



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

May 31, 2022 Government Records Council Meeting

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

Complaint No. 2020-51

v.

City of Hoboken (Hudson)
Custodian of Record

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

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

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: June 2, 2022



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

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

GRC Complaint No. 2020-51

v.

**City of Hoboken (Hudson)²
Custodial Agency**

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

1. Summonses and complaints that were prepared by the Police Department relating to each one of the defendants listed in Drug Recognition Evaluation/Expert Rolling Logs.
2. Driving Under the Influence (“DUI”) and Driving While Intoxicated (“DWI”) summonses and complaints that were prepared by the Police Department from January 2019 through present.
3. Drug possession complaints and summonses prepared and filed by the Police Department from January 2019 through present.
4. Drug paraphernalia complaints and summonses prepared and filed by the Police Department from January 2019 through present.

Custodian of Record: Michael Mastropasqua⁴
Request Received by Custodian: December 7, 2019
Response Made by Custodian: January 13, 2020
GRC Complaint Received: February 24, 2020

Background

February 22, 2022 Council Meeting:

At its February 22, 2022 public meeting, the Council considered the February 15, 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 Complainant represents the African American Research & Data Institute.

² Represented by Alyssa L. Wells, Esq., Assistant Corporation Counsel (Hoboken, NJ). Previously represented by Asaad K. Siddiqi, Esq., of McCusker, Anselmi, Rosen & Carvelli, P.C. (Florham Park, NJ).

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

⁴ The current Custodian of Record is James J. Farina.

1. The Custodian did not fully comply with the Council's July 27, 2021 Interim Order. Specifically, although the Custodian provided the Complainant with the responsive records within the extended time frame, he failed to provide a certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Additionally, the Custodian failed to fully comply with the Council's July 27, 2021 Interim Order. However, the Custodian demonstrated that she provided the responsive records to the Complainant in accordance with said Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's July 27, 2021 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 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 to produce the responsive records maintained by HPD. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Procedural History:

On February 23, 2022, the Council distributed its Interim Order to all parties. On March 30, 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. On March 31, 2022, Custodian's Counsel responded to the GRC requesting additional time to speak with Complainant's Counsel regarding a settlement. That same day, Complainant's Counsel consented to the extension request, and the GRC granted additional time until April 21, 2022 to notify the GRC of a fee agreement.

On April 22, 2022, the GRC advised the parties that the extended time frame expired. The GRC further advised that the Complainant's Counsel had twenty (20) business days to submit a fee application. That same day, Complainant's Counsel responded to the GRC stating that he was informed by Custodian's Counsel that additional time was needed. The GRC responded stating that the extension request needed to come directly from the Custodian. On April 25, 2022,

Custodian’s Counsel responded to the GRC requesting an additional extension of time for the parties to negotiate a fee agreement. That same day, the GRC granted the extension until May 20, 2022.

On May 18, 2022, the Complainant’s Counsel notified the GRC that the parties have resolved the issue of counsel fees.

Analysis

Compliance

At its February 22, 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 February 23, 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 March 23, 2022.

On March 30, 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, or until April 21, 2022 to submit a fee application in accordance with N.J.A.C. 5:105-2.13. On March 31, 2022, Custodian’s Counsel requested an additional time to confer with Complainant’s Counsel regarding a possible fee settlement. The GRC granted Custodian’s Counsel until April 21, 2022 to notify the GRC of a fee settlement. On April 22, 2022, the GRC advised the parties again that the extended deadline had passed. On April 25, 2022, Custodian’s Counsel requested another extension of time, which the GRC granted until May 20, 2022. On May 18, 2022, Complainant’s Counsel notified the GRC that the parties have settled the issue of attorney’s fees.

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

Conclusions and Recommendations

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

Prepared By: Samuel A. Rosado
Staff Attorney

May 24, 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

February 22, 2022 Government Records Council Meeting

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

Complaint No. 2020-51

v.

City of Hoboken (Hudson)
Custodian of Record

At the February 22, 2022 public meeting, the Government Records Council (“Council”) considered the February 15, 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 did not fully comply with the Council’s July 27, 2021 Interim Order. Specifically, although the Custodian provided the Complainant with the responsive records within the extended time frame, he failed to provide a certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Additionally, the Custodian failed to fully comply with the Council’s July 27, 2021 Interim Order. However, the Custodian demonstrated that she provided the responsive records to the Complainant in accordance with said Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s July 27, 2021 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423, 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 to produce the responsive records maintained by HPD. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee**

agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

Interim Order Rendered by the
Government Records Council
On The 22nd Day of February 2022

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: February 23, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

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

GRC Complaint No. 2020-51

v.

**City of Hoboken (Hudson)²
Custodial Agency**

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

1. Summonses and complaints that were prepared by the Police Department relating to each one of the defendants listed in Drug Recognition Evaluation/Expert Rolling Logs.
2. Driving Under the Influence (“DUI”) and Driving While Intoxicated (“DWI”) summonses and complaints that were prepared by the Police Department from January 2019 through present.
3. Drug possession complaints and summonses prepared and filed by the Police Department from January 2019 through present.
4. Drug paraphernalia complaints and summonses prepared and filed by the Police Department from January 2019 through present.

Custodian of Record: James J. Farina⁴

Request Received by Custodian: December 7, 2019

Response Made by Custodian: January 13, 2020

GRC Complaint Received: February 24, 2020

Background

July 27, 2021 Council Meeting:

At its July 27, 2021 public meeting, the Council considered the July 20, 2021 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

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

² Represented by Asaad K. Siddiqi, Esq., of McCusker, Anselmi, Rosen & Carvelli, P.C. (Florham Park, NJ).

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

⁴ Previously represented by Michael Mastropasqua.

1. The Custodian may have unlawfully denied access to the Complainant's December 7, 2019 OPRA request. N.J.S.A. 46:1A-6. Specifically, the Custodian had an obligation to conduct a search for responsive records through Hoboken Police Department's access to eCDR. Simmons v. Mercado, ___ N.J. ___ (2021). Thus, the Custodian shall perform a search for the responsive complaints and summonses. Should the Custodian not locate such records, he must certify to this fact. Also, should the Custodian determine that a special service charge is warranted thereafter, he must provide the Complainant with the amount of the special service charge required to purchase the requested summonses and complaints.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order by disclosing the responsive records with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Executive Director.⁶**
3. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC's 14-point analysis⁷ and calculate the appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall deliver to the Executive Director certified confirmation of compliance as first provided above. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Executive Director a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification in accordance with R. 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.**
4. 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.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium.

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

5. 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 July 28, 2021, the Council distributed its Interim Order to all parties. On August 3, 2021, Custodian's Counsel e-mailed the GRC requesting thirty (30) additional days to full comply with the Council's Order. On August 9, 2021, Counsel submitted a certification from Lt. Edgardo Cruz, who was assigned to the OPRA request. He certified that he was working to obtain the responsive records but requested additional time to respond. On August 12, 2021, the GRC replied to Counsel, granting the extension of time to respond until September 3, 2021.

On August 27, 2021, Counsel e-mailed the GRC, inquiring as to what portion of the requested complaints were required to be disclosed. That same day, the Complainant responded to Counsel requesting that the entirety of the complaints be provided, rather than a single page. On September 2, 2021, Counsel e-mailed the GRC requesting an additional thirty (30) day extension of time to comply with the Council's Interim Order. That same day, the Complainant responded to Counsel consenting to the extension, and the GRC granted same until October 4, 2021.

On September 21, 2021, Counsel e-mailed the Complainant and GRC stating that the requested files were ready to be delivered but stated that additional time may be needed if the Complainant wanted the requested records provided electronically. Counsel stated that if not, the records were ready to be physically picked up. That same day, the Complainant responded to Counsel stating that the records can be physically delivered to his office. On September 22, 2021, Counsel responded to the Complainant stating that it would be cumbersome to physically mail the files. That same day, the Complainant responded stating that his OPRA request requested electronic delivery, which the Custodian was obligated to follow. The Complainant also stated that if electronic delivery could not be done, then the Custodian must physically mail the records.

On September 24, 2021, Anna Seguinot e-mailed the GRC and the Complainant providing a link to access the responsive records electronically. On September 29, 2021, the Complainant responded to Ms. Seguinot stating that he could not print the records through the link. Ms. Seguinot responded that same day stating that she could not send the files directly via e-mail because the files were too large. Ms. Seguinot requested the Complainant try to download the files again before being required to physically mail the records. The Complainant replied stating he had already attempted to print without success, and requested Ms. Seguinot physically mail the records to his office.

On February 7, 2022, the GRC e-mailed the Complainant, inquiring as to whether he received the responsive records from the Custodian. Later that same day, the Complainant responded to the GRC confirming that he received the responsive records and same were satisfactory.

Analysis

Compliance

At its July 27, 2021 meeting, the Council ordered the Custodian to locate and provide responsive records to the Complainant, or provide a special service charge estimate for review. 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 July 28, 2021, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on August 4, 2021.

On August 3, 2021, the fourth (4th) business day after receipt of the Council's Order, Custodian's Counsel submitted a certification from Lt. Cruz, certifying that the City was intent on complying with the Order but needed a thirty (30) day extension. The GRC granted the extension request, as well as an additional thirty (30) day extension until October 4, 2021.

On September 24, 2021, Ms. Seguinot provided a link to provide the Complainant with electronic access to records. However, the Complainant responded expressing issues with being able to the print said records. On February 7, 2022, the GRC requested confirmation from the Complainant that he received the responsive records. That same day, the Complainant replied to the GRC stating that he did receive the requested records to his satisfaction. However, the Custodian failed to provide certified confirmation of compliance to the Executive Director.

Therefore, the Custodian did not fully comply with the Council's July 27, 2021 Interim Order. Specifically, although the Custodian provided the Complainant with the responsive records within the extended time frame, he failed to provide certified confirmation of compliance to the Executive Director.

Knowing & Willful

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must

have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the matter before the Council, the Custodian unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Additionally, the Custodian failed to fully comply with the Council's July 27, 2021 Interim Order. However, the Custodian demonstrated that he provided the responsive records to the Complainant in accordance with said Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

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

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

In Teeters v. DYFS, 387 N.J. Super. 423, 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. Additionally, the court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

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

relationship of the parties . . .” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

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

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA. [196 N.J. at 73-76.]

The Court in Mason, further held that:

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

[Id. at 76.]

Here, the Complainant sought complaints and summonses prepared by Hoboken Police Department (“HPD”) pertaining to drug paraphernalia, drug possession, DUI/DWI offenses, and DRE Rolling Logs. The Custodian asserted that the City did not maintain the responsive records and directed the Complainant to the Hoboken Municipal Court. The Complainant then filed the instant complaint asserting that that HPD had access to the responsive records at issue.

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 July 27, 2021 Interim Order, the Custodian was ordered to produce responsive records maintained by HPD, which was the Complainant’s desired result in filing the

instant complaint. Teeters, 387 N.J. Super. at 432. Thus, a causal nexus exists between this complaint and the change in the Custodian's conduct. Mason 196 N.J. at 76. Accordingly, the Complainant is a prevailing party entitled to attorney's fees.⁸

Therefore, pursuant to the Council's July 27, 2021 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Custodian was ordered to produce the responsive records maintained by HPD. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not fully comply with the Council's July 27, 2021 Interim Order. Specifically, although the Custodian provided the Complainant with the responsive records within the extended time frame, he failed to provide a certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Additionally, the Custodian failed to fully comply with the Council's July 27, 2021 Interim Order. However, the Custodian demonstrated that she provided the responsive records to the Complainant in accordance with said Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's July 27, 2021 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the

⁸ 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).

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

Prepared By: Samuel A. Rosado
Staff Attorney

February 15, 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

July 27, 2021 Government Records Council Meeting

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

Complaint No. 2020-51

v.
City Hoboken (Hudson)
Custodian of Record

At the July 27, 2021 public meeting, the Government Records Council (“Council”) considered the July 20, 2021 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian may have unlawfully denied access to the Complainant’s December 7, 2019 OPRA request. N.J.S.A. 46:1A-6. Specifically, the Custodian had an obligation to conduct a search for responsive records through Hoboken Police Department’s access to eCDR. Simmons v. Mercado, ___ N.J. ___ (2021). Thus, the Custodian shall perform a search for the responsive complaints and summonses. Should the Custodian not locate such records, he must certify to this fact. Also, should the Custodian determine that a special service charge is warranted thereafter, he must provide the Complainant with the amount of the special service charge required to purchase the requested summonses and complaints.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council’s Interim Order by disclosing the responsive records with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,¹ to the Executive Director.²**
3. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC’s 14-point analysis³ and calculate the appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council’s Interim**

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

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

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

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

Interim Order Rendered by the
Government Records Council
On The 27th Day of July 2021

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: July 28, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

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

GRC Complaint No. 2020-51

v.

**City of Hoboken (Hudson)²
Custodial Agency**

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

1. Summonses and complaints that were prepared by the Police Department relating to each one of the defendants listed in Drug Recognition Evaluation/Expert Rolling Logs.
2. Driving Under the Influence (“DUI”) and Driving While Intoxicated (“DWI”) summonses and complaints that were prepared by the Police Department from January 2019 through present.
3. Drug possession complaints and summonses prepared and filed by the Police Department from January 2019 through present.
4. Drug paraphernalia complaints and summonses prepared and filed by the Police Department from January 2019 through present.

Custodian of Record: Michael Mastropasqua
Request Received by Custodian: December 7, 2019
Response Made by Custodian: January 13, 2020
GRC Complaint Received: February 24, 2020

Background⁴

Request and Response:

On December 7, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 13, 2020, the Custodian responded in writing stating that the requested records were not maintained by the Hoboken Police Department (“HPD”) but by the Hoboken Municipal Court (“Municipal Court”) and the Superior Court of Hudson County.

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

² Represented by Asaad K. Siddiqi, Esq., of McCusker, Anselmi, Rosen & Carvelli, P.C. (Florham Park, NJ).

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

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

Rotimi Owoh, Esq. (On Behalf of African American Data & Research Institute) v. City of Hoboken (Hudson), 2021-51 – Findings and Recommendations of the Executive Director

Denial of Access Complaint:

On February 24, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that New Jersey police departments have direct access to eCDR as well as the ATS/ACS database. The Complainant argued that police departments did not need the assistance or permission of any court to access the database containing the responsive records.

The Complainant also asserted that the Records Retention Schedule for both Municipal Police Departments and Municipal Prosecutors required retention of the requested records. The Complainant also contended that several other police departments have retrieved, printed, and furnished the Complainant with the requested records. The Complainant therefore requested the GRC compel compliance with the OPRA request and to award counsel fees.

Statement of Information:

On March 16, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on December 7, 2019. The Custodian certified that the request was forwarded to HPD, where Det. Arturo Gonzalez reviewed HPD’s files in connection with the subject OPRA requests. The Custodian certified that on January 13, 2020, he responded to the Complainant stating that the requested records were not maintained by the City of Hoboken (“City”).

The Custodian asserted that according to HPD’s protocols, handwritten summons is submitted directly to the Municipal Court and copies are not maintained by HPD. The Custodian also asserted that eCDR summons (“CDR-1”) are electronically generated by HPD officers by accessing the New Jersey Courts website. The Custodian asserted that if a defendant was present and being processed as an arrestee, a copy is provided to same at the time, otherwise a copy is mailed via the Municipal Court. The Custodian asserted that HPD did not keep, store, save or maintain any copies of CDR-1 summonses. For eCDR warrants (“CDR-2”), the Custodian asserted that copies are provided to the defendant if present at the time, then the entire copy is sent to the jail along with the defendant. The Custodian asserted that if the defendant was not present, the CDR-2 form is forwarded to the Municipal Court electronically. The Custodian asserted that HPD did not keep or maintain copies of the CDR-2 warrants.

The Custodian argued that HPD was not the Custodian for the requested complaints and summonses, because they’re electronically entered and logged into the New Jersey Courts online and ATS/ACS. The Custodian asserted that the Court Service Supervisor informed him that the records could be requested directly from the judiciary, and that those other police departments that provided the Complainant with responsive records did so without the consent of the courts.

The Custodian argued that in accordance with Bent v. Twp. of Stafford Police Dep’t, 381 N.J. Super. 30 (App. Div. 2005), he was not obligated to search for records beyond the City’s own files. The Custodian asserted that the fact that other police departments provided the records did not mean HPD had an obligation greater than what was required under OPRA.

Additional Submissions:

On March 25, 2020, the Complainant filed a letter brief in opposition to the Custodian's SOI. Therein, the Complainant first argued that because HPD officers "made" the complaints upon issuing them, they qualified as government records under OPRA. Further, the Complainant contended that according to an Attorney General Directive, if the complaints were unable to be entered electronically, police officers were required to prepare the complaints manually and then transmitted to the municipal court for filing.

The Complainant next argued that police departments in the State were required to retain summonses and complaints until thirty (30) days after disposition of same.⁵ The Complainant further asserted that municipalities were required to retain these records for at least fifteen (15) years after disposition. The Complainant argued that because HPD officers and municipal prosecutors were City employees, their records were subject to access under OPRA and should have been disclosed accordingly. The Complainant noted that if the responsive records were in storage or otherwise unavailable, the Custodian had an obligation to extend the response time frame but failed to do so.

The Complainant also argued that in accordance with Paff v. Galloway Twp., 229 N.J. 340 (2017), agencies were required to provide access to electronically stored information. The Complainant asserted that eCDR was set up by the New Jersey State Police ("NJSP") in cooperation with the Administrative Office of the Courts ("AOC"), and that eCDR was a separate system from eCourts. Notwithstanding, the Complainant contended that since HPD officers had direct access to the database maintaining the records and could retrieve and print the records without any assistance, help, or permission from the municipal court, they were obligated to retrieve same.

The Complainant further argued that he specifically requested records that were prepared by the police department, and not the judiciary. Additionally, the Complainant asserted that R. 1:38 was inapplicable since the request was made directly to an executive branch agency. The Complainant asserted that they had the right to decide where to send their request to the judiciary or executive branch.

The Complainant further noted that HPD's obligation to disclose responsive records was not diminished simply because judiciary also made them available to the public. See Keddie v. Rutgers Univ., 144 N.J. 377 (1996). The Complainant also noted that it was far cheaper to obtain the responsive records via OPRA than through R. 1:38. The Complainant argued that OPRA should not be used as "a money generating scheme (another form of taxation) for government." The Complainant thus argued that HPD should be required to disclose the responsive records.

The Complainant also argued that HPD should not be allowed to erect technological barriers as means to deny access to government records. The Complainant contended that the complaints should remain subject to access under OPRA regardless of whether they were prepared

⁵ The Complainant noted that his experience was that DUI/DWI or drug possession charges normally included sample testing by the New Jersey State Police. The Complainant alleged that this testing averaged between three (3) and six (6) months.

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manually in the past but now entered electronically. The Complainant asserted that the standard under OPRA was not “actual possession” but rather “access” to the requested records, citing Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), and Verry v. Franklin Fire Dist. No. 1, 230 N.J. 285 (2017).

The Complainant also noted that several other judges have ruled that summons and complaints prepared by police officers were subject to disclosure and ordered counsel fees as a result. The Complainant asked the GRC to take notices of the decisions in favor of AADARI in AADARI v. Town of West New York, Docket No. HUD-L-31-20, and AADARI v. City of Millville, Docket No. CUM-L-712-18.

On June 15, 2020, the Custodian filed a supplemental submission to the GRC. Therein, the Custodian attached a copy of Simmons v. Mercado, 464 N.J. Super. 77 (App. Div. 2020), rev'd, ___ N.J. ___ (2021). The Custodian asserted that the Appellate Division held that “DWI/DUI complaints and summonses, drug possession complaints and summonses and drug paraphernalia complaints and summonses” were records in the custody of the judiciary and not the police department. The Custodian argued that the case was directly on point with the current matter and supported the City’s position. That same day, the Complainant responded to the Custodian’s filing, stating that a petition for certification has been sent to the New Jersey Supreme Court, and dismissal pursuant to the current ruling would be premature.

On April 1, 2021, the GRC submitted a request for additional information from the Custodian. Specifically, the GRC asked the Custodian:

1. Does the [City’s] municipal prosecutor continue to keep or maintain physical copies of summonses and complaints as part of a “Municipal Prosecutor’s Case File”?
2. Does the [City] keep or maintain physical copies of the requested summonses and complaints in archives or storage?

On April 7, 2021, the Custodian e-mailed the GRC stating that request had been forwarded to the City’s Law Department, who requested a two (2) week extension of time to respond. The GRC granted the extension that same day. On April 22, 2021, the Custodian requested an additional extension to April 28, 2021, which the GRC granted.

On April 28, 2021, Justin Halwagy, Esq. of the Law Department e-mailed the GRC, stating that he has not been able to reach the City’s Municipal Prosecutor in order to respond to the first question. Mr. Halwagy next stated that he was able to learn that the City did not keep or maintain the requested summonses and complaints in archives or storage. Mr. Halwagy then requested another extension to provide a certification through May 14, 2021.

On May 24, 2021, the GRC e-mailed the Custodian, stated that as of that date, the GRC has not received a response to its request for additional information. The GRC then stated that the Custodian had until the end of business on May 28, 2021 to provide a response and advised that failure to respond may result in the GRC moving forward with adjudication without a certification. As of June 2, 2021, the GRC has not received a response to its request.

Analysis

Unlawful Denial of Access

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

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). In Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004), the custodian argued that the requested complaints and summonses were not subject to access since they were dated beyond the required retention period via the State’s retention schedule. The Council held that if the agency in fact possessed the responsive records, they were subject to access under OPRA even if they were supposed to have been destroyed in accordance with the retention schedule.

Additionally, the New Jersey Supreme Court has held that retention schedules created in accordance with the Destruction of Public Records Law, N.J.S.A. 47:3-15 to -32, did not satisfy the “required by law” standard under OPRA. See N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 568 (2017), aff’g in relevant part and rev’g in part, 441 N.J. Super. 70, 106-07 (App. Div. 2015). The Court found that if the retention schedules carried the force of law, parts of OPRA would be rendered meaningless due to the retention schedules’ comprehensive list of records. Id. The Court therefore held that “the retention schedules adopted by the State Records Committee [do not] meet the ‘required by law’ standard for purposes of OPRA.” Id.

Furthermore, although decided during the pendency of this complaint, the GRC finds the Court’s holding in Simmons relevant and binding. There, the Complainant requested the same records as those at issue in the instant matter, with the custodian asserting that the records were not maintained by the Millville Police Department (“MPD”) once its officers created and submitted the records through eCDR. Simmons, ___ N.J. ___ (slip op. at 13-14). The Court reversed the Appellate Division and found that the requested records were government records subject to disclosure under OPRA. Id., slip op. at 10. The Court found that notwithstanding which government branch created the CDR-1 and -2 forms, it is the information contained within those forms by MPD officers that is sought by AADARI. Id., slip op. at 26-25. Thus, the Court held that:

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

Additionally, the Court rejected MPD’s argument that they did not maintain the records, holding that OPRA’s definition of a government record is not restricted to records maintained by

the agency, but rather includes records it creates, even if not maintained. Id., slip op. at 26-27. Thus, the Court found, “that the Judiciary might maintain on its servers the information that MPD made does not absolve MPD of its obligation to produce that information pursuant to a proper OPRA request made to MPD.” Id., slip op. at 29.

In the current matter, the Custodian responded and later certified that the City did not possess or maintain copies of the requested summonses and complaints and directed the Complainant to request them from the Municipal Court or to the Hudson County Superior Court. The Complainant asserted that the retention schedules required police departments and municipal prosecutors to possess copies of the requested records for the stated period. Furthermore, the Complainant asserted that HPD had access to the complaints and/or summonses through eCDR and the ACS/ATS databases.

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

However, considering the Court’s decision in Simmons, the Custodian maintains the obligation to provide the Complainant with the responsive records available through eCDR. Notwithstanding whether HPD maintained physical copies of same, the Court held that since police departments created the CDR-1s and CDR-2s when inputting information, they were government records even if the records are maintained by the Judiciary’s electronic databases. Simmons, ___ N.J. ___ (slip op. at 29). Thus, because the Custodian certified that HPD officers have access to eCDR, the Custodian had the ability to search for responsive records from the database.

Accordingly, the Custodian may have unlawfully denied access to the Complainant’s December 7, 2019 OPRA request. N.J.S.A. 46:1A-6. Specifically, the Custodian had an obligation to conduct a search for responsive records through HPD’s access to eCDR. Simmons, ___ N.J. ___ (slip op. at 29). Thus, the Custodian shall perform a search for the responsive complaints and summonses. Should the Custodian not locate such records, he must certify to this fact. Also, should the Custodian determine that a special service charge is warranted thereafter, he must provide the Complainant with the amount of the special service charge required to purchase the requested summonses and complaints.

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 Complainant's December 7, 2019 OPRA request. N.J.S.A. 46:1A-6. Specifically, the Custodian had an obligation to conduct a search for responsive records through Hoboken Police Department's access to eCDR. Simmons v. Mercado, ___ N.J. ___ (2021). Thus, the Custodian shall perform a search for the responsive complaints and summonses. Should the Custodian not locate such records, he must certify to this fact. Also, should the Custodian determine that a special service charge is warranted thereafter, he must provide the Complainant with the amount of the special service charge required to purchase the requested summonses and complaints.
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order by disclosing the responsive records with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁶ to the Executive Director.⁷**
3. **In the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC's 14-point analysis⁸ and calculate the appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council's Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant's failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant's payment of the special service charge, the Custodian shall deliver to the Executive Director certified confirmation of compliance as first provided above. Conversely, if the Complainant declined to purchase the records, the**

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁷ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium.

⁸ See <https://nj.gov/grc/pdf/OPRASpecialServiceCharge.pdf>.

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Custodian shall deliver to the Executive Director a statement confirming the Complainant's refusal to purchase the requested records and such statement shall be in the form of a certification in accordance with R. 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.

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

Prepared By: Samuel A. Rosado
Staff Attorney

July 20, 2021