Cnty of Bergen, 198 N.J. 408 (2009). The Custodian further argued that “information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation” is exempted from disclosure. See Executive Order No. 26 (McGreevy, 2002) (“EO 26”). The Custodian also noted that the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) guarantees privacy rights with respect to individually identifiable health information/protected health information. 45 C.F.R. 164.502(a). The Custodian therefore contended that HPDs limited redactions of the subjects’ names was authorized and supported by law.

The Custodian noted that in Rivera v. Office of the Cnty. Prosecutor, 2012 N.J. Super. Unpub. LEXIS 1921 (August 8, 2012), the trial judge analyzed the issues surrounding the release of names of individuals identified in UFRs with purported psychiatric or medical conditions. The

Custodian asserted that the court held that, upon applying the privacy balancing test under Burnett, “the names of those subjected to force who were not arrested, that is criminally charged, must be redacted when there is an indication on the UFR of “suicidal,” “emotionally disturbed person,” “EDP,” or any other purported psychological conduct.” However, the Custodian argued that the redactions should apply even if there were criminal charges listed. The Custodian contended that the release of arrestee information under N.J.S.A. 47:1A-3(b) is not absolute and can be eclipsed by existing laws such as N.J.S.A. 47:1A-1 and EO 26.

The Custodian argued that the Complainant has not presented a justifiable need for the names of the subjects contained in the UFRs, given the potential severe and long-term consequences for these subjects if they were to become publicly available. The Custodian argued that the existing stigma surrounding mental illness and suicidality has shown to be a heavy barrier to patients from seeking treatment, and that HPD had a responsibility to protect the names of these individuals under the law.

Lastly, the Custodian argued that there was no knowing and willful violation of OPRA. The Custodian argued that he properly responded within the timeframes permitted by statute along with reasonable extensions. The Custodian asserted that HPD provided the Complainant with responsive records containing the requested information with redactions authorized under the law and public policy.

### **Analysis**

#### **Unlawful Denial of Access**

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

OPRA also provides that its provisions:

[S]hall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; *Executive Order of the Governor*; Rules of Court; any federal law; *federal regulation*; or federal order.

[N.J.S.A. 47:1A-9(a) (emphasis added).]

EO 26 states in part that, “[i]nformation relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation” are not government records subject to access under OPRA. Furthermore, HIPAA regulations are intended to prevent the disclosure of personal health information except when necessary. See 45 C.F.R. 164.501 and 160.103.

OPRA also provides that, “if an arrest has been made, information as to the defendant’s name, age, residence, occupation, marital status and similar background information and, the identity of the complaining party” must be released “unless the release of such information is contrary to existing law or court rule[.]” N.J.S.A. 47:1A-3(b).

In the current matter, the Custodian provided sixty-five (65) pages of UFRs in response to the Complainant’s OPRA request. The Custodian redacted the names of subjects within the UFRs where the incident pertained to suicide, mental illness, or other medical health situation. The Complainant contended that the names of the subjects should have been disclosed, and that the portions of the UFRs discussing the medical/mental health information should have been redacted instead.

Although unpublished, the GRC finds the Rivera decision persuasive. In that case, the plaintiff sought UFRs without redactions to the names of the subjects upon whom the application of force was used. Rivera, slip op. at 7. The court initially found that while UFRs do not contain a medical diagnosis, they still contained “information relating to the psychiatric or psychological history of the subject of force.” Rivera, slip op. at 19. The court thus held that the names of subjects in UFRs which include an indication of “suicidal,” “emotionally disturbed person,” “EDP,” or similar notation can be redacted under EO 26. Id.

The court also analyzed the issue using the balancing test from Burnett and held that when the subject of the UFR was arrested for the sole purpose of “facilitat[ing] psychological treatment,” they retain their privacy interest under OPRA and their names were lawfully redacted. Rivera, slip op. at 32. The court noted that, “just as the rest of a subject’s psychological history appears to be protected, a subject’s name should also be protected, and the court declines to create a backdoor through which a creative researcher would be able to uncover of a patient’s psychological history by obtaining a UFR under OPRA.” Rivera, slip op. at 31-32. However, the court also held that no privacy interest exists for subjects of UFRs who were charged with a criminal offense, “as biographical information about this class of subjects is already a matter of public record under OPRA.” Rivera, slip op. at 34-36; N.J.S.A. 47:1A-3(b).

Here, the Custodian redacted fourteen (14) names of subjects where there was an indication of the subject’s mental health of other purported psychological conduct, and/or medical health (i.e. “suicidal”, “mental illness”, etc.), and one (1) name connected with a medical disease and related information. However, it is unclear in the record whether these subjects were criminally charged in connection to the incident resulting in the creation of the UFRs.

Accordingly, the Custodian may have unlawfully denied access to the requested records. N.J.S.A. 47:1A-6. While the names of subjects in UFRs may be redacted under EO 26 and N.J.S.A. 47:1A-1 if they indicate the subjects’ mental or medical health, the privacy interest is lost if the subjects were criminally charged. N.J.S.A. 47:1A-3(b). Therefore, the Custodian shall review the redacted UFRs to determine whether criminal charges were filed in connection with the UFR’s creation. If such records exist, the Custodian shall produce same without redactions. If no such records exist, the Custodian shall certify to same.

## **Knowing & Willful**

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

## **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian may have unlawfully denied access to the requested records. N.J.S.A. 47:1A-6. While the names of subjects in Use of Force Reports ("UFRs") may be redacted under Executive Order No. 26 (McGreevy, 2002) and N.J.S.A. 47:1A-1 if they indicate the subjects' mental or medical health, the privacy interest is lost if the subjects were criminally charged. N.J.S.A. 47:1A-3(b). Therefore, the Custodian shall review the redacted UFRs to determine whether criminal charges were filed in connection with the UFR's creation. If such records exist, the Custodian shall produce same without redactions. If no such records exist, the Custodian shall certify to same.
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>6</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>7</sup> to the Executive Director.<sup>8</sup>**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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<sup>6</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>7</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>8</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.

Rotimi Owoh, Esq. (On Behalf of Baffi Simmons) v. Hopatcong Police Department (Sussex), 2020-162 – Findings and Recommendations of the Executive Director

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Staff Attorney

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